

No 7.

nation, the pursuer's father was denied of all right to the contract of marriage, which must stand good; and it could be of no import, in point of right, whether the new obligation became, in all its parts, effectual or not; and no regrefs was competent to the cedent.

THE LORDS found, That it was not competent to the defender to propone on the assignation granted to his father, without acknowledging the passive titles.

No 8.

A person was bound, by contract of marriage, to convey his estate to the heir of the marriage. He conveyed to his eldest son; but inserted a clause, empowering himself to alter at pleasure. The son was infest, and died; the father exercised his reserved power after his death, and conveyed to his second son. The eldest son's widow claimed terce. Found the might plead upon her husband's infestment; and yet impugn the reservation contained in it as gratuitous, and in prejudice of the contract of marriage.

Reporter, *Lord Cullen.*A&C. *Archibald Stewart, jun.*
Clerk, *Dalrymple.*Alt. *Alex. Hay.**Fol. Dic. v. 3. p. 33. Edgar, p. 169.*1731. *January 26.*FEA *against TRAIL.*

A PERSON, whose estate in his contract of marriage was provided to the heirs of the marriage, did thereafter, in implement of the contract, dispone his estate to his eldest son; but reserving to himself a power to alter at his pleasure. The eldest son having died infest, and his relict claiming a terce, it was objected by a second son of the marriage, to whom the father, in virtue of the reservation, had gratuitously disponed the estate after the eldest son's death: That the eldest son's infestment, upon which the pursuer's claim was founded, was evacuated by the conveyance in his favours; and that if the pursuer did plead upon her husband's right, she must take it as it stands.

Answered, The reservation must be held *pro non adjecta*, being repugnant to the limitation in the contract of marriage; and the pursuer's husband had never accepted of the disposition to tie him down to the unreasonable condition.

THE LORDS found the pursuer might plead upon her husband's infestment, and yet impugn the reservation therein contained, as being gratuitous, and in prejudice of the contract of marriage.

*Fol. Dic. v. 1. p. 48.*1740. *January 16.*JOHN M'KEAN *against* ELSPETH RUSSELL.

No 9.

A creditor, in a bond to himself in life, and certain substitutes in fee, exercised, on death-bed, a reserved power to uplift without their consent.

JAMES M'KEAN being creditor to Sir Harry Innes, in a bond for 2000 merks, payable to himself, if in life, and, after his decease, to certain other persons; containing a power to James, at any time in his life, to uplift, receive, and discharge the same, without consent of the persons whose names were therein-mentioned, did, on death-bed, exercise this faculty, and gave it away, not only from the heirs at law, but likewise from the substitutes.

In a reduction, on the head of death-bed, it was pleaded for the heir at law, That the death-bed deed did evacuate the substitution, whereby there came to be place

for him; and though, with the same breath, the subject is given away to strangers, the alienation could not be effectual against him, being done on death-bed.

THE LORDS repelled the reason of reduction. (See DEATH-BED.)

Fol. Dic. v. 3. p. 34. C. Home, p. 240.

1758. January 17.

DANIEL CUNNINGHAM of Cayen, against MARY GAINER, and SUSANNAH CUNNINGHAM, her Daughter.

By minute of sale, dated 13th June 1741, Thomas Forbes of Waterton, obliged himself to dispone the lands of Holms of Dundonald to Robert Cunningham, Esq; for which Mr Cunningham thereby became bound to pay Waterton L. 1008: 14: 2 Sterling as the price. It was further declared, That the disposition to be granted, and the lands themselves, should be burdened with the said price until payment.

Mr Cunningham soon after raised a suspension and reduction of the minute of sale *ex capite fraudis*. The reasons of reduction were, however, repelled by two consecutive interlocutors of the Lords, the last of which was pronounced 30th June 1743; but a question with respect to certain deductions from the price was still in dependence at Mr Cunningham's death, November 1743.

By a deed, of date 17th July 1741, Robert Cunningham disposed to Mary Gainer in life, and to her daughter Susannah in fee, his lands in Scotland, there particularly described, without mentioning the Holms of Dundonald.

On the 27th October 1743, Mr Cunningham executed his last will and testament, by which he conveyed his estate in the island of St Christopher's (there said to yield L. 2500 Sterling *per annum*) to certain trustees, for payment of his debts and legacies, and in further trust for Daniel Cunningham his son, to whom he also thereby bequeathed certain other plantations, said to yield L. 380 of yearly rent, and his whole other estates not disposed by his will. Among other legacies given by this will, there was one in these words: 'I give and bequeath unto my dear wife, Mary Gainer, (which I have hitherto concealed,) all my lands, plate, houses, furniture, linens, horse, mares, bulls, cows, sheep, and whatever I have or shall have, in Scotland, at the time of my decease, for and during her life, for her maintenance, and for the maintenance and education of my daughter Susannah Cunningham; and after the decease of my said wife, I give and bequeath all my lands, plate, &c. and whatever I have or shall have, in Scotland at the time of my decease, unto my daughter Susannah Cunningham, and the heirs of her body; and failing such heirs, I give my said lands and premises to my son Daniel Cunningham, Esq; and his sons for ever.'

Robert Cunningham died on the 13th November 1743, when the price of the Holms of Dundonald was not paid; Waterton thereupon adjudged these lands, and Mr Cunningham's other land-estate in Scotland. Mary Gainer then brought

No 9.

By the same death-bed deed he conveyed the money to a stranger. Found the heir at law could not reduce the death-bed deed, to the effect of doing away the substitution, that he might come in before the stranger.

No 10.

A legacy of a right to lands is effectual against the testator's heir, who takes benefit from the testament in which the legacy is given.