

1818.

EARL OF
WEMYSS
v.
EARL OF HAD-
DINGTON, &c.

[Fac. Coll., Vol. xviii., p. 240.]

The Right Hon. FRANCIS CHARTERIS, EARL
OF WEMYSS and MARCH, *Appellant*;
CHARLES, EARL OF HADDINGTON, and others,
Trustees of the deceased Earl of Wemyss, . *Respondents*.

House of Lords, 20th May 1818.

MARRIAGE CONTRACT—JUS CREDITI—PROVISION—SURROGATUM
—FIAR ABSOLUTE—LIMITED.—A marriage contract settled on
the heir male of the marriage certain lands, besides bank stock,
to the amount of £4000. These were afterwards sold by the
father; he lived fifty-eight years after this sale. The grandson,
who was the heir male of the marriage, made a claim for the
value of these lands and bank stock, calculated as at the de-
ceased's death. Held him entitled only to the value received
for them at the time they were sold.

The appellant's grandfather, then the Hon. Francis Char-
teris, by his marriage contract, dated 12th September 1745,
entered into with Lady Catherine Gordon, bound and obliged
himself, "in contemplation of this marriage, to provide and
" secure to himself and the heirs male of this present marriage;
" which failing, to the heirs of his body of any subsequent
" marriage, which failing, to his nearest heirs and assignees
" whatsoever, the lands of Muirfoot and pertinents, and the
" lands of Lethenhopes; as also the sum of £4000 sterling,
" of capital stock of the Royal Bank of Scotland, and several
" other sums of money, extending to the sum of £11,581
" sterling."

The late Lord Elcho, the appellant's father, was the only
son of that marriage. Lord Elcho died some years before his
father, the Earl of Wemyss, who survived him, and died in
the year 1808. After his death the appellant was the heir
male of marriage, entitled to take in free property the lands
of Muirfoot and Lethenhopes, and the £4000, bank stock,
under the express provision of the marriage contract.

But it appeared that, a long time before his death, the Earl
of Wemyss had sold the lands of Muirfoot and Lethenhopes,
and the bank stock mentioned; and the present action was
raised by the appellant against his trustees, concluding either
that the deeds of entail subsequently executed by the Earl
should be set aside, and the property contained in them held
as a *surrogatum pro tanto* of the lands, bank stock, and money
which the late Earl became bound to settle by his marriage

contract; or that the value of the latter, as at the death of the Earl, should be paid out of the trust funds, so far as they go, and the balance declared a debt upon the entailed property.

The entail executed by him, of this date, was in regard to the estate of Elcho. There is a clause in it binding the heirs of entail to free and relieve the said lands “of and from the payment and performance of all the debts and obligations, which he for himself, and as representing his predecessors, should be liable to.”

In the trust-deed which was executed of even date, he binds the trustees to “pay and discharge all such legacies, donations, annuities, and provisions which I have already left and bequeathed, or become bound for in favour of any person whatsoever.” Various codicils were added to this trust-deed, which seemed immaterial to the merits of the question, and he executed in 1806 a separate entail as to his house and grounds in Lauriston.

The defences stated to the action were, 1. That there was no ground for reducing the entails, and for holding the lands purchased by him as a surrogatum for these settled by the marriage contract. 2. That the claim of the appellant under the contract of marriage, could not extend further than to the price actually received by the late Earl of Wemyss for the lands and other property settled by the contract, under the deduction of the debts affecting those subjects. 3d. That before the appellant could insist in this action, he was bound judicially to renounce the benefit which he might eventually derive from the deeds of entail executed by the late Earl.

The appellant ultimately limited his claim to the *value* of the property settled by the marriage contract *as at the late Earl's death*.

The Lord Ordinary ordered informations in order to report the case to the Court. When reported, there was a difference of opinion on the part of the judges, and the cause was ordered to stand over for a full bench. And, afterwards, their Lordships ordered counsel to be heard upon the following question:—“Whether the pursuer, under the second alternative conclusion of the libel, is entitled to claim the value of the estates sold by the late Earl of Wemyss, as at the date of the said Earl's decease, or only as at the dates of the respective sales of the same?”

The cause having been thereafter heard on this question, their Lordships pronounced this interlocutor:—“Find that the claim of the pursuer, as a just and lawful creditor to

1818.

EARL OF
WEMYSS.
v.

EARL OF HAD-
DINGTON, &c.
Mar. 27, 1804.

Feb. 26, 1814.

Mar. 28, 1815.

1818.

EARL OF
WEMYSS.
v.
EARL OF HAD-
DINGTON, &c.

“ the deceased Earl of Wemyss, under the contract of marriage libelled on, extends to the amount of the prices received for the lands of Muirfoot and Lethenhopes, and for the bank stock, together with the sums of money settled by the said contract, but no farther; remit to the Lord Ordinary to proceed accordingly; and, *quoad ultra*, sustain the defences, assoilzie the defenders, and decern.”

Against the above interlocutor, the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The marriage-contract in this case constituted a legal obligation, binding the late Earl of Wemyss to provide *cum effectu*, that the heir male of marriage, *i.e.*, appellant should, on his death, succeed as heir of provision to the lands of Muirfoot and Lethenhopes, and £4000 stock of the Royal Bank of Scotland, as well as the sums of money mentioned in the contract, from which obligation there arose a corresponding *jus crediti* in favour of the appellant.

Such is generally the effect, by the law of Scotland, of an obligation in a contract of marriage, to provide lands or other subjects to the heirs of the marriage. It has been said that anciently such obligations only bound the contracting party to settle *once*, by executing an instrument containing a simple destination alterable at his pleasure; but it is not easy to believe that contracts, onerous in their nature, could ever have in practice, received an interpretation which, in truth, made them nugatory. But if such was ever the law, it has long ceased to have authority for such contracts, as now interpreted, give the heir a *jus crediti* against the husband or his representatives, entitling him to implement of the contract.

The claim of the appellant once admitted, there can be no legal principle for limiting it to the price received by the late Earl of Wemyss, but ought to be extended to the value at the time of his death, when the appellant was entitled to succeed.

Pleaded for the Respondents.—A simple destination, even in a marriage contract, does not vest in the heir any proper *jus crediti*, but only a right of succession liable to be defeated by the onerous or rational acts of the father, and only supported against his gratuitous deeds, and as giving a claim for the price of the subjects when sold, upon principles of equity, and in contradiction to the general rules of law, and to the original practice even with regard to contracts of this description. 2d, The father, notwithstanding such a destination, has a clear and undeniable right to sell the lands so destined, both as being himself the sole fiar and proprietor thereof, and

as administrator, with powers unlimited and uncontrollable, for the heir, for his other children, and for himself; and because it is contrary to all principle and precedent, to subject any person in damages, or to make him answer in his separate estate, for doing that which he had a complete right to do, both in justice and in law. The lands being placed, by the sale, beyond the control of the parties, it is the value they then brought, not that which they might have possessed at the death of the late Earl, that the appellant is entitled to.

After hearing counsel,

THE LORD CHANCELLOR said,*

“I shall state my view of this case very shortly. Looking into the case with great attention, and having regard to the marriage-contract which is the foundation of the claim, I offer my opinion that the law of Scotland has been rightly applied by the judgment appealed from to such a marriage contract as this, and, therefore, that the judgment ought to be affirmed.”

It was ordered and adjudged that the interlocutor complained of be, and the same is hereby affirmed.

For the Appellant, *Sir Saml. Romilly, Geo. Cranstoun, Fra. Horner, J. H. Mackenzie.*

For the Respondents, *Alex. Maconochie, F. Jeffrey.*

1818.

EARL OF WEMYSS
v.
EARL OF HADDINGTON, &c.

[Fac. Coll. Vol. xviii. p. 362.]

JOHN THOMSON, Writer in Jedburgh, *Appellant;*

Dr WM. SOMMERVILLE, Deputy-Inspector of
Army Hospitals, *Respondent.*

1818.

THOMSON
v.
SOMMERVILLE.

House of Lords, 8th June 1818.

DAMAGES—SERVICE—MALA FIDES IN OPPOSING DO.—PRESUMPTION OF LIFE OR DEATH—FACTORY.—The respondent's wife was next heir to the estate of Knowsouth, belonging to her brother, a Lieutenant in the navy. Word was sent home by the officers of his ship, that being under arrest to stand trial, he had dropped overboard to escape to land, and was believed to have been drowned. The appellant, a writer, was married to a Miss Rutherford, who was entitled to succeed to the estate, failing the respondent's wife. He was also factor for the deceased brother in managing the estate. He accepted of a mandate from the respondent's wife, who was the next heir, to make up her titles to the estate. He had also made out the respondent's marriage contract, by which his wife left the

* From Mr Gurney's Short-hand Notes.