1744.

STEWART
v.
GRAHAM, &c.

CAPTAIN JOHN STEWART, *alias* COLTERANE, - - - } *Appellant;*

WILLIAM GRAHAM, Trustee for AGNES STEWART, *et alii*, - - } *Respondents.*

10 *February*, 1744.

MUTUAL CONTRACT.—HUSBAND AND WIFE.—An estate being provided in a marriage contract "to the heirs of the marriage," the father was found not entitled to settle it by an entail, upon any child, other than the heir of the marriage; and an entail, thus settling it, was reduced as being *contra fidem tabularum nuptialium*.

[Elchies, *voce* Mutual Contract, No. 20.]

No. 71. BY marriage contract entered into in 1668 between John Stewart of Phisgill, and Agnes Stewart, the latter disponed her lands of Glenturk, and others, to the said John Stewart, and "the heirs of the marriage," &c.; and, in like manner, John Stewart bound himself to provide all the lands, sums of money, &c. he then had, or might acquire, "to the heirs of the marriage."

John was infeft, and his infeftment was recorded. Of this marriage there was issue, four sons, David, Robert, William, and James; and four daughters, the eldest of whom were named Agnes and Elizabeth. David predeceased his father, without issue. Robert also predeceased his father, but left a daughter, Agnes.

On 6th June, 1719, John executed an entail of his whole estate, (including his wife's property,) whereby he disponed it to himself, and the heirs

male of his body; whom failing, to the heirs female of his body, and the heirs male of their bodies; whom failing, to such persons as he should name in *lecto;* whom failing, to his heirs male whatsoever, &c.; and he expressly excluded Agnes (the daughter of his son Robert) from the succession.

The entail was registered, a charter was expede, and infeftment taken; and upon the father's death, in 1720, William, the third son, was served heir of tailzie to him, and was infeft. He died without issue, and his youngest brother having predeceased him, Agnes, the eldest daughter of the entailer, took up the estate as heir of entail.

Upon her death, without issue, in 1732, the appellant (being the eldest son of Elizabeth, the second daughter,) was served heir of entail to her.

By this time Agnes, the daughter of Robert, and heir of line of the marriage, was of age, and was married; and in order to try the right of the parties to the estate, she and her husband granted a bond in trust to Mr. Graham, the respondent, for L.7000, upon which he charged Agnes to enter in special as heir of line and of provision to her grandfather, and obtained decree of adjudication, in virtue of which he brought an action of reduction and improbation, to set aside the entail, 1719, as being *contra fidem tabularum nuptialium.*

The Lords (5 January 1743,) upon the report of the Lord Ordinary, (after repelling an objection to the title,) found, "that John Stewart, the maker "of the entail, could not settle the estate provided "in the contract of marriage to the heirs of the "marriage, so as to prefer his daughter Elizabeth, "and her issue, to Agnes Stewart, the heir of line

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"of the marriage," and they, therefore, reduced the entail, &c.

Thereafter their Lordships adhered, (9th June 1733, and found that the "entail was *contra fidem tabularum nuptialium.*"

Entered 1 Dec. 1743.

The appeal was brought from these interlocutors of 5th January and 9th June 1743, and others in the cause.

Pleaded for the Appellant:—The intention of the parties was only to secure the estates to the children of that marriage in general, but not to point out any particular child. The father had a discretionary power of disponing it to any of the issue, though not strictly the heir of the marriage, and was only restrained from giving it to extraneous heirs.

By the law of Scotland, notwithstanding such a destination in a marriage contract as here occurs, the father continues absolute fiar of the estate. He may sell it, or burden it with debt; and he has also a discretionary power over the succession: for it has been found that he may, for reasonable causes, pass over the eldest son, and give the estate to the second. And in the present case the father had sufficient grounds for exercising that discretion, so as to exclude the granddaughter.

Pleaded for the Respondents:—By the marriage-contract in 1668, the estates are provided to John Stewart, and the "heirs of the marriage." A provision in these terms has received a certain and limited signification in the law of Scotland. The heir of the marriage, under such a provision, is subject to the onerous deeds and debts of the husband; but, in all other respects, such heir is a creditor, and cannot be excluded from the succession

by any gratuitous deed, and he is entitled to reduce and set aside all such as are done to his prejudice.

After hearing counsel, "it is ordered and adjudged, &c. that the said petition and appeal be, "and the same is hereby dismissed, and that the "several interlocutors complained of be, and the "same are hereby affirmed."

Judgment, 10th Feb. 1744.

For Appellant, *Wm. Noel, C. Erskine.*
For Respondents, *Ro. Craigie, W. Murray.*

COLONEL STRATTON, - - *Appellant;*
The MAGISTRATES of MONTROSE, *Respondents.*

19 *March*, 1744.

PUBLIC POLICE.—ACT I. GEO. I. c. 5.—PROCESS.—Found that, in an action upon the statute, it is not necessary to summon the whole inhabitants, but only the magistrates.

Found that action upon the statute is only competent where a building has been "demolished, or begun to be demolished," by a mob, with the intention of demolishing it, but not where injury has been done to a house in the prosecution of a different object.

Found by the Court of Session, that "no action lies on the sta-"tute for damage arising from the carrying off grain, or other "goods, out of any house or outhouse, but only for the damage "done by pulling down such house or outhouse." Reversed in the House of Lords.*

[Elchies *voce* Public Police, No. 5. Clk. Home, No. 224. Fol. Dict. IV. 197. Mor. Dict. 13158.]

IN the year 1741, a mob in the town of Montrose No. 72.
having broken into some granaries belonging to

* This reversal is not noticed in the Reports.