1728. *December* 7. CRAIK *against* CRAIK.

No 111.

WILLIAM CRAIK, in his marriage-contract, became bound to provide and secure himself, and the heirs-male to be procreated of the marriage, certain lands therein named, and further, that he should not alter the foresaid provision and destination of succession, conceived in favour of the heirs-male of the marriage. After the dissolution of the marriage, by the death of the wife, William Craik having but one son of the marriage, Adam, and one daughter, Jane, made a settlement of his estate in favour of his only son, and the heirs-male of his body, (in terms of the foresaid contract of marriage,) whom failing, to the heirs-male of his own body; whom failing, to his daughter and the heirs-male of her body; whom failing, to the heirs-female of his son's body; and whom failing, to his own heirs and assignees whatsoever; and the settlement contains the following provisions; "That it should not be understood to debar any of the heirs of tailzie from granting reasonable provisions to wives and children, or to contract debts for just and onerous causes, but that they should have nowise liberty to disappoint the course of succession, by contracting debts unnecessarily, or making deeds or conveyances in prejudice thereof." Adam having raised a reduction of his father's settlement, upon this ground, that by the contract of marriage the father was bound to settle the succession of the estate upon him, the heir-male of the marriage, and, consequently, upon his heirs whatsoever; and therefore was debarred from preferring his own daughter, to his son, the pursuer's daughter; the LORDS found, that the provision in the contract of marriage, being only to the heirs-male of the marriage, the father was at liberty to make such substitutions as he thought reasonable. See APPENDIX.

*Fol. Dic. v.* 2. *p.* 287.

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1731. *December* 11.

GORDON of Auchline *against* CHRISTIAN and BARBARA GORDONS.

No 112.

A person who had settled his estate on the heirs of a marriage by contract, found not entitled to make a tailzie of the estate consistent with the contract.

GORDON of Auchline, who stood bound in his contract of marriage to resign his estate in favour of himself, and the issue of the marriage, did, thereafter, execute a tailzie with clauses prohibitive and irritant to himself in liferent, and, after his decease, to Alexander Gordon, his eldest son, heir of the marriage, also in liferent, and to the heirs-male lawfully to be procreated of his body; whom failing, to James Gordon, his second son, and the heirs-male of his body; whom failing, to the heirs-male of the tailzier's body of any other marriage, whom failing, to the heirs-female of his body, &c. James Gordon, now of Auchline, in the right of the heir of the marriage, raised a reduction of this tailzie, insisting, that no father, who stands bound, by contract of marriage, to resign his estate in favour of himself and the issue of the marriage, can tailzie that estate, with clauses prohibitive and irritant, in regard he is under obligations to make the

estate not only to descend to the issue, but that it shall descend *tanquam optimum maximum*, and consequently not under irritant and resolutive clauses, by which the issue would not be fiars, but liferenters of that estate. In the *second* place, That abstracting from the general point, this particular entail was an irrational deed, and fraudulent, tending to evacuate the destination in favour of the heir of the marriage. Upon this head it was observed, that the estate was small, burdened moreover with a liferent and considerable debts; 2*dly*, That the heir was not impowered to charge the estate with a shilling to redeem him from slavery; 3*dly*, That the heir had no power to provide wife or children; 4*thly*, That the heir-male of the maraiage was cut out and made a liferenter, and the heirs-female of the marriage postponed, even to the youngest daughter of the maker of the tailzie, contrary to the provision of the contract, which is in favour of the heirs of the marriage. THE LORDS did not determine the general point, but with respect to the particular qualifications insisted on, they found, that this tailzie was not consistent with the provisions in the contract of marriage, and therefore reduced the tailzie. See APPENDIX.

No 112.

*Fol. Dic. v. 2. p. 287.*

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1737. *January* 7. TRAIL *against* TRAIL.

No 113.
Where an estate was provided to heirs whatsoever of the marriage, the contract was found to have been sufficiently implemented by a deed in favour of the heir-male and his heirs.

AN estate being provided, in a contract of marriage, to heirs whatsoever of the marriage; of the marriage there existed two sons; and the father, while the eldest son was yet minor, made a settlement of his estate upon him, and the heirs-male of his body; whom failing, to the second son, and the heirs-male of his body, &c. upon which infeftment was expede. The eldest son died before his father, leaving a daughter behind him, but without accepting of the disposition. In a competition betwixt the heir-female and the heir-male, it was *contended* for the heir female, That she was heir of the marriage, and that the father had it not in his power arbitrarily to disappoint the marriage-settlement. *Answered*, Though the eldest son cannot, strictly speaking, be heir of the marriage while his father is alive, seeing he may die before his father, and so never be capable of succeeding, yet it is received in our law, that a father may implement the obligations he comes under, in his contract of marriage, by disponing in favour of the heir expectant of the marriage; and the contrary doctrine would be highly prejudicial to the heirs of the marriage, seeing it would exclude the father from making a settlement upon them during his life; 2*do*, A provision to heirs whatsomever of the marriage, is not the same with a provision to the heir-male of the marriage; the last points out a particular person, the other is rather negative, barring extraneous heirs, but leaving the father *intra familiam* to prefer one to another, especially males to females, agreeably to the ordinary course of law. *Replied* to the first, Such settlement may be effectual in law, where the heir of the marriage survives the father, because this would