

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

vested in the heir, which cannot be defeated or restricted afterwards, by any gratuitous deed of the father. Garnkirk, therefore, had not power to defeat his son's right to the full benefit of the succession, by confining him to a life-rent, and giving the fee to his children. The heir was entitled to set aside such deeds.

No 141.

The insolvency of the heir no more deprives him of this *jus crediti* under the marriage contract, than it annuls his right as creditor under any bond or obligation. On the contrary, the circumstance that the creditors of the heir have an interest, is an additional reason that the succession should not be disappointed, or the benefit of it diminished. Money is often lent on the faith such successions. When they open to the heir, the creditors, by attaching them, have the same right which the heir had to render them effectual.

It was admitted by the pursuer, that the provisions of Dunlop, elder, to his younger children, could only be challenged in so far as exorbitant, as they are only in so far gratuitous

Answered for the defenders; The heir of a marriage has not an absolute right to the succession. It may be disappointed by all onerous deeds of the father, and lessened by provisions to his children. The father, who remains fiar, may likewise, on reasonable considerations, lay the heir of the marriage under restrictions, in order to save the estate from being carried off by creditors, where the heir is a spendthrift, or bankrupt; Thomson, and his Creditors, *contra* Thomson, 1762, No 135. p. 13081. Vide note on Ersk. p. 562. On this principle, the deed executed by Garnkirk, limiting his son's right in the reversion of the estate to an aliment, proceeded. It is not an act in defraud of the provision in the contract, but to prevent that provision from being frustrated, as far as circumstances will admit.

There is no injustice done to the creditors. In lending their money, they could have no dependence on so precarious a right of succession.

The COURT were of opinion, that the object of the deeds under challenge being gratuitously to defeat the right of property, to which the heir is entitled upon his succession, they are not effectual against the heir, nor his creditors, who are entitled to have the whole benefit of the succession applied to their payment. The COURT found, "That James Dunlop, elder, could not disappoint the succession of the estate of Garnkirk, as settled upon the heir-male of the marriage between him and Henrietta Maxwell, by their marriage-contract; and in so far sustains the reason of reduction; and remitted to the Lord Ordinary to proceed accordingly."

Act. Wight, Blair, Craig.

Alt. Ilay Campbell, Morthland.

Fol. Dic. v. 4. p. 180. Fac. Col. No 36. p. 62.