set aside the bond as void and null, on the ground of its being an unlawful contract or wager. 1789.

SINCLAIR, &c. *v.* THREIPLAND, &c.

After hearing counsel, it was

Ordered and adjudged that the interlocutors of the Court below be affirmed.

For Appellant, *Geo. Ferguson, W. Adam.*

For Respondent, *Ilay Campbell, R. Dundas.*

HENRIETTA SINCLAIR, (Wife of WILLIAM WEMYSS SINCLAIR, Esq.), and JANET WILLIAMSON, formerly SINCLAIR, (Wife of BENJAMIN WILLIAMSON, Esq.), the Daughters and only Children of JAMES SINCLAIR, Esq., by his Wife MARJORY, deceased, who was the Eldest Daughter of DAVID SINCLAIR, Esq., late of Southdun, deceased, by MARJORY his second Wife; the said WILLIAM WEMYSS SINCLAIR and the said BENJAMIN WILLIAMSON, for their interests; and JAMES SINCLAIR of Durren, Esq. Trustee, constituted by Mrs. KATHERINE SINCLAIR, now deceased, who was the Second and only other Child by his Second Wife, } *Appellants;*

STEWART THREIPLAND of Fingask, Esq. the Father and Executor of DAVID SINCLAIR THREIPLAND, deceased, and PATRICK THREIPLAND, Esq., Brother of the half-blood, and Heir-at-Law of the said DAVID SINCLAIR THREIPLAND, - } *Respondents.*

House of Lords, 27th March 1789.

MARRIAGE SETTLEMENT—RELIEF AMONG HEIRS—RES JUDICATA.—The questions in this case were, 1st, Whether a deed executed by David Sinclair of Southdun in 1716 was to be considered a marriage settlement? 2. Whether it was competent to enter into that question, in respect of it being *res judicata*, by a decree pronounced between the same parties in 1763? 3. Whether the heir in possession, who is bound to keep down the interest of the debt due on the estate, during his possession, has relief against the other heirs of line taking separate estates? The Court of Ses-

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sion waived the first point, and held the *res judicata* to foreclose. Found, in the House of Lords, that the decree 1763 being in reference to a different subject matter, did not exclude, and case remitted for further consideration.

David Sinclair of Southdun was thrice married. With his first wife he had issue one daughter, who married the respondent, Stewart Threipland. Of this marriage there was issue a son, David Sinclair Threipland, and a daughter Janet. They survived their grandfather, but died without leaving issue.

With his second wife, David Sinclair of Southdun had two daughters, Marjory and Katherine Sinclairs. Marjory married James Sinclair, and died leaving two daughters, Henrietta and Janet Sinclairs, the appellants; and Katherine died without issue, having vested her effects in the appellant, Mr. Sinclair of Durren, as trustee.

With his third wife he had a daughter, Margaret, who survived him, but died without issue.

David Sinclair of Southdun, two years after his marriage with his first wife, executed a deed, conveying the estate of Southdun to his wife in liferent, and to his heirs male; whom failing, to Janet Sinclair his only daughter, whom also failing, the nearest heirs female procreate of his body in fee.

With his second wife a formal antenuptial contract was entered into, whereby all the real and personal estate which should be conquest (acquired) by him, during the subsistence of that marriage, was disponed, "The one half to his wife "in liferent, and the whole to the children of the marriage "in fee," declaring that nothing was to be reputed conquest, but what the said David Sinclair shall be worth at his death, beyond his present land estate, and after payment of all his just and lawful debts contracted during the marriage.

In 1747, Mr. Sinclair of Southdun made an entail, comprehending not only Southdun and others comprised in the deed 1716, but also other lands after acquired, to David Sinclair in liferent, and to the heirs male lawfully procreated of his body.

After his marriage with his third wife, he executed a post-nuptial contract of marriage; in order to fulfil the terms agreed between them before the marriage, whereby he "bound "and obliged him and his foresaids to infeft and seize his said "wife, for her liferent provision, in all and whole the town "and lands of Stanhill," and others therein mentioned, of

which a considerable part were comprised in the deed 1716. He left her also £1000 Scots to build a house on the lands.

Southdun died in March 1760, leaving his third wife to survive him.

David Threipland, the only son of the daughter of his first marriage, was entitled, under the entail 1747, to succeed to the lands thereby conveyed. Mrs. Marjory and Katherine Sinclairs, the children of the second marriage, were entitled to the conquest of that marriage; and were, besides, heirs portioners of line to the real estate not otherwise destined, and belonging to him at his death.

Soon after David Sinclair of Southdun's death, action of reduction was raised by David and Janet Threipland of the first marriage, to set aside the deed of entail of 1747, on the ground that Southdun had not power to alter the order of succession established by the deed 1716, or to lay the heirs thereby called under the fetters of an entail. In this action the Court of Session "Sustained the reasons of reduc- Nov. 19, 1763.
"tion of the entail, in so far as concerned the lands of
"Southdun and others contained in the deed or obligation
"granted by the deceased David Sinclair of Southdun,
"1716; but repelled the reasons of reduction in so far as
"concerned the remaining lands contained in the said en-
"tail."

By the death, both of David Thriepland in 1773, and Janet his sister, the issue of the first marriage became extinct, leaving the succession of the entailed estate open to Mrs. Katherine Sinclair, the surviving daughter of the second marriage; and the lands comprised in the deed 1716 descended to the said Katherine, her sister Margaret, and the appellants, Henrietta and Janet Sinclair, her nieces, in the character of heirs of provision to Mr. Threipland, by the limitations of that deed.

Soon after David Threipland's death, the estates became the subject of a ranking and sale, and were sold.

The respondent Dr. Threipland, before his son's death, (David Sinclair Threipland), in 1773 had, in order to relieve the estates of certain debts pressing upon it, made several large advances to Southdun's creditors, taking conveyances of the debts in Mr. Farquharson's name as his trustee, amounting to £3000, part of which consisted of money paid to the widow of Southdun, by the third marriage, both as jointure, and £1000 Scots to build the house. Action being raised by the respondent for these sums, it was conjoined

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with the ranking; and the Lord Ordinary found the respondent entitled to be "ranked for the sums libelled, and "interest thereof that were paid by him, with annualrent of "the accumulated sums, consisting of said principals and "interest, from the different periods at which the same "were paid respectively, in the process of ranking at the in-"stance of the respondents, as heirs of line of the deceased "Southdun."

The following question then occurred. It was objected by the appellants that Mr. Threipland, while in possession of the entailed estates, was bound to contribute along with the other heirs towards relief of the interest of that debt incurred during the possession of that estate, after application of all the funds primarily liable to discharge the same. And therefore that Dr. Threipland's claim could not be sustained.

Dec. 13, 1786. The Court, on report of the Lord Ordinary, pronounced this interlocutor: "Find that the rents of Southdun's en-"tailed estate of Brabsterdonan and others, during the "deceased David Sinclair Threipland's possession, stood "chargeable with the payment of the interest arising due "during that time upon that part of Southdun, the entail-"er's debts, which exceeded the proceeds of his unentailed "estates, descendible to his executors and heirs of line. "But find that in so far as the jointure and other provisions "settled upon Southdun's widow, and paid to her by the "said David Sinclair Threipland, or uplifted by her out of "the lands of Southdun's first marriage settlement 1716, "were not satisfied or repaid to him by any surplus of the "rents of the said estate during his possession, remaining "after deducting the interest above mentioned, the pursuers "(respondents) as in right of the said David Sinclair Threip-"land, are entitled to relief of the said jointure, to be accu-"mulated yearly, at the first term of Whitsunday or Martin-"mas after the payments thereof were made to the widow, "with the interest of such accumulated sums from and since "the terms of accumulation thereof; and are also entitled "to relief of the sum of £1000 Scots paid to the widow for "providing a jointure house, with interest thereof since the "date of payment, and that the appellants are liable to the "respondent in such relief, as now representing Southdun."

Two reclaiming petitions were presented to the Court by the appellants, but the Court refused the desire thereof, and adhered to the above judgment.

Feb. 24, 1787.
Mar. 7, ——

Against these interlocutors the appellants brought an appeal to the House of Lords against that part of the judgment which sustained the respondents' claim, in so far as the jointure to the widow and sum for building the house were concerned.

Pleaded for the Appellants.—The first question is, Whether by the deed which David Sinclair of Southdun executed in 1716, binding himself to infeft his third wife in liferent, and the issue of the marriage between them in fee, in the lands therein described, a *jus crediti* was vested in the issue entitling them to obtain relief against the effects of onerous deeds granted by him affecting the lands specified in that deed, out of any separate estate or fund he left at his death? It is not disputed that where an estate is settled upon the issue of a marriage by a regular antenuptial contract, the husband is restrained from burdening gratuitously the estate settled by that deed, and that the issue must be indemnified against his onerous debts and deeds out of any separate estate he leaves. But the fallacy in this case lies in arguing upon the deed 1716 as a contract of marriage, or as a deed having such legal consequences. The deed is not an antenuptial contract of marriage, nor even a postnuptial contract. It is a unilateral deed, signed and executed by Sinclair of Southdun alone, and bears to proceed upon love, favour, and affection he has towards his wife. Husband and wife do not here join to convey to each other their respective estates. The deed had in view to provide his wife with a jointure, and to make a destination to his children alterable at pleasure. The children therefore, by this deed, were not constituted creditors, but had a bare hope of succession. And therefore when David Sinclair burdened the lands in that deed with the third wife's jointure, he exercised a right reserved to himself, and the children taking the lands must hold with all the burdens he thought proper to lay upon them.

No doubt it is stated by the respondent that the deed 1716 has the operation of a marriage contract in restraining the grantor from burdening to the prejudice of the issue, in consequence of the decision in the former case in 1763, to set aside the entail. But the appellants are not bound by that decision. They were then under age, and did not appear in the action. But, in point of fact, the single object of the action was to set aside the entail 1747, as imposing restraint upon heirs who were supposed to have an unlimited fee under the deed 1716. Although Mr. Threipland

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succeeded in persuading a majority of the Court that the deed 1716 resembled a marriage contract, and as such, was a bar to Mr. Sinclair of Southdun making a strict entail of the lands comprised in it, it does not follow that it ought *now* to be decreed a bar to his laying a burden upon those lands, from which the heirs have no title to be relieved. That former decree therefore cannot be pleaded as a *res judicata* binding the present parties, or necessarily regulating the decision of a *different right*. The parties here being different, and the subject matter different, there is no bar to the present question; and David Sinclair Threipland was not entitled to relief for any sums paid in name of jointure, &c., he being bound to keep down the interest on the debts with which the estate was burdened during the term of his possession.

Pleaded for the Respondents.—By the marriage settlement of 1716, the estate of Southdun, and certain other lands therein, having been settled upon the heirs of the marriage between Sinclair of Southdun and his wife, and that settlement containing a clause of warrandice, by which David Sinclair became liable that the provision therein contained "should be good, valid, and sufficient to the heirs respec-"tive of the said marriage, and against all deadly;" it was not in the power of David Sinclair to defeat this settlement, in whole or in part, by any voluntary gratuitous deed. The respondents do indeed admit that he was entitled to charge the lands so settled with a suitable provision for the heirs of any subsequent marriage, and with a reasonable jointure to a second wife. But, while admitting this, the respondents maintain that the heirs of the first marriage have, by the law of Scotland in every such case, a clear and undoubted right to be relieved of the burdens so imposed out of any separate estate or funds of the deceased against his representatives succeeding to the same. Here Southdun charged the lands with a jointure of £100 a-year to his third wife as well as with £1000 Scots to build a house. In point of fact also David Sinclair of Southdun died possessed of considerable separate estate, not included in the deed 1716, to which the appellants have succeeded, and are therefore liable to relieve the respondent of the sums disbursed by David Sinclair Threipland, in paying the jointure and other sums, with interest as aforesaid.

But further, in an action to which the appellants were parties, it was solemnly decided, by a judgment in which all

parties acquiesced, that tho deed 1716 was a valid and effectual marriage settlement to the effect of setting aside the entail executed by Southdun in 1747. By that decision there is a sufficient bar to the present question.

After hearing counsel,

The LORD CHANCELLOR said,

"MY LORDS,

"The decree in 1763, I am clearly of opinion, is not a bar to the appellants' action, and that the deed 1716 ought not to have the effect of a marriage contract. But as the Court below had not gone fully into that question in the present cause, I thought it right to give them an opportunity of reconsidering it."

It was therefore ordered and declared that the matter adjudged in the interlocutor of 19th November 1763 was essentially different from that brought into question in the present cause, and could not bind the subject matter of the present suit. And it is therefore ordered that the cause be remitted back to the Court of Session to hear and determine the point now put in issue without any prejudice arising from the said interlocutors.

For the Appellants, *Ilay Campbell, Geo. Wallace.*
For the Respondents, *Sir J. Scott, Alex. Abercromby, Thos. Andrew Strange.*

ANDREW STRATION, a Pauper, - *Appellant;*
THOMAS GRAHAM of Balgowan, Esq. *Respondent.*

House of Lords, 28th March and 12th May 1789.

LEASE—DEVIATION FROM MODE OF CROPPING—PENALTY.—A tack stipulated that the tenant was at liberty to deviate from the mode of cropping and management laid down in the tack upon his paying £2. per acre more of additional rent to the landlord. He departed from the mode of cropping. Held, in the Court of Session, that he was liable to pay the £2. of additional rent. Reversed in the House of Lords, and case remitted to ascertain and determine specially what was the number of acres the tenant became bound to cultivate in the manner specified in the tack, and what was the number of acres cultivated contrary to the conditions thereof.

The present question was raised by the respondent against the appellant, his tenant, for the additional rent mentioned