

APPENDIX.

PART I.

FIAR, ABSOLUTE, LIMITED.

1804. December 5. DOUGLAS *against* JOHNSTON and Others.

WILLIAM JOHNSTON of Lockerby, in the marriage-contract between Grace, his eldest daughter, and Sir William Douglas of Kelhead, Baronet, executed a settlement of his estate; by which, in the event of his dying without male-issue, it devolved upon his daughter, and the heirs whatsoever of her body; whom failing, on his other daughters successively, and the heirs of their bodies, the eldest heir-female always succeeding without division. The contract of marriage contained a prohibition to alter the order of succession; but it contained no prohibition against contracting debt, or selling the estate.

Some years afterwards, William Johnston executed a disposition and tailzie of his estate of Lockerby, in which he observed the same order of succession as in the marriage-contract, but introduced sundry provisions and restrictions, and, among others, a prohibition against contracting debt or alienating the estate.

Upon the death of Mr. Johnston without male-issue, his eldest daughter succeeded to the estate of Lockerby, and made up her titles under the deed of tailzie.

Sir Charles Douglas, her eldest son, and heir of provision under the contract of marriage, brought a process of reduction of the tailzie against his mother and the other heirs; and

No. 1.

A father who settles his estate, in his daughter's marriage-contract, on a certain series of heirs, is not entitled to impose additional restrictions by a subsequent deed of tailzie, tho' no alteration is made in the order of succession.

No. 1. Pleased : The settlement of the estate in the marriage-contract being of the nature of an entail ; it was out of the power of the proprietor to make a new tailzie, imposing additional restrictions upon the heirs called to the succession ; Gordon against Dewar, August 2, 1771, No. 123, p. 15579. Menzies against Menzies, June 25, 1785, No. 53. p. 15436. But even supposing that the settlement in the marriage-contract was not equivalent to an entail of the estate, and was merely a provision in favour of the heirs of the marriage, such a provision, being of an onerous nature, is not to be affected by any subsequent gratuitous deed of the granter ; Erskine, B. 3. Tit. 8. § 38 ; Fotheringham against Fotheringham, December 5, 1734, No. 71. p. 12929 ; Spiers against Dunlop, July 28, 1778, No. 141. p. 13026. The deed of tailzie contains conditions and provisions contrary to the terms of the marriage-contract ; and the heir of the marriage is therefore entitled to insist that it should be set aside ; Ker against Kers, January 23, 1747, No. 116. p. 12987. Bruce against Bruce, February 7, 1761, No. 147. p. 13036 ; Cunningham against Cunningham, July 9, 1776, APPENDIX, PART I. CLAUSE, No. 1. Gordon against Gordon's Trustees, December 8, 1790, No. 142. p. 13028.

Answered : A father, notwithstanding a destination of his estate in a contract of marriage, remains absolute fiar. He is not indeed entitled by a gratuitous deed to disappoint the succession of the heirs of the marriage ; but a simple destination in a marriage-contract does not prevent him from imposing such limitations as appear expedient in themselves, or necessary to preserve the estate to the heirs of the marriage. By so doing, he does not violate, but secures their right ; Bankton, B. 2. Tit. 3. § 134 ; Erskine, B. 3. Tit. 8. § 39 ; Scott against Scott, June 23, 1713, No. 121. p. 15569 ; Lord Lindores against Stewart, December 8, 1714, No. 13. p. 7735. The cases quoted by the pursuer were decided on special circumstances ; and in most of them, the deed challenged either contained a different destination of heirs from that of the marriage-contract, or imposed some irrational restrictions, by which the estate might be forfeited by the heir.

The Lord Ordinary reported the cause, and the Lords sustained the reasons of reduction.

Lord Ordinary, *Bennatyns.*
 Alt. *Cochran.*

Act. *Connell.*
 Agent, *W. Johnston.*

Agent, *F. Brodie, W. S.*
 Clerk, *Walker.*

J.

Fac. Coll. No. 189. p. 425.