

4 PROVISION TO HEIRS AND CHILDREN. [APPENDIX, PART I.

No. 1. A petition reclaiming against this interlocutor was refused (30th July 1776,) without answers.

Lord Ordinary, *Hailes*.
D. Armstrong.

Act. *Buchan Hepburn.*

Alt. *Crosbie.*

D. C.

1776. December 20. RICHARD DICK *against* ROBERT LINDSAY and Others.

No. 2.
Particulars of
the case
No. 140.
p. 13025.

Robert Dick, dyer in Jedburgh, by contract of marriage, assigned and disposed to the children of the marriage, which failing, to his own heirs and assignees, the whole heritable and moveable subjects that should pertain to him at his death, under the burden of certain provisions to his wife. This settlement, being displeased with the conduct of his son Richard, he afterwards altered, leaving only some trifling annuities to Richard's wife and children; upon which an action was raised at their instance against the trustees under these latter deeds of the father, concluding that the same should be reduced as *ultra vires* of the granter, and contrary to the provisions and obligations contained in the contract of marriage.

This action came before Lord Gardenstone Ordinary, who ordered memorials to the whole Court.

For the pursuers of the reduction, pleaded, 1st, Although children by virtue of a marriage-contract take up the subjects provided to them by a right of succession as heirs of provision to their father, yet they are so far considered to be *creditors* under the marriage contract, that the father cannot by any voluntary or gratuitous deed, disappoint that right of succession. Even in onerous contractions, (although undoubtedly available to creditors in a competition with children,) the obligation in the marriage-contract remains full and unimpaired *quoad* the father, in so much that the children have a good claim of recourse against his cautioner or separate representatives to the amount of the encroachments made upon their provisions by his onerous debts or deeds. On this head our law is clear, Stair, B. 3. Tit. 5. § 13.

Supposing therefore the trustees had been successful in establishing every one point of which they had undertaken a proof, and had shown that Richard Dick, was foolish, idle, and extravagant,—still these circumstances could not have the effect to liberate the father from his obligations in the marriage-contract.—Because a person is foolish or extravagant, he does not therefore cease to be creditor in any obligation legal or conventional which is conceived in his favour; and were a father's powers over subjects provided by a marriage-contract to depend, not upon any general rules of law, but upon the particular character of the children and their being sensible prudent persons, or the reverse, it is easy to see, what uncertainty in this branch of the law must be the consequence.

2d, 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; 1st, The proof does completely establish the folly and extravagance of Richard Dick.

2d, 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 present 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.

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.

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 Fulertown; 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 failing, to the said Alexander Watson, his heirs and assignees whatsoever; the eldest heir-female succeeding always without division.

No. 2.

No. 8.

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,