1777.

CUNYNGHAM, &c. *v.* CUNYNGHAM.

[M. App. "Clause," P. 1. No. 1.]

ROBERT MYRTON CUNYNGHAM and FRANCIS CUNYNGHAM, second and third Sons of Sir WM. AUGUSTUS CUNYNGHAM, Bart. and their Guardians, - - } *Appellants;*

DAVID CUNYNGHAM, Esq. Eldest Son of the said SIR WILLIAM, - - } *Respondent.*

House of Lords, *May* 1777.

POSTNUPTIAL CONTRACT—RESERVED FACULTY.—Shortly after his marriage, a party executed a postnuptial contract, settling his estate on the heirs male of the marriage, whom failing, on the heirs female of that marriage, reserving power, in case of there being no heirs male, "and two, three, or more daughters," to settle the estate on *either* of the daughters. He had no sons, but there were three daughters of the marriage, the two eldest of whom predeceased their father. He afterwards executed a new deed, settling the estate on the *second and third sons* of the *youngest daughter*. Held, in the Court of Session, that this deed did not fall within the special powers reserved, and was reducible, as the father's faculty and powers were at an end.*

This judgment was affirmed by Lord Mansfield in the House of Lords.

For full report of case, *vide* Morison, App. "Clause," P. 1. No. 1.

For Appellants, *E. Thurlow, Dav. Rae, Gilb. Elliot.*

For Respondent, *Al. Wedderburn, Alex. Murray, Ar. Macdonald.*

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* NOTE.—*Opinions of Judges as noted on Lord President Campbell's Session Papers, vol. xxx.*

PRESIDENT.—GENERAL POINT. "Father was in former times considered as unlimited fiar—Dirleton—Afterwards considered to have *jus crediti*, but of the gentlest kind. Remains fiar entitled to do rational deeds for consideration not fradulent. Onerous deeds good, not merely on faith of records but father's powers. Inhibition would be good for nothing, it could not extend to it, because fee in father. Here consider what is in view. If daughter, do not choose to give up powers. If a son, he is to take absolutely, but not if daughters. If he can give it to the children of any daughter, why not to a younger child of that daughter? She may be married to a peer or family that he does not like. This construction necessary to carry intent out into execution. All the concern of the friends is, that it shall go to *familiæ* not to the heir-at-law. Otherwise eldest daughter succeeds. Must not give it to a stranger.—Samething to us which of them. Admit that he could not exclude the daughters. Must come

through her. In case of Phisgil disinherits heir of marriage. Question of tailzie is of a different nature as put by Lord Covington. Both pursuer and defender are heirs-portioners, *i. e.* claim under an heir-portioner. Contract 1764, no implement—sustains reasons of reduction."

GARDENSTON.—" Not important in point of precedent. Depends on clauses, so turns entirely upon construction of reserved powers,—if in the usual manner, no doubt the father bound,—question is, whether to interpret the clause literally and judicially, or liberally according to sense of parties. Clear that the clause is entitled to a large construction—entitled to choose his heir among his family. Would not do justice if he did not go further than mere words. This both the rational and legal construction. Impossible to presume that he meant to reserve less power as to daughter than as to their children. Inconceivable that he meant to give an indefeasible right to children and not to daughters; besides, legal construction against this, for in law it is implied that the child coming in place of daughters, can have no better right than the daughter herself. Right defeasible in daughter, and must be the same in child. Suppose he had burdened his daughter with a reserved faculty of providing £10,000 to younger children, and that she had predeceased, leaving a son, could he not have burdened the child?"

COVINGTON.—" Impossible for the art of man to devise an entail which may not be found fault with or cavilled at. Case of Leslie presented same difficulties as to conception of deed,—impossible events. It is very problematical whether father's powers should be limited or enlarged. In England, father generally has no power at all. Father continues proprietor, has a power to carry on the line of succession; but still so as not to prejudice the children of the marriage. Must transmit to heir of marriage; and heir must have power of settling the estate as he pleases. My opinion upon the question of entailing is, that father has no such power. Cannot defeat the heir's right in whole or in part. This perhaps the most moderate entail, yet it contains one condition, viz. to carry name and arms, &c., under irritancy; in certain cases may forfeit. This of itself sufficient to cut it down. *First Point*—Not for a judaical construction of the clause, but just ground of distinction between heirs-male and heirs-female; but this is not an absurd or irrational clause. Reasonable to single out any of the daughters he thought proper. I am inclined to think that he had same power over issue of the daughters, if two of them had issue, because they came to be in the same case as their parents. But it is question if he could prefer any of descendants, for in that view he might have preferred a grandchild to the daughters themselves. Cannot carry it so far.—Titles of honour in England. Case of ———. Crown could not have given it to the child of heir-portioner. The same way here, he cannot take the younger child of a daughter. Suppose sons had daughters, and he had pre-

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ferred daughter of a daughter. He cannot take the succession out of the line of descent. No reason for giving him a power to disinherit the right heirs of all his daughters. When whole *jus crediti* came to vest in the youngest daughter by the death of the elder, father's powers were at an end."

Second Point. "Contract 1764, not with Jean Myrton herself, but with her husband (Mr. Fletcher). The object of it was to prefer her and her issue; but unalterable settlement. Sir Robert agreed to discharge his powers of preferring younger daughters. Renounces the powers in the contract of marriage altogether—therefore contract must operate. Sir Robert not the arbiter to settle at his own pleasure—strict construction must be laid down if he means to carry the succession from heirs of the marriage altogether. I think the second contract should not operate beyond the interest of the parties contracting."

JUSTICE CLERK.—"For adhering—Faculty at an end. *Est divinit in eum casuam.*"

GARDENSTON.—"I am for altering powers of father,—ought to have most liberal interpretation."

KAMES.—"Postnuptial contract this, which is different from antenuptial. Do not go together upon that faith. Husband has every thing already. Word contract has no charm. Suppose a son of another marriage. (Covington previous commencing—makes over whole estate), Meaning was not to pick out of any of his descendants. As to sons, clear that no such power; if meant as to daughters and their issue, it was easy to have said so. By giving it to his eldest daughter, he exhausted his power, and not *termini habiles* for doing it again. Suppose Lady Cunningham had daughters, could he have given estate to her daughters in preference to her son?"

BRAXFIELD.—"Postnuptial contract makes no difference in the question. It would be dangerous to find that postnuptial contract not onerous."

"Child a creditor for provisions in contract.

"Father cannot lawfully hurt child, either onerously or gratuitously; would annul warrandice of contract by so doing. Sum of money may, but case of land estate settled upon heirs of the marriage,—therefore only question here is, what is effect of reserved faculty? Where a man is giving his estate for nothing, the reserved faculty is entitled to an extensive construction, but in case of onerous contracts the contrary takes place. Suppose no other daughter than Lady Cunningham had existed, no *termini habiles* for faculty. Case same here, where she became the only one. If a daughter dies leaving a son, would consider him in the place of his mother, an heir-portioner, and in his daughter's power to give it him by very construction of contract. But where there is only one heir-portioner, faculty is at an end, though it was cut off by transaction with Mr. Fletcher before; how then can it revive? Suppose it had been

faculty of burdening, with £5000, could he take it up again even if it came to a remote substitute? Besides, this discharge shews Sir Robert's own sense of the matter. Sees that there is no room for exercising it afterwards."

PRESIDENT.—"Late practice has made marriage contracts so binding—Dirleton—This contract not in the common style—meaning of reservation—father was to give him ample powers, bound only *familæ* tied down to heirs-male for preservation of family; but if it comes to heirs-portioners, power is reserved to give it to any. Admitted that would give it to descendants. This only another exclusion. Suppose two daughters of Lady C. and no sons *Second Point*, discharge. Lady C. no creditor in it, only substitute."

MONBODDO.—"Powers not discharged. Only done so as to Mrs. Fletcher and heirs of her body—Case of Baillie, &c. *Second Point*, Two or more—how can I add another clause? Words clear—No evidence what his intention was. Defender not the heir, either by the law or by contract. If it was his intention, he has not executed it."—"Adhere."

[M. App. P. 1. No. 2. "Society.]

ALEXANDER SPEIRS, ANDREW BLACKBURN, and ANDREW SYME, JAMES DUNLOP's Trustees, } *Appellants;*

THOMAS and WM. DUNLOP and Co., Trustees for the Creditors of JOHN CARLYLE and Co. } *Respondents*

House of Lords, *9th May* 1777.

RANKING—SOCIETY—COMPANY AND INDIVIDUAL ESTATE—PRINCIPLES OF RANKING.—(1) Held that a company are entitled to rank on an individual partner's separate estate, *pari passu* with the creditors of that separate estate, for the whole amount of debts owing by the company after deducting any dividends that may have been paid to the company creditors. But, (2) Held in the House of Lords, that where, after a dividend on an estate was declared, and most of the creditors paid, a new claim was lodged for the first time on the estate, that such claim will not be allowed to disturb or affect the dividend paid before any notice was received of such claim.

James Dunlop, merchant in Glasgow, carried on an extensive Virginia trade on his own separate account. He was also partner of another concern, carried on under the firm of John Carlyle and Co., merchants in Glasgow. A misfortune in the Virginia trade obliged Dunlop to stop payment; and sometime after the company of Carlyle and Co., in which he was a partner, also failed.

At the time Dunlop failed, the only claim which Carlyle and Co. appeared to have against Dunlop as an individual, was a sum of £4500, for goods furnished him in his separate