DECISIONS

OF THE

LORDS OF COUNCIL AND SESSION,

COLLECTED BY

JAMES BURNETT, LORD MONBODDO.

1738. *November* 25. M'DOWALL *against* CREDITORS of CRICHAN.

[Elch. No. 2, *Heir cum beneficio;* Kilk. No. 2, ibid.; C. Home, No. 104; Kaimes, *Rem. Dec.* No. 27.]

The Lords found that the citation and decreet thereupon gave no preference in this case, the subject being *in medio*. But they seemed to be of opinion, if actual payment had been made, that not only the heir would have been liberate in so far, but that the creditor, paid in that manner, would not have been obliged to repeat to the other creditors; in respect that the entering *cum beneficio* only restricts the claims of the creditors, but does not alter the nature of them; so that the creditors in every other respect *eodem jure utuntur*, as in any other case.

1738. *December* 1. CHILDREN of COLONEL JAMES CAMPBELL *against* CHILDREN of the Eldest Son of the said COLONEL.

[Elch. No. 2, *Arb. Boni Viri;* No. 14, *Mut. Cont.;* No. 20, *Jurisdiction;* Kilk, No. 4, *Provisions to Heirs, &c.*]

COLONEL James Campbell, in his contract of marriage, obliges himself to provide 40,000 merks, his present stock, to himself and wife in conjunct fee

and liferent, and to the bairns of the marriage in fee. The conquest to be made during the marriage is provided in the same manner; with respect to which the Colonel obliges himself to do no deed, directly or indirectly, by which the bairns of the marriage may be frustrate of it; and further adds, that the foresaid clause of conquest is not only a destination of succession, but an actual and real disposition and conveyance of the lands and others, to be conquest during the marriage. The Colonel, while the marriage was standing, purchased the estate of Burnbank, and took the rights to himself and heirs whatsomever, and he took the debts due to him secured in the same manner.

Upon the 16th of January 1713, the Colonel, being upon deathbed, executed an entail of his whole estates in land, in favour of his eldest son, Archibald Campbell, and the heirs of his body, without any mention of his spouse; and, by a testament of the same date, he names the said Archibald his universal legatar and executor. To his younger children, Charles and Mary, he left certain provisions, but with this irritancy, that, if his lady did not accept of some settlements he at that time had made upon her, in lieu of all former provisions, then and in that case they should be void and null. At the same time he made another settlement upon them, by which, if the foresaid irritancy was incurred, then they were to have what the Duke of Argyle and the Earl of Ilay, or the survivor of them, should appoint. After the Colonel's death, the lady refuses the provision made for her on deathbed, and, by virtue of her contract of marriage, claims the liferent of the whole estate. The two noble persons above mentioned decline to give any determination; and, in the meantime, the younger children, Charles and Mary, bring an action against Elizabeth and Jean Campbells, who had succeeded to their father Archibald, deceased, for the reduction of Colonel James Campbell's settlement, as being done upon deathbed, and in prejudice of their right by their father and mother's contract of marriage.

As to the first head of reduction, *viz.* the law of deathbed, it was not much insisted on; 1*mo*, Because the greatest part of the Colonel's estate was settled *in liege poustie* upon his heirs whatsomever, of which the settlement upon deathbed was no more than a confirmation; 2*do*, Because, by the strain of late decisions, bairns provided in contract of marriage are rather considered as creditors than heirs; and that such provisions (especially where the subject is uncertain, such as conquest,) do not actually make them heirs, but only import an obligation to make them so. Besides, supposing they were heirs, there is no reason for extending the law of deathbed to them, because that law was intended to prevent irrational settlements to the heir's prejudice, which might be elicited from a dying man; whereas they are secure from such settlements at all times either *in liege poustie* or on deathbed.

As to the second head of reduction, *viz.* the right acquired to the pursuers by the contract of marriage, there was more dubiety; and, 1*st*, it was sustained for the defenders, that though the words in the provision of conquest seemed to imply a disposition *de presenti*, yet that there could be no such thing as a disposition, of a subject not existing, to persons not existing; and that these words could be no otherways understood than as an anxious security against the father's doing any thing in contravention of the provisions in the contract;

so that the question came solely to this, How far the father, by what he had done, had implemented his obligations in the contract of marriage?

As the chief subject of debate, the estate of Burnbank, was conquest, so the most of the arguments on both sides related chiefly to the explication of clauses of conquest in contracts of marriage. It was argued for the pursuers, that a provision in a contract of marriage to bairns could never be fulfilled by providing only one bairn: that, by such a provision, children were made creditors; and though creditors for onerous causes might be preferred to them, yet the father could not wantonly, by any gratuitous deed, defraud them of their right; that every one of the bairns had a positive right in his person for his share, which the father could not take from him no more than he could take an estate provided to the heir-male of a marriage from the eldest son and give it to any of the younger children: that even the power of division ascribed to the father could have no place by the Scotch law; according to which no father has power to take one son's right from him and give it to another; and, lastly, That this doctrine is established by a continued tract of decisions. See *January 29th* 1678, *Stuarts* contra *Stuart;* and *February 13th* 1677, *Carnegie* contra *Clark.*

For the defenders it was pled, That a provision to bairns in a contract of marriage gave no particular positive right to any one child, but a general right to the whole; that it only restrained the father from giving his effects *extra familiam,* or to the bairns of any other marriage; but that it did not hinder him to give all his estate to any one child of that marriage,—as a *fideicommissum familiæ* among the Romans was implemented by giving the thing so left to any one of the family: that there is a great difference betwixt the provision of a certain subject to the bairns of a marriage and a provision of conquest: that, by the former, the children acquired each a right, and could have an action against the father to fulfil the contract,—*February 13th,* 1677, *Fraser* contra *Fraser;* but by the latter, the father remains absolute fiar, and free disposer of what he acquires by his industry, and the children have only a negative right by which they can hinder the father from giving his estate out of the family: that, if the contrary doctrine prevailed, it would be the greatest discouragement to industry, the greatest encouragement to children to be undutiful, and it would effectually prevent the establishing a family, because whatever estate was acquired behoved to be divided equally amongst the children: and lastly, that the doctrine of the defenders was established by decisions, particularly by one observed by Lord Fountainhall, *July 7th* 1698, *Cuming* against *Kennedy.*

The Lords found, That, by such a provision, the children were creditors *per capita,* each for his respective share; that the father could not exclude any one altogether; but that he had a power of rational division, even so far as to give all his land to his eldest son, and burthen it with provisions for his younger children; but that if the father did not exerce this power, then the subject behoved to be equally divided among his children. Found, That the father may delegate this power, as is done in this case, and that the reduction intended must depend until it appear whether the noble persons thus intrusted will give any determination, for which a competent time behoved to be allowed them.

January 2, 1739. The Lords refused a reclaiming petition against this interlocutor, without answers. See *infra,* December 23, 1739.