

Sir William and Lady Cunningham, Sir William accepts the provision therein made in full, &c. except in so far as he is eventually provided to the estate of Gogar by the contract of marriage betwixt Sir Robert Myrton and Dame Mary Campbell. After Lady Cunningham's death, Sir Robert Myrton made a settlement of Gogar on Robert, the second son of Lady Cunningham, in order that his own family might not be sunk in that of Livingston. Of this settlement a reduction was brought by David the eldest son of Sir William Cunningham, on the ground, that he was the heir of provision to that estate under his grandfather Sir Robert Myrton's contract of marriage with his wife, being heir at law to his mother Lady Cunningham, the only child of that marriage who left issue, and therefore entitled to challenge any gratuitous deed to the prejudice of his right thence derived. *Urged* in defence, That the contract of marriage between the pursuer's grandfather and grandmother, being postnuptial, does not convey the same *jus crediti* or indefeasible right as if it had been an antenuptial contract; but that, even had the contract been antenuptial, it would have had no other effect than a simple destination, affectable by all the rational debts and deeds of the obligee, and subject to his power of altering the destination, or giving the estate to any child of the marriage at his pleasure. Where a deed of the father is challenged as *in fraudem* of such destination by a marriage-contract, the deed must be shown to be irrational and inexpedient, and actually contrary to the obligations in the contract. But in the present case, the settlement in question is highly rational and expedient, and is perfectly agreeable to the spirit and intention of the contract, which clearly was to prevent the estates from being united, and the one family sunk in the other. That with regard to the obligations in Mr Fletcher's contract of marriage, all that was given to the other substitutes in that settlement was a *specie successionis*, alterable at pleasure. Sir Robert's renunciation of his reserved powers in favour of Mrs Fletcher and her heirs, was not an act favourable to Lady Cunningham, but the contrary; and, on the whole, as by the original contract of marriage of Sir Robert Myrton he had a right to chuse his heir among his own daughters, there is no reason why that right should not extend to the children of his daughters. THE LORDS, on a hearing in presence, sustained the reasons of reduction. This judgment was affirmed on appeal. See APPENDIX.

Fol. Dic. v. 4. p. 180.

1776. December 20.

DICK against LINDSAY.

No 140.

DICK, by his marriage-contract, disposed to the children of the marriage his whole heritable and moveable property at his death, under the burden of a provision to his wife. Being displeased with the conduct of his eldest son Richard, he altered this settlement, leaving only a trifle to Richard's wife and children.

No 140.

After his death, Richard brought a reduction of this last deed against his father's trustees, as being contrary to the provisions of the marriage-contract, and *ultra vires* of the father; and *pleaded*, That his *jus crediti* could not be disappointed, whatever had been his misconduct, of which, however, there was no proof. *Answered*, The powers of a father, even in the case of special provisions in favour of children, are ample and discretionary, if nothing arbitrary or fraudulent is done; much more are they so, where the provision is indefinite. THE LORDS repelled the reasons of reduction. See APPENDIX.

Fol. Dic. v. 4. p. 180.

1778. July 28.

ALEXANDER SPIERS and Others, *against* THOMAS DUNLOP and Others.

No 141.

Powers of
the father
over a subject
provided to
the heirs of
the marriage.

By contract of marriage betwixt James Dunlop and Henrietta Maxwell, his estate of Garnkirk was settled on himself, and his wife, in conjunct fee and liferent, and the heirs-male of the marriage.

James Dunlop, heir-male of the marriage, having engaged in an extensive trade, borrowed considerable sums, for which his father became jointly bound with him. The son failed, and disposed his effects to Spiers and others, as trustees for his creditors. The debts, in which father and son had been jointly bound, were paid up by Thomas Dunlop and others; and, for their security, the father granted an heritable bond over his estate, and, afterwards, a trust-disposition, empowering them to sell his estate, to apply the price to the payment of his debts, and the reversion to be paid to himself, his heirs, and assignees. He likewise executed, soon after, bonds of provision in favour of his own youngest children, and a bond for a sum, payable at the first term after his decease, to his son James, and his wife, in liferent, and their children in fee, and another sum to James, in liferent, and the children in fee, with this *proviso*, "that the liferent to James should be held to be alimentary, and should not be subject to his debts, or capable of being alienated by him. He likewise, by a new deed, enabled the trustees, formerly named, to apply the price of the lands, after paying the debt, to the payment of these provisions. And as to the residue, if any, the trustees were thereby empowered to convey it to his son simply, or under such reservations as they, at the time, should think proper.

James Dunlop, elder, died soon after; and the trustees of his son's creditors having, upon a charge against him to enter heir, adjudged the estates provided to him in the contract of marriage, brought a reduction of the whole deeds above-mentioned, granted by the father, in which his trustees, and all parties concerned, were called.

Pleaded for the pursuers; It is an established point, that, by providing the estate to the heir-male of a marriage in the contract, a right of succession is