

the entire exclusion of the eldest son of a marriage, on account of his particular situation, has received the sanction of our Courts; and although, in a later instance, the creditors of the eldest son were successful in setting aside a settlement of the same kind, as made in defraud of their just claims, that decision cannot affect the present question; Erskine, B. 3. T. 8. § 39.

Answered; By the marriage-articles, the eldest son, unless in the particular events therein provided, was entitled to claim the lands then belonging to his father. It is true, that his claim so far partook of the nature of a right of succession, that his father's onerous creditors would have been preferred to him. But from thence it does not follow, that the father, by a voluntary deed, could entirely frustrate the purposes of those who were parties to the agreement, and who evidently meant to establish a representation of the family in one or other of the sons of the marriage; and although the father had a power of preferring one of his youngest sons to the eldest, *quod potuit non fecit*. As to the decisions referred to on the other side, they have been justly considered as extending, to an unreasonable length, a father's authority over his children, and therefore have never been followed as precedents; Erskine, B. 3. T. 8. § 38.; 28th July 1778, Spiers *contra* Dunlop and others, No 141. p. 13026.

THE LORDS sustained the reasons of reduction.

Reporter, *Lord Eskgrove.* Ac. *Rolland.* Alt. *Abercromby.* Clerk, *Mitchelson.*

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Fol. Dic. v. 4. p. 182. Fac. Col. No 157. p. 314.

1804. *January 17.* CUNYNGHAME *against* CUNYNGHAME.

By contract of marriage, entered into in the year 1768, between Sir William Augustus Cunynghame of Livingston, Baronet, and Frances, only child of Sir Robert Myrton of Gogar, Baronet, "in contemplation of the said marriage, the said Sir William Augustus Cunynghame binds and obliges himself, his heirs and successors, to make due and lawful resignation of the lands, baronies, teinds, rights of patronage, and others particularly above and after mentioned, in the hands of his immediate lawful superiors of the same, in favour and for new investment thereof, to be made and granted to the said Sir William Cunynghame himself, and the heirs-male of his present marriage; whom failing, to the other heirs of tailzie and provision after specified." The lands to be resigned, consisting of the barony of Livingston, are then particularly enumerated; and in case of the failure of the heirs of the marriage, a substitution is made in favour of a succession of heirs, heirs-male succeeding in preference to female, and the eldest daughter to the exclusion of heirs-portioners, through the whole course of the succession. The contract contained a variety of provisions, and, among

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An obligation of the proprietor of an estate in his marriage-contract, to resign it in favour of himself and the heirs-male of the marriage, does not create to the heir-male such a *jus crediti* during the life of his father, as to prevent the father from selling the estate.

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others, that the heir in possession should constantly bear the name and arms of the family of Livingston.

Sir William having sold some part of the estate settled in this marriage-contract, and having advertised the remainder, Colonel David Cunynghame, the eldest son and heir of the marriage, raised an action against him, alleging, that the sole object of this sale was to defeat the provisions of the contract in favour of the heirs of the marriage, and concluding, " that it should be found and declared, by decree of our Lords of Council and Session, that the pursuer is a just and lawful creditor to his father, in the terms of the aforesaid obligation, and as such is entitled to insist in legal measures for preventing any disappointment of his right of succession by virtue of the contract of marriage before recited : And the said Sir William Augustus Cunynghame, defender, ought and should be decerned and ordained, by decree foresaid, to invest such prices as may be obtained as aforesaid, in case of his actually selling the lands and estate before referred to, or any part thereof, or at least the free residue thereof remaining after applying so much thereof as may be necessary for payment of any debts he may be at present owing, either in a new purchase of lands in Scotland, under the destination before expressed, or under a destination to the said Sir William Augustus Cunynghame himself, and the heirs-male procreated betwixt him and the said Mrs Frances Myrton ; and in case of a change of such securities, or any of them, or the sale of such lands to be purchased, always to re-invest the money thence arising in the same manner, and under the same destination : And likewise, in case any part of the prices of the lands before mentioned, which are now intended to be sold, should be carried off by the defender's creditors, or applied for payment of his debts, the said defender ought and should be decerned and ordained to employ a sum equivalent to such part of the said prices as may be so carried off, or applied in payment of his debts, upon a purchase of lands in Scotland, or heritable securities over such lands, under the destination aforesaid, in terms of the said contract of marriage in favour of the said Sir William Augustus Cunynghame himself, and the heirs-male of the said marriage, either upon such sale being made, or at any time thereafter, when he shall be possessed of free funds capable of being so employed ; and in case of a change in such securities, or any of them, or of a sale of such lands so to be purchased, always to re-invest the monies thence arising in the same manner, and under the same destination : And further, it ought and should be found and declared, by decree foresaid, that the pursuer is a just and lawful creditor of his said father for the whole value of such of the said lands settled by the said contract of marriage as have been already sold ; and the said defender ought and should be decerned and ordained to employ the prices thereof upon new purchases of land in Scotland, or heritable securities taken under the destination aforesaid ; and that either now, if he is possessed of free funds capable of being employed for that purpose, or at any time hereafter when he may acquire such funds ; and in case of a change of such secu-

rities, or any of them, or a sale of such lands so to be purchased, always to re-invest the moneys thence arising in the same manner, and under the same destination."

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At the first appearance before the Lord Ordinary, the pursuer was allowed to introduce an additional conclusion into his summons, to prohibit the defender from alienating such parts of the estate as still remained unsold, except in so far as might be necessary for payment of the debts already due; and to prevent the estates from being sold during the dependence of the action, the pursuer presented a bill of suspension and interdict.

THE LORD ORDINARY passed the bill, to the effect of trying the question, and afterwards conjoined the process of suspension with the other process, and reported the cause. The pursuer

Pleaded; By the marriage-contract, a *jus crediti* is conceived in favour of the heirs of the marriage. It is admitted that the defender cannot disappoint this right gratuitously. Neither can he disappoint it for onerous causes, without becoming liable in *id quod interest*. This obligation is not implemented by merely making up titles in terms of the marriage-contract, if the defender be allowed afterwards to cancel these titles, by selling the estate, and defeating the obligation. If he sell the estate of Livingston, he must reiterate his obligation, by securing to the heirs of provision another tangible subject of equal value, otherwise the stipulation in favour of the heirs of the marriage is quite nugatory.

Heirs of a marriage must therefore be considered in some respect as creditors of the father, to the extent of the provisions contained in the marriage-contract, since he has come under an obligation to denude in their favour; Stair, B. 3. T. 5. § 19.; Erskine, B. 3. T. 8. § 38.; Bankton, B. 1. T. 5. § 15.; Young against Bothwells, July 6. 1705, *voce* TAILZIE; Macintosh against Macintosh, January 23. 1717, No 36. p. 12881.; Fotheringham against Fotheringham, December 5. 1734, No 76. p. 12941.; Cuming against Gordon, July 29. 1761, *voce* TAILZIE. It has accordingly been found, that the heir of a marriage is entitled, after his father's death, to sue his representatives for implement, without the necessity of a service, Wallace against Wallace, January 13. 1665, No 20. p. 12857.

If, therefore, from the date of the contract, the defender lay under an obligation in favour of the heirs of the marriage *nascituri*, they are entitled, during his life, to prevent him from defeating it. This right is recognised by the usual style of marriage-contracts, in which persons are appointed, at whose instance execution may pass, for implement of the provisions of the wife and children; which nomination must proceed on the supposition that the heirs of the marriage are creditors during their father's life, for after his death no interposition of this kind is necessary. Accordingly, the obligation contained in a marriage-contract, in favour of the heirs of the marriage, may be discharged by them

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during their father's life ; Threipland against Sinclair, 13th February 1770*.

The evident object of the defender in selling this estate, is to defeat the obligation he came under in favour of the heirs of the marriage, who are not obliged patiently to submit to the sale, and allow him to dispose of the price, by sinking it in an annuity, or otherwise, reserving to themselves to sue his representatives after his death. If they have a right to be restored against such an injury, they are entitled to prevent it, and to insist in an action for this purpose against their father ; Stair, B. 3. T. 5. § 4.; Fraser against Fraser, February 13. 1677, No 23. p. 12859.; Panton against Irvine, March 1684, No 24. p. 12860.; Granton against Collington, December 16. 1628, No 102. p. 12974. ; Cairns against Cairns, January 31. 1705, No 27. p. 12862. ; Home against Home, July 17. 1708, No 55. p. 12900.

Answered; If the pursuer were to prevail in this action, the defender would be reduced to the situation of a possessor of an estate fettered by a strict entail, although his estate is settled on the heirs-male of the marriage merely in the form of a simple destination. The marriage-contract conferred upon the heir a *spes successionis*, which his father could not disappoint by gratuitous deeds, but laid him under no restriction as to the right of administration during his life. The defender remains fiar of his estate, and at perfect liberty to dispose of it at pleasure ; for the contract contains none of those provisions or restrictions which are introduced into marriage-contracts, when it is intended to limit the power of the father. Nor are there any prohibitory, irritant, or resolute clauses, against selling or contracting debt ; consequently the heir has nothing more than a *spes successionis* ; Erskine, B. 3. T. 8. §. 40.; Stair, B. 3. T. 5. § 19. ; Bankton, B. 1. T. 5. §. 5.

The cases quoted by the pursuer, relate either to those contracts where the heirs of the marriage are made creditors of the father during his life, or where the action was not raised until after his death. This is the first instance of an heir by simple destination endeavouring, during his father's life, to deprive him of the management of his estate ; and it is not easy to see what advantage the pursuer can derive from being successful in such an action. For it is admitted the defender may contract debt to the full extent of his estate ; and supposing his intentions to be those imputed to him by the pursuer, which is by no means the case, there would be nothing to hinder him from borrowing money upon the estate of Livingston to the amount of its value, and purchasing an annuity upon his own life.

As for the interdict craved by the pursuer, it is repugnant both to our law and practice ; and if it were to be allowed, it is evident it would be attended with consequences highly destructive to the peace of families, by allowing

* Not reported. See APPENDIX.

every heir, who was impatient of his father's management, to present bills of suspension and interdict against any reasonable act of administration by which he might pretend to be eventually injured. But it is not the duty of a court of law to deprive the owner of an estate of his powers over it, merely because his heir supposes they may be exercised to his prejudice.

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THE LORDS (November 25. 1802) "having advised the mutual informations for the parties, sustain the defences, assoilzie and decern."

And, upon advising a reclaiming petition for the pursuer, with answers, they adhered.

There was, however, some difference of opinion on the Bench. It was conceived by several of the Judges, that the contract of marriage must be understood as conveying something more than a mere *spes successionis*; because every son has a *spes successionis* to his father's estate, whether there is any contract or not; and, therefore, though the son had no power to control his father in the management of the estate, if the father chose to sell it, the father must become bound to reiterate the obligation, by securing the price in the same way in which the estate itself was secured, to the heirs-male of the marriage, otherwise such provisions in marriage-contracts are of no avail. But the majority of the Court held, that the father remained fiar of the estate, with no other burden than a provision in favour of the heir-male of the marriage, which, by the law this country, does not prevent him from executing onerous deeds, and therefore from selling the estate; that there was little danger of a father selling a family estate, without sufficient reason, for the mere purpose of disappointing his heirs; and that it would be attended with bad consequences to recognise the right of an eldest son to control his father in the management of his property.

Lord Ordinary, *Glanlec.* Act. Lord Advocate Hope, Monypenny. Agent, Colin Mackenzie, W. S.

Alt. Hay, Clerk. Agent, Jo. Macfarquhar, W. S.

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Fac. Col. No 135. p. 298.

SECT. XVII.

What Deeds are held onerous.

1739. July 12. & 1740. July.

M'DOUGAL against BARBARA M'DOUGAL and her Husband.

THE estate of Mackerston was in the year 1669 settled by Henry M'Dougal then of Mackerston, upon Thomas M'Dougal his son, and the heirs-male of his

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Provision to heirs of a marriage, onerous in competi-