No. 2.

2*d*, The evidence adduced on the part of the trustees by no means proves that Richard Dick was foolish, idle, or extravagant; but that all the distresses in which he has been involved, have arisen from the harsh usage of the father.

Answered for the trustees; 1*st*, The proof does completely establish the folly and extravagance of Richard Dick.

2*d*, But even without any proof of misbehaviour on the part of Richard, the father's powers were sufficient to enable him to execute the settlement which is now endeavoured to be reduced. Provisions of this kind in contracts of marriage do not tie up the father's hands,—Erskine B. 3. T. 8. § 40. Even in the case of special provisions of lands or sums of money, it has always been considered that the father's powers are ample, if nothing arbitrary or fraudulent is done, so as entirely to alter the line of succession, and defeat the provision; but much more ought this to be in the father's power where the provision is indefinite, as in the presnt case.

The Court (20th December 1776,) pronounced an interlocutor sustaining the defences against the reduction.

Lord Reporter, *Gardenstone.* Act. *Blair.* Alt. *Ilay Campbell.*

J. W.

*** See Cunningham against Cunningham, 9th July 1776, APPENDIX, PART I. *voce* CLAUSE, No. 1.

1792. *February* 2. MACKENZIE'S CREDITORS *against* his CHILDREN.

No. 3.

This case, (No. 66. p. 12924.) was appealed. The House of Lords ORDERED and ADJUDGED, that the appeal be dismissed, and the interlocutors complained of be affirmed.

1801. *January* 28. ALEXANDER WATSON, *against* JOHN PYOT.

No 4.

Where an estate was, provided in a marriage-contract to the father, and the heirs-male of the marriage, an absolute conveyance of a considerable part of it,

ALEXANDER WATSON, with consent of his father, in his marriage-contract with Mrs. Jane Fulertown, became bound to resign the estate of Turin to himself and 'the heirs-male to be procreated betwixt him and the said Jane Fuler-'town; which failing, to the heirs-male of the said Alexander Watson's body 'of any subsequent marriage; which failing, to the heirs-male to be procreated 'betwixt him and the said Jane Fulertown; which failing, to the heirs-male of 'the said Alexander Watson's body of any subsequent marriage; which fail-'ing, to the said Alexander Watson, his heirs and assignees whatsoever; the 'eldest heir-female succeeding always without division.'

No. 4.
and of other lands not included in the contract, by the father during his lifetime to the eldest son, was found not to discharge the latter's *jus crediti* under the contract, so as to entitle the father afterward to exclude him altogether from the remainder.

It was likewise found, that the father had not power to entail it, in the manner mentioned in this report.

There were two sons of the marriage, John and Alexander.

During the lifetime of the former, the father executed an entail of the lands contained in the contract, and of others afterwards acquired by him, upon the series of heirs called by the contract; but upon John's death this entail was revoked, and Alexander, who had been bred a merchant, having given up business, his father, 17th May 1781, granted an obligation to dispone to him the lands there mentioned, consisting partly of a portion of the lands included in the contract, and partly of an after acquisition, under burden of £5000 of the debts then due by the granter, proceeding on the narrative, that 'my son is 'not anywise provided or secured for a proper living to support him in his pre-'sent situation, and that I am very desirous he should be provided, as far as 'my circumstances will permit.' And on 5th July 1781, he accordingly granted an absolute disposition to the lands, in terms of the obligation.

The son was immediately infeft upon the precept in the disposition.

Before this time, the father had sold part of the lands contained in the contract.

On the 30th July 1781, Alexander Watson *senior* executed a separate disposition of the remaining lands, to himself in liferent, and his son in fee, reserving to himself ample power to dispose of the subjects and revoke the deed.

On these two dispositions one Crown-charter was expede, narrating both, and confirming the base infeftment of the son, upon the disposition of 5th July 1781.

Upon this charter, separate infeftments were taken, one in favour of the son, and the other in favour of the father and son, for their respective interests. Both infeftments were included in one instrument of sasine.

On the 28th November 1781, the father and son executed a contract, reciting the engagements on both sides, in consequence of the obligations 17th May 1781; stating that the conveyance had been already granted by the father, and the debts paid by the son; regulating the payment of public burdens between the parties, and reserving to the father the right to dig marl, and the servitude of certain roads in the lands conveyed; but taking no notice of the disposition 30th July 1781, or titles following on it.

The contract ends with a declaration, 'that what has been already performed 'by the parties before written, with what is still incumbent upon them, by the 'foregoing contract, comprehends and includes all the obligations prestable by 'the one party to the other, by the agreement before mentioned.

Upon the Crown-Charter the son was enrolled as a freeholder, as was the father also, upon the restricted qualification remaining with him.

Alexander Watson married a second time, but never had any children of the marriage.

In 1793, many years after this marriage, he executed a strict entail of the lands remaining with him, to himself in liferent, and 'to Alexander Watson,

'my only son now in life, in fee; whom failing, to any other heirs-male of 'my body, and to the heirs of their bodies; whom failing, to the heirs whom-'soever of the body of the said Alexander Watson; whom failing, to the heirs-'male of the body of Isobel Ogilvie *alias* Pyot,' and other substitutes. By this entail, the highest jointure to a widow was fixed at £150, and £2000 was the utmost sum which could be given to younger children, and Alexander Watson *junior* was to have no power of providing either his wife or children, unless he, within six months, executed a similar entail of the lands previously conveyed to him. No. 4.

In 1795, Alexander Watson *senior* executed a suplementary deed to the same effect, but containing a more ample description of the lands conveyed by it.

In 1796, he executed a disposition, proceeding on a narrative of the entails 1793 and 1795, and that his son was already in possession of about one-half of his estate, by the previous conveyance in his favour; and that his late conduct had induced him to exclude his son from the remaining lands, except on the event and condition after mentioned, and therefore he called John Pyot, eldest son of the Isobel Ogilvie mentioned in the former entails, and the heirs-male of his body; whom failing only, he called the heirs-male of his son's body, on condition of his entailing the other lands formerly conveyed to him by a deed of a similar nature, and, with this alteration, Alexander Watson *senior*, approved of the former deeds executed by him.

This deed contained neither procuratory nor precept, and, on that account, a supplementary one was executed in 1797, likewise entailing the lands, and recalling the three former entails executed by him, with this exception, that they should remain in force if the last deed should, from any cause whatever, prove ineffectual.

Upon the death of Mr. Watson *senior*, the son brought a reduction of the four deeds executed by his father to his prejudice, in which the points at issue came to be,

1*mo*, How far the son's *jus crediti* under the marriage contract was virtually discharged by the conveyance in his favour in 1781, so as to render effectual the deeds executed by his father in 1796 and 1797?

2*do*, Supposing the *jus crediti* to remain in force, and these two deeds to be ineffectual, How far the entails executed in 1793 and 1795 were struck at by the contract?

On the *first* point,

The defender admitted, that the father could not gratuitously exclude the pursuer in terms of the marriage-contract; but he contended, that his *jus crediti* under it had been derelinquished by his acceptance of the disposition 5th July 1781, by which above a half of his father's whole property was immediately bestowed on him in fee-simple. This conveyance, (it was said) the pursuer might have good reason to prefer to the uncertain right vested in him by the

No. 4. contract, which depended on his survivancy, and might be disappointed by his father's selling the lands, or burdening them with debts. The pursuer cannot be entitled to both; (Dict. *voce* PRESUMPTION, Div. 3. Sect. 4.) Both parties understood the father to have afterwards complete power over the lands remaining, as is evident from the reservation in the disposition 30th July 1781, and subsequent deeds executed by him, as well as by the son's acceptance of the Crown charter.

The pursuer

Answered: The lands conveyed under the burdens attached to them, were not worth a sixth part of the lands retained, and afforded no more than a suitable immediate provision to an only son, who had relinquished a profession at his father's request; so that there is no room for presuming a discharge of his valuable right under the contract. Indeed, the contract in November 1781, recites the whole obligations incumbent on both parties in consequence of the disposition of 5th July 1781, yet takes no notice of the intermediate deeds, nor discharges the claims under the marriage-contract, which would not have been omitted, if meant to be included in the transaction.

The disposition 30th July was executed by a writer unacquainted with the contract of marriage, and merely for the purpose of executing freehold qualifications in favour of the father and son. The latter was no party to, and was not acquainted with the terms of the disposition and charter following on it, which last indeed narrates both dispositions, and therefore can have no more effect on the rights of the pursuer, than if separate charters had been executed.

On the *second* point, the pursuer

Pleaded: The heir under a marriage-contract, has a *jus crediti* against his father, which, though it does not prevent the latter from selling the lands, or burdening them with debt, or granting reasonable provisions to a second wife, and children, which are in law considered to be onerous, yet gives the heir, in such cases, a claim of relief against the separate estate of his father, and, even in the lifetime of the latter, founds an action against him for purging incumbrances: and the gratuitous deeds of the father are wholly ineffectual against him.

The heir is thus entitled to claim the estate *tanquam optimum maximum*, which cannot be said where it is loaded with the restrictions of an entail, by which the heir is reduced nearly to the situation of a liferenter; and the mutual onerous contract cannot be said to be *bonâ fide* implemented, when a liferent only is given to the heir of the marriage.

The contract at least prevents gratuitous deeds, and such, an entail must always be considered, in questions with the granter; Gordon of Auchline, No. 112. p. 12984; Ker of Abotrule, No. 116. p. 12987; 25th July 1751, Douglas, No. 119. p. 12989; 28th July 1778, Speirs against Dunlop, No. 141. p. 13026.

No. 4.

Further, the only plausible argument in support of an entail, in such case, is, that its restrictions are so rational, that it must be presumed that the mother and her relations would have agreed to them, if they had been proposed at the time; but the entail, in the present case, contains various irrational and oppressive clauses; in particular, if it does not affect the places even of the pursuer's sons; in all events, it deprives his daughters of their places in the destination, in terms of the contract, if there had been children of the second marriage. It also unreasonably limits the provision to widows and young children, and obliges the pursuer to entail in the same manner the lands previously disponed to him in fee-simple.

Answered: A marriage-contract is not meant to deprive the father of the usual exercise of property; he may sell the lands; he may burden them with debts; and, in general, restrictions are not to be inferred against him by implication.

It is true, the contract must be fairly implemented; but the execution of an entail, so far from being *in fraudem* of it, is the most effectual way of enforcing the object of it, which is to secure the succession to the other children of the marriage, as well as to the eldest son. When no fetters are imposed, the latter may gratuitously disappoint his own children, and the other heirs of the marriage. He may execute an entail, even excluding them altogether; and it would be singular, if the father could not execute an entail to enforce the destination of the contract.

Nor is the argument affected by the relief competent to the heir, when the father sells the lands, or burdens them with deb . This relief proceeds upon the principle, that it is *in fraudem* of the contract to sell or incumber the lands while he has other funds. If he could, the contract would be useless; but a father cannot be said to act *in fraudem* of the contract, when he executes an entail to enforce it. His doing so, indeed, makes the succession less agreeable to the heir, but this is not an interest which the heir can be allowed to plead in opposition to it. There is in truth no difference between a voluntary destination and that arising from a marriage-contract, as to the powers of enforcing it by an entail; Stair, B. 2. Tit. 3. § 41; B. 4. Tit. 18. § 6; Ersk. B. 3. Tit. 8. § 39; Craick, No. 111. p. 12984.

The entail in the present case was fair and rational. There never were any children of the second marriage, and, if there had, they are called by the entail in the same order only as in the contract.

The provisions allowed to wives and children were suitable to the circumstances of the estate; it was most natural for the father to wish the lands previously conveyed to the pursuer to be reunited to those which remained with himself; and the only sanction in case of the pursuer's not doing so was, that he should not be allowed otherwise to provide his widow and children from the entailed lands, but, in that case, the lands previously conveyed to him were amply sufficient for that purpose.

No. 4.

In the cases founded on by the pursuer, the entails were unreasonable.

The Lord Ordinary reported the cause on Informations.

The Court were clear, that, in the circumstances of the case, the previous conveyance to the son did not weaken his *jus crediti* under the contract; and as to the father's power of entailing, the Lords, waving the decision of the general point, were of opinion, that the entails complained of were ineffectual against the heir of the marriage.

'In respect of the special circumstances of the case, the Lords sustained the 'reasons of reduction of the whole deeds libelled.'

Lord Ordinary, *Dunsinnan.* Act. *Cha. Hay.* Alt. *D. Cathcart.*
Clerk, *Menzies.*

D. D. *Fac. Coll. No.* 215. *p.* 487.

1806. *January* 21. CHRISTIE and Others, *against* DUNN and Others.

No. 5.
Whether provisions to heirs and children vest without service or confirmation, to the effect of transmission?

ARCHIBALD ROBERTON, in his contract of marriage with Isobel Harvie, became bound to provide the whole property which he then had, and all that he might afterward acquire during the subsistence of the marriage, to himself and his wife in liferent, and to the children of the marriage, in fee. There were two sons, who both survived their mother; and, in 1793, Roberton executed an assignation *mortis causâ*, distributing his effects between them. The younger died before his father, whose death happened in February 1800, and the elder died in Jamaica, in the month of November of that year; having, in August preceding, executed a settlement, bequeathing his whole property to his cousin John Harvie Christie, Esq. advocate, and certain other persons, whom he named his executors. In this will, no notice was taken of his father's death, or of any claim which he had upon his father's succession.

Mr. Harvie Christie took out a confirmation before the Commissaries of Edinburgh, under the son's testament, and afterward he executed another confirmation before the Commissary of Glasgow, with the view of taking up the son's right under the assignation by the father in 1793.

James Dunn, and the other nearest of kin to Archibald Roberton, applied for a confirmation of his effects in that character.

A process of multiplepoinding was brought by the person in whose hands the property of the deceased was lodged, in which compearance was made for the executors of the son and the nearest of kin of the father.

The Lord Ordinary pronounced the following interlocutor: 'Finds, That 'in virtue of the marriage-contract between the said Archibald Roberton *senior*, 'and Isobel Harvie, bearing date the 6th day of December 1763, the provisions 'therein contained in favour of the children of the marriage came to be vested