On the 3d July 1778, " The Lords found that it was not incumbent on the defender to justify the grounds of his application for lawburrows;" altering Lord Covington's interlocutor.

Act. R. Cullen. *Alt.* W. Craig.

Diss. Covington, Ankerville.

1778. *July* 22. JUSTICE-CLERK. I was not present when the former judgment was pronounced. I think it agreeable to law. This writ of lawburrows is one of the oldest writs known among us. I am not for departing from what I always understood to be the rule of our law. It is true that, in different inferior jurisdictions, different regulations prevail; and we are told that the sheriff of Edinburgh does not grant warrant for lawburrows till after forty-eight hours. This may be right; but it is not the general practice. If you require a condescendence and a proof, the consequences would be fatal; for lawburrows is particularly aimed at private malice, which cannot be proved, and which is often exerted in conveying alarms when there is no serious intention of doing hurt.

GARDENSTON. When there are witnesses present there is no occasion for lawburrows, for then there is a manifest breach of the peace, which of itself is sufficient to warrant a prosecution.

COVINGTON. This applies not to the present case; for the party offered to prove by witnesses.

GARDENSTON. His offer was rash; his retracting prudent.

JUSTICE-CLERK. We will not cut a man out of his just right because he hastily offered to prove before an Ordinary what he was not obliged to prove.

On the 22d July 1778, " The Lords refused the petition, and adhered to their interlocutor of the 3d instant."

For the petitioner,—R. Cullen.

1778. *July* 28. ALEXANDER SPEIRS, &c. *against* THOMAS DUNLOP, &c.

PROVISION TO HEIRS AND CHILDREN.

Powers of the Father over a Subject provided to the Heirs of the Marriage.

[*Fac. Coll. VIII.* 62; *Dict.* 13,026.]

GARDENSTON. The question is on an important branch of our law, the effect of settlements on heirs of a marriage. I think that a father has power to make a settlement like the present one, when the son is bankrupt. The right of the son is a contingent right, and it may be disappointed by the father contracting debt or by the predecease of the son. The intent of the marriage-

contract is to make a settlement *familiæ*. I am confirmed in this opinion by the decisions in the cases of *Cummerhead* and *Dick*.

COVINGTON. I am not for extending the powers given by law or practice to fathers. The plain purpose of this settlement is to disappoint the creditors of James Dunlop. That a son's right under a marriage-contract may be disappointed in some cases is true. The father may burden; but still there is a personal action against him for disburdening the estate settled by marriage-contract.

HAILES. To this I have only to add, that the case of *Dick* was understood by the Court to respect a very general clause of conquest, and that, in its deliberations and judgment, it avoided the point now in controversy. As to the case of *Cummerhead*, as commonly related, I shall only say that I do not admire the judgment.

MONBODDO. Here, not only the *fides tabularum nuptialium*, but also the interest of creditors is concerned. The creditors trusted to the prospect of succession in the son: here the father has made a deed depriving the son of the succession, and disappointing his creditors. This is very like fraud. The father had no such powers. A son, by a settlement in a marriage-contract, has no more but a *spes successionis*: he cannot, however, be deprived of it by any gratuitous deed of the father. Even the provisions made by the father to younger children must be rational to be effectual. If we give any farther powers to the father, we cannot draw the line, and the powers of the father will become arbitrary.

JUSTICE-CLERK. The question here is as to a small estate; but the rule established here will take place in the settlements of the greatest families. Whenever there is a marriage-contract without an entail, such a provision, although it only gives a *spes successionis*, or an eventual right, cannot be disappointed by *gratuitous* deeds of the father. It is so much a *jus crediti*, that, if the father has any separate estate, he is obliged, out of it, to make good the subject in the marriage-contract. There may be a *jus quæsitum* in an eventual right: here the event has happened, for the father is dead, and the son, or his creditors, claim. How can a right become caduciary because the person having the right is bankrupt? I know of no such principle in any law. An honest man, become bankrupt, wishes to satisfy his creditors with the loss of his estate: how can the father exheredate this honest bankrupt? Suppose that James Dunlop should retrieve his circumstances, he will find himself disinherited. I should be sorry to see every settlement in marriage-contracts rendered arbitrary from considerations of the state of the heir of the marriage.

KENNET. The general argument comes before us, and I think that is in favour of the pursuers. There were specialties in the case of *Cummerhead*, particularly the son's acceptance: but, at any rate, a single decision is not sufficient to fix the law: the father cannot arbitrarily withdraw the subject from the creditors of the heir of the marriage.

On the 28th July 1778, "The Lords found that Garnkirk could not disappoint the heir of the marriage by the settlement under reduction."

Act. ——— *Alt.* ———.

Reporter, Kennet.