

## SECT. III.

Provision that the Child shall be an equal sharer in the Father's means and effects.

1683. February.

A. against B.

No 15.

It being provided, in a wife's contract of marriage, that she, in case of her decease without children, should have power to dispose of 400 merks, even without her husband's consent; she surviving him without children, claimed the 400 merks. It was *alleged* for the defender, That the foresaid power of disposal was only intended in case the wife had predeceased, seeing these words, "without his consent," import him to be living the time of her disposal; and this was rational, in respect she would have had no jointure off the estate in such a case; but she having outlived him, and got a jointure, there is no reason she should have also the disposal of the 400 merks.

THE LORDS sustained the defender's allegiance, and found the pursuer had only right to the 400 merks, in case she had died before her husband.

*Fol. Dic. v. 2. p. 277. Harcarse, (CONTRACTS OF MARRIAGE.) No 355. p. 89.*

1715. February 4.

ISABEL BROWN Spouse to ROBERT PYLE, Writer in Kelso, *against* Her HUSBAND.

No 16.

A man, in his daughter's contract of marriage, bound himself that, failing heirs-male, she should be an heir portioner. There being no other children, it was found, the father was entitled so to qualify his daughter's right as to exclude the *jus mariti*.

LANCELOT BROWN, feuar in Kelso, having contracted Isabel his daughter in marriage with Robert Pyle, amongst other things it is provided in the contract, that in case he had no heirs-male of his present, or any other marriage, then Isabel was to be heir portioner, and bairn of the house with the other daughter or daughters. Lancelot having married a second wife, repeats the same, or very like clause in his own contract of marriage; but there being no children of the marriage, makes a tailzie of some lands and houses in favours of Isabel for her liferent use allenary, and to the heirs of her body; which failing, to others therein substituted; in which disposition, the husband Robert Pyle his *jus mariti* is expressly excluded, even as to the wife's liferent, which her father there declares, shall be possess by herself allenary, and the rents applied to her own use. After the father's decease, the wife raised declarator against her Husband, for declaring the foresaid exclusion of his *jus mariti*, and that she had the absolute power of uplifting the rents, &c.

*Answered* for the defender ; That the father could not make a legal conveyance in these terms, in regard of the provision above mentioned, in the defender's contract with the daughter, by which there was *jus quæsitum* to the Husband in case of that succession, in so far as the *jus mariti* might extend to ; *et quod meum est sine facto meo a me avelli nequit.* 2do, The same clause is renewed in his own second contract, which carries not only a new provision in Isabel's favours, but supposes and implies, that she was settled in the right as heir, by an anterior provision.

*Replied* for the pursuer ; 1mo, In general, that there is a great difference betwixt a husband's renouncing his *jus mariti*, and a third party's disposing to a wife with that express quality, since a third party may impose what conditions and qualities he pleases upon his own grant ; with which the husband must take it, or otherwise want the right. 2do, The above clause gave no such *jus quæsitum* to the Husband ; for, 1mo, The Husband having got a good portion, the above provision is not such a precise tie, as the father might not rationally dispose otherwise ; but only he could not make plainly fraudulent deeds to overturn this settlement, which was only provisional, as in the case of a clause of conquest, since still Isabel as heir portioner behaved to represent her father, and fulfil his deeds not fraudulent. 2do, This clause was not adjected in favours of the Husband's *jus mariti*, which was not in view, but the clause was personal to the wife, so that there is no *jus quæsitum* thereby to the Husband, since the clause being designed only to bring in Isabel equally with any other female heirs, the Husband's marrying one of them is *per accidens* only. 3tio, The father having provided the liferent to Isabel, and the fee to the heirs of her body, he had effectually fulfilled that clause, according to the true intent of it, though the Husband's *jus mariti* be excluded, there being nothing in that provision demonstrative that it was given upon account of the Husband's *jus mariti*, but only out of respect to Isabel's mother and her issue. 4to, The clause itself was conditional, if the father should have other daughters alive at his decease, but that condition did not exist, nor does the repeating of the clause in the second contract of marriage make it of more force, but only shews the father was remaining in the same purpose and destination in favours of Isabel, as in the first.

" THE LORDS found, that notwithstanding of the 1st and 2d contracts of marriage, the father might qualify the right to his daughter, to the exclusion of the *jus mariti*."

Act. Sir Walter Pringle.

Alt. Robert Dundas.

Clerk, Mackenzie.

Fol. Dic. v. 2. p. 277. Bruce, v. 1. No 55. p. 70.