1790. *December* 8.

JAMES FARQUHAR-GORDON, and his CURATORS, *against* The TRUSTEES of the late JOHN GORDON.

No 142.
The powers of a father over lands provided to the heirs of a marriage.

THE late John Gordon, by his marriage-articles, became bound " to provide and secure the lands and estate of Balmuir, and others particularly mentioned, to himself and the sons of his intended marriage *seriatim*, and the heirs whomsoever of their bodies; whom failing, to the sons *seriatim* of the said John Gordon in any subsequent marriage, and the heirs whomsoever of their bodies; whom failing, to the daughters *seriatim* of the marriage, and the heirs whomsoever of their marriage; whom failing, to the daughters of the said John Gordon by any subsequent marriage, and the heirs whomsoever of their bodies; whom failing, &c. the eldest daughter or heir-female always succeeding without division, and excluding all heirs-portioners."

Mr Gordon reserved to himself a power of preferring any of the younger sons of the marriage to the eldest; or in case of there being no sons, any of the younger daughters to their eldest sister, and to make substitutions of one of the sons to another, and of any of the daughters to the rest; and also to impose on all or any of the heirs, whether male or female, such conditions and limitations against contracting debt, or alienation of the lands, and with regard to bearing and using the name and arms of the family, as he should think fit; and to enforce such conditions and limitations, by clauses prohibitory, irritant and resolutive. Certain sums were provided to the other children, L. 1500 being given if there were three or more children; and a jointure of L. 100 was provided for the widow.

Mr Gordon, beside the landed estate falling under the marriage-articles, which yielded about L. 200 per annum, was possessed of effects, heritable and moveable, to the extent of L. 13,000. Having twelve children, he conveyed his whole property to trustees, with directions to sell the lands, and to divide the proceeds, along with his other funds, among his children, the two eldest being to have L. 200 more than the rest.

After Mr Gordon's death, the Curators of his eldest son, James Farquhar-Gordon, considering this settlement, so far as respected the lands falling under the marriage-articles, to be *ultra vires*, brought an action for setting it aside. In bar of this action, it was

Pleaded; After the execution of the marriage-articles, Mr Gordon remained the absolute proprietor of the lands falling under them. His power of selling them is indisputable; and his authority in making such a distribution of them as appeared to be necessary for the exigencies of his family, is equally so. As he might have altogether excluded his eldest son from inheriting his landed property, and restricted him to a rateable share of the sum of L. 1500, the settlement actually made cannot be thought liable to challenge. In some cases,

No 142.

the entire exclusion of the eldest son of a marriage, on account of his particular situation, has received the sanction of our Courts; and although, in a later instance, the creditors of the eldest son were successful in setting aside a settlement of the same kind, as made in defraud of their just claims, that decision cannot affect the present question; Erskine, B. 3. T. 8. § 39.

Answered; By the marriage-articles, the eldest son, unless in the particular events therein provided, was entitled to claim the lands then belonging to his father. It is true, that his claim so far partook of the nature of a right of succession, that his father's onerous creditors would have been preferred to him. But from thence it does not follow, that the father, by a voluntary deed, could entirely frustrate the purposes of those who were parties to the agreement, and who evidently meant to establish a representation of the family in one or other of the sons of the marriage; and although the father had a power of preferring one of his youngest sons to the eldest, *quod potuit non fecit*. As to the decisions referred to on the other side, they have been justly considered as extending, to an unreasonable length, a father's authority over his children, and therefore have never been followed as precedents; Erskine, B. 3. T. 8. § 38.; 28th July 1778, Spiers *contra* Dunlop and others, No 141. p. 13026.

THE LORDS sustained the reasons of reduction.

Reporter, *Lord Eskgrove*. Ac. *Rolland*. Alt. *Abercromby*. Clerk, *Mitchelson*.

C. *Fol. Dic. v. 4. p. 182. Fac. Col. No 157. p. 314.*

1804. *January* 17. CUNYNGHAME *against* CUNYNGHAME.

No 143.

An obligation of the proprietor of an estate in his marriage-contract, to resign it in favour of himself and the heirs-male of the marriage, does not create to the heir-male such a *jus crediti* during the life of his father, as to prevent the father from selling the estate.

By contract of marriage, entered into in the year 1768, between Sir William Augustus Cunynghame of Livingston, Baronet, and Frances, only child of Sir Robert Myrton of Gogar, Baronet, "in contemplation of the said marriage, the said Sir William Augustus Cunynghame binds and obliges himself, his heirs and successors, to make due and lawful resignation of the lands, baronies, teinds, rights of patronage, and others particularly above and after mentioned, in the hands of his immediate lawful superiors of the same, in favour and for new infeftment thereof, to be made and granted to the said Sir William Cunynghame himself, and the heirs-male of his present marriage; whom failing, to the other heirs of tailzie and provision after specified." The lands to be resigned, consisting of the barony of Livingston, are then particularly enumerated; and in case of the failure of the heirs of the marriage, a substitution is made in favour of a succession of heirs, heirs-male succeeding in preference to female, and the eldest daughter to the exclusion of heirs-portioners, through the whole course of the succession. The contract contained a variety of provisions, and, among