

1776. July 30.

LAMOND *against* LAMOND.

No 120.

LAMOND, a shoemaker, by his marriage-contract, bound himself to settle his whole heritage and moveables on himself and spouse in conjunct fee and life-ferent, and to the heirs and bairns of the marriage in fee, and to do no deed to prejudge the children of their said right. He left a son and four daughters; three of whom having married with his consent, he gave them tochers, and received their discharges of all due them under the contract. The fourth daughter having married without his consent, received nothing; but, at her father's death, she claimed her provision as a bairn of the marriage; and *insisted*, That two heritable subjects, of which her father had taken the rights of the one to himself and spouse in conjunct fee and life-ferent, and to his heirs in fee; and of the other to himself and spouse in life-ferent, and to his son in fee, should, along with the moveable succession, be subject to an equal division among all the children. *Urged* in defence, The father, notwithstanding the obligation in the contract, retained the power of division; and the destination of the heritage, in the title-deeds, was the most formal division possible with regard to it.—THE LORDS found, that the titles of the heritable subjects carry them exclusively to the son; but that the pursuer, as a bairn of the marriage, has a right to an equal share of the remainder of the estate.—See APPENDIX.

Fol. Dic. v. 4. p. 191.

1797. June 20.

WILLIAM FOTHERINGHAM, and ALEXANDER HUME, his Tutor *ad Litem*,
against Colonel ALEXANDER FOTHERINGHAM OGILVIE, and Others.

No 121.

IN 1742, Elizabeth Ogilvie of Balfour was married to Thomas Fotheringham of Powrie. By the contract of marriage, the latter became bound to settle his estate of Powrie on the heir of the marriage; and the Lady, 'In contemplation
' of the said marriage, disposed her estate of Balfour to herself, and the said
' Thomas Fotheringham, her future husband, in conjunct fee and life-ferent, for
' the said Thomas Fotheringham his life-ferent use alienably, and to the second
' son of the present intended marriage betwixt them; which failing, to the
' third, fourth, and other younger sons to be procreated betwixt them, in their
' order, successively; which failing, to the eldest son to be procreated of the
' said marriage betwixt them, under the condition of his being obliged to de-
' nude in manner after expressed; which failing, to the heirs-male of the body
' of the said Elizabeth Ogilvie, by any subsequent marriage; which failing, to
' the heirs-female to be procreated of the said intended marriage; which all
' failing, to the said Elizabeth Ogilvie, her heirs and assignees whatsoever; the

An heiress, in her marriage-contract, settled her estate on the second son of the marriage, under an obligation to de-nude in favour of the immediate younger, in the event of succeeding to the father's estate. She thereafter granted a disposition of the estate to

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the second son, reserving her own and her husband's liferent. The disponee again conveyed the estate to himself, and the heirs of his body, in fee simple. The eldest son having afterwards died, the second came to be his father's heir, and the mother's disposition to him was ratified by his immediate younger brother, who survived his father, but died before his mother, leaving an only child, who did not represent him, and who, as heir of provision to his grandmother, under the marriage-contract, challenged those transactions, as *in fraudem* of the contract; but the reasons of reduction were repelled.

‘ eldest daughter, or heir-female, throughout the whole succession, always having the preference, and succeeding without division.’

The contract provides, that the husband shall use the surname of Ogilvie along with his own, and quarter the arms of Balfour with those of Fotheringham; and also, that the whole heirs of tailzie succeeding to the estate of Balfour, and their descendants, shall immediately, on their succession, use the name and arms of Ogilvie of Balfour in all time thereafter, under the forfeiture of the benefit of succession.

The husband and wife became bound, during the subsistence of their respective rights, to pay the interest of certain debts with which the estate of Balfour was burdened, and not to suffer it to be, on their account, affected by legal diligence.

A subsequent clause provided, that if there should be one son only of the marriage, or if the eldest son should succeed to Balfour, by the failure of his younger brothers without male issue, in either case, he should be bound to denude in favour of his second son, on his attaining majority.

And moreover, ‘ In case it shall happen, that the second, or younger son of this marriage, who hath succeeded to the estate of the said Elizabeth Ogilvie, shall thereafter succeed to the foresaid lands and estate of the said Thomas Fotheringham, then, and in that case, the foresaid lands and estate of the said Elizabeth Ogilvie shall fall and devolve to any younger son of this present marriage, and the heirs-male of his body, in whose favour the elder brother, so succeeding to the said lands and estate of the said Thomas Fotheringham, shall be obliged to denude of the foresaid lands and estate of the said Elizabeth Ogilvie; and failing such younger brother, and the heirs-male of his body, he shall denude of the said lands and estate of the said Elizabeth Ogilvie, in favour of his second son, and younger sons, at the age of twenty-one, and the heirs-male of their bodies, in manner above provided.’

Next follow regulations in case of a female succeeding.

And it is likewise declared, ‘ That, in all the before mentioned cases, of the heirs above written, male or female, who shall succeed to and hold both estates, and are bound to denude thereof in the respective cases above expressed, all and every of them shall be bound and obliged to satisfy and pay the annualrent of the said debts, as the same shall be ascertained, as aforesaid, with the respective liferents and public burdens that shall affect the said lands and estate of Balfour, and others aforesaid, belonging to the said Elizabeth Ogilvie, and to be payable forth thereof, during their possession, from time to time, as the same shall fall due; and to transmit the said lands and estate of Balfour, and others above written, belonging to the said Elizabeth Ogilvie, to the next heir, according to the respective provisions above written, in as good condition as such heir shall have received the same at the time of their succession thereto; so that, in all cases and events, the said estates may be preserved and kept in distinct and separate families, throughout the course of

‘ the whole succession above written ; and that the said lands and estate of Balfour, and others foresaid, belonging to the said Elizabeth Ogilvie, may not suffer, by being conjoined, at any time, in the same person with the lands and estate of Powrie, and others above written, belonging to the said Thomas Fotheringham, and may descend to the next heir, in the course of succession above established, at least in as good condition as it is at present.’

In 1765, the sons of the marriage were, Patrick, the eldest, Alexander, the second, Norman, the third, and two others.

The father and mother became desirous, that in the event of Patrick or Alexander dying without issue, both estates should be united in the survivor, in place of Balfour going to the third son, in terms of the contract of marriage:

Accordingly, with this view, Mrs Fotheringham Ogilvie in 1795, with consent of her husband, executed a deed, narrating the contract of marriage, and that their second son Alexander had now attained the years of majority ; ‘ there-fore, in implement of the obligation and provision of succession, contained in the foresaid contract of marriage,’ she disposed her estate of Balfour to him, and the heirs-male of his body ; whom failing, to the younger sons of the marriage, in their order ; whom failing, to Patrick, the eldest son ; whom failing, to her heirs-male, of any subsequent marriage ; whom failing, to the heirs-female of the present marriage ; whom failing, to her heirs and assignees whatsoever.

The disposition reserved the liferent to herself and her husband, and was granted under the burden of the debts which affected the estate at the marriage ; and in the event of the third or younger sons succeeding both to Balfour and Powrie, or of the eldest succeeding to Balfour, they were taken bound to denude of the latter, in terms of the contract. But no obligation was laid on Alexander to denude in favour of his immediate younger brother, or second son, if he should succeed to Powrie, in which respect the disposition to him deviated from the contract.

Alexander, a few months after, made up titles to the estate, and disposed it in fee simple in ‘ favour of myself, and the heirs of my body ; whom failing, to the heirs-male of the marriage betwixt Thomas Fotheringham Ogilvie of Powrie, and Mrs Elizabeth Ogilvie of Powrie, my father and mother ; whom failing, to the heirs-female of the said marriage,’ &c.

Alexander afterwards married ; and by his contract of marriage, he became bound to infest his wife in a jointure of L. 300 out of the estate of Balfour, which he also thereby settled on the heirs-male of the marriage ; whom failing, on his heirs-male of any future marriage ; whom failing, on the heirs-female of that marriage ; whom failing, to his nearest heirs and assignees whatsoever.

Patrick Fotheringham, the eldest son, died in 1781, whereby Alexander, as heir of the marriage, became entitled to the estate of Powrie on his father’s death, while Norman became the second son of the marriage.

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In 1785, a contract was entered into between Norman on the one hand, and Mr and Mrs Fotheringham Ogilvie and Alexander on the other. This deed narrated, that all the parties to it were satisfied, that in consequence of the steps which had been taken, the destination in the marriage-contract 1741 was put an end to, and that Alexander was entitled to hold the estates both of his father and mother; but that he was notwithstanding desirous to have the settlements of the estate of Balfour homologated by Norman. It was therefore agreed, that the father, with the consent of Alexander, should grant an obligation for L. 3000 in favour of Norman, payable at the first term after the death of his father and mother, on condition that Norman should, 'upon the death of the said Elizabeth Ogilvie, whether she shall predecease or survive the said Thomas Fotheringham Ogilvie, her husband, be bound and obliged, as he has already herein bound and obliged himself, to sign a formal and valid ratification and homologation of the foresaid two several dispositions executed by the said Elizabeth Ogilvie, &c.; which ratification, homologation and disposition, shall contain a full and ample discharge and renunciation of the destination of succession appointed to have taken place by the foresaid contract of marriage betwixt the said Thomas Fotheringham Ogilvie and Elizabeth Ogilvie, and of the whole limitations and conditions therein contained; and, generally, to execute such deed or deeds as shall be thought expedient at the time for carrying this present agreement into full force, effect and execution, and to establish such titles in his person as to render the said deed or deeds effectual.'

Thomas Fotheringham, the father, died in 1790, on which Alexander succeeded to the estate of Powrie.

Norman died insolvent in 1793, leaving an only child, William, in minority, who did not represent his father.

Those to whose care he was left conceiving him to be heir of provision to the estate of Balfour, under his grandmother's contract of marriage, and that the conveyance granted by her to Alexander was null, as *in fraudem* of it, a process of declarator was brought in his name for having his right ascertained.

In defence it was

Pleaded; imo, When an estate is destined by a marriage-contract to a particular child, the parents may anticipate the succession, by conveying it to that child in their lifetime, and by doing so, the obligation in the contract is fulfilled; Bankton, b. 1. t. 5. § 10. Alexander, in 1765, when his mother disposed Balfour to him, was the second son of the marriage, and consequently heir of provision under the contract. No obligation was laid on him by the disposition to denude in favour of his third brother, in the event of his succeeding to Powrie, and supposing there had, it would not have availed the pursuer. For although a disponee should be taken bound to denude on a particular event, he remains absolute fiar till its arrival, unless he be laid under prohibitory clauses. And as there are none in the contract, Alexander, before succeeding

to Powrie, was not precluded from putting an end to the clause of devolution, and he actually did so, by disposing Balfour to himself, and a different series of heirs in fee-simple; Ersk. b. 3. t. 8. § 41. 6th July 1736, Edgar, No 17. p. 4325; 7th January 1737, Trail, No 114. p. 12985.

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2do, Even supposing the devolution of succession provided by the marriage-contract had been guarded by prohibitory, irritant and resolute clauses, it was in the power of the father and mother, as the makers of it, and of Alexander, as the institute, to put an end to it, which they accordingly did, by the deeds above mentioned. An entail may be set aside in this way, although made for an onerous cause; and a contract of marriage cannot be in a better situation; Bankton, b. 2. tit. 3. § 160.; 23d June 1713, Scott, *voce* TAILZIE; Case of Balnagowan, 25th January 1744. *

3tio, The pursuer's right is cut off by the agreement entered into with his father in 1785. On the supposition that a *jus crediti* under the contract had arisen to Norman on Patrick's death, he might have validly discharged it, although he had predeceased both his father and mother; Ersk. b. 3. t. 8. § 38.; 3d June 1748, Gordon, No 63. p. 12915.; 9th December 1760, Porterfield, No 32. p. 12874.; 7th February 1730, Case of Stewart of Brugh; * 8th December 1759, Moncrieff, No 31. p. 12871. But Norman survived his father, at whose death Alexander became proprietor of both estates. The condition, therefore, under which the devolution of succession was to take place, happened during Norman's life. He might have brought an action against his brother to denude; and on his brother's doing so, as the clause of devolution in the contract did not, in any event, lay an obligation on the son, who takes the estate in consequence of it, again to denude, Norman would have held the estate in fee-simple; of course, an unconditional disposition of it, granted by him to Alexander in 1785, would, by the *jus superveniens*, which arose to him at his father's death, have been good; and if so, the contract entered into by him in 1785, ratifying the deeds granted in Alexander's favour, and discharging the obligation in the contract, must be binding; Ersk. b. 3. t. 8. § 38.

Answered; 1mo, The son to whom the estate of Balfour was destined by the contract, was not the second son born of the marriage, but the second son existing at his mother's death. For, by the contract, she herself remains *fiar* during her life; of consequence, no other son could be meant but he who could serve himself heir of provision to her, under the contract, when she died. The disposition 1765, therefore, in favour of Alexander, so far from being an implement of the contract, has, in the event which has happened, taken the estate from the real heir.

Besides, by the marriage-contract, the second son was taken bound, in case he should succeed to the estate of Powrie, to denude of Balfour in favour of his immediate younger brother. But this material condition was left out of the disposition; and, therefore, in this view also, it cannot be considered as implement of the contract. Nor was this obligation the less binding, that it was not

* These cases not reported.—See APPENDIX.

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fortified by a prohibitory clause. A prohibition could not, indeed, be properly applied in such case. Suppose the second son had been under an obligation to pay a sum of money to his immediate younger brother, on his succeeding to both estates, it would have acquired no additional force from having been followed with a prohibition to withhold payment. The obligation on the second son, to denude of Balfour on succeeding to Powrie, is similar to that of a father, who, in his marriage-contract, becomes bound to settle his estate on the heir of the marriage. No prohibition is necessary to render either obligation effectual, and they cannot be defeated gratuitously. *2do*, There is no analogy between a marriage-contract and an entail. The substitutes in an entail have merely a *spes successionis*, which may be defeated by the maker and the first institute; but all the future children of the marriage are held, in law, to have been parties to the contract, to the effect of rendering their rights under it indefeasible; Bankton, b. 1. tit. 5. § 17.; Erskine, b. 3. tit. 8. § 38.; 28th July 1778, Speirs, No 141. p. 13026.; 8th December 1790, Gordon, No 142. p. 13028. Besides, Alexander was not institute under the contract; for, from the terms of the destination, it remained uncertain which of the sons should possess that character till their mother's death; 2d December 1758, Howes, No 30. p. 1799.

3tio, Norman, while his mother lived, had only a contingent *jus crediti*, which, by his predeceasing her, came to an end, and devolved on the pursuer, not as representing his father, but as heir of provision under the contract. Norman, therefore, could not convey the subject, nor renounce his right to it, to the prejudice of the person, who, on his death, became the heir of the marriage; 12th January 1780, Maconochie, No 149. p. 13040. Nor does it signify, that Norman survived his father. Supposing Alexander to have taken the fee of Balfour, even by a proper anticipation, he must nevertheless have been considered as holding it precisely in the same manner as if he had taken it by service at his mother's death. The disposition 1765, in his favour, was, as to Norman, *res inter alios acta*, and in no shape intended for his benefit; consequently, although he had been free from the contract 1785, he could not have insisted on Alexander's denuding of Balfour, although in possession of Powrie, so long as his mother lived. Till his death, therefore, his right of succession remained contingent, and, as such, he could not discharge it to the prejudice of any subsequent heir of provision under the marriage-contract.

THE LORD ORDINARY found, " That the disposition to the defender, Colonel Alexander Balcarras Fotheringham Ogilvie, in the year 1765, was a proper implement of the marriage-contract; and that the subsequent settlements by him are effectual to alter the order of succession pointed out in that contract; also found, that the pursuer is barred by the contract, entered into by his father in 1785, from challenging the deeds under reduction; therefore repelled the reasons of reduction, and assoilzied the defenders from all the conclusions of the libel."

On advising a reclaiming petition, with answers, the LORDS “ adhered to the interlocutor reclaimed against, in so far as it finds that the disposition to the defender, in 1765, in implement of the marriage-contract, was a valid effectual conveyance of the estate to him; but, before further answer, ordained counsel to be heard, in their own presence, upon the question, How far the subsequent settlements and transaction would be effectual against the clause of devolution contained in the said contract.”

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The pursuer presented a reclaiming petition against this interlocutor, which was followed with answers. Counsel were afterwards heard on the whole cause.

When it was again advised, four of the Judges were of opinion, that although it was a fixed point, that where an estate was settled unconditionally on the heir of the marriage, at the death of his father or mother, the obligation might be fulfilled, by anticipation, during the lifetime of his parents, yet that, in this case, there was a *jus crediti* in all the younger children, in consequence of the clause of devolution, which the mother could not disappoint, and which Norman had it not in his power to discharge till her death.

A considerable majority of the Bench were for assailing the defenders, chiefly on the ground of Norman's discharge and ratification, which they thought effectual; because, by surviving his father, the condition occurred during his life on which the devolution was to take place, and because the clause contained no obligation on him again to denude in favour of any other person, in the event of his succeeding to Powrie. As he would, therefore, (it was observed,) have held the estate in fee-simple, he was clearly entitled to discharge the clause of devolution in his favour.

THE LORDS (26th December 1796) “ repelled the reasons of reduction; and assailed the defenders.”

And, on advising a reclaiming petition, with answers, they “ adhered.”

Lord Ordinary, *Methven.*

Act. Lord Advocate *Dundas, Rolland, Craigie,*

Alt. Solicitor-General *Blair, Hay, Tait, Jo. Anstruther, A. Campbell jun.*

Clerk, *Sinclair.*

R. D.

Fac. Col. No 38. p. 85.

1799. February 26. ALEXANDER EWING against WALTER EWING, and Others.

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ALEXANDER EWING, in his second son Robert's contract of marriage, disponed certain lands to him and the heirs of the marriage; whom failing, to his own nearest heirs and assignees.

Robert had seven children of the marriage.

Alexander, the eldest son, was unfortunate in trade, and on bad terms with his father, against whom he raised an action, and on the dependence of it, an inhibition, on account of a claim, with regard to which a balance of L. 113 was ultimately found due to his father.

When a father, in his son's contract of marriage, disposes lands to him, and the heirs of the marriage, the son may grant special provisions to the younger chil-