1762. *June* 16. JOHN ALLAN *against* MARGARET CALLENDER.

No 35.
A person's insolvency is not a sufficient reason for his father to dispose of his whole effects, and thereby exclude him from his legitim.

JAMES ALLEN, merchant in Edinburgh, having two children, Euphan who was married and forisfamiliated, and John who was married but not forisfamiliated, made his ultimate settlement, disponing to his wife Margaret Callender his house and shop, to be sold, and the price to be settled upon his son John in liferent, and John's children in fee; and settling also his moveables upon John and his children, to be distributed among them as the said Margaret Callendar should think proper, according to the circumstances of him and his family.

The son John challenged this deed as *ultra vires*, by depriving him of his legitim, over which the father has no power. *Answered*, That John at the time of the settlement and at his father's death being bankrupt, the settlement was the most rational that could be contrived even for his own interest, because it secured a fund for his family which otherwise must have been swallowed up by his creditors; and at the same time John himself was not overlooked, for his mother was empowered, if she saw cause, to settle all upon him; and which she certainly would do were a free man to take the benefit of it.

In support of this answer it was *urged* for the defender, That the legitim being established by law as a provision to children, it cannot in the nature of things be due in any case where a child cannot hold or take benefit by it. For this reason a father can never be blameable for disappointing a son attainted of high treason of his legitim. What if a child be cognosced an idiot? What if a young man has attempted to murder his father? These particulars prove that there are many reasons to justify a man for with-holding the legitim from his son; and bankruptcy is as strong a justification as any of them.

Replied for the pursuer; That the inference from the cases mentioned to bankruptcy is not fair. A bankrupt has always hopes of emerging out of his difficulties, to which his legitim may greatly contribute; and therefore to deprive a bankrupt of his legitim is not less hard than to deprive one who is not a bankrupt. Put the case, which holds true as to John Allan, that the legitim will pay all the bankrupt's debts, and set him down a free man. This, instead of being a reason for depriving him of his birth-right, is one reason more for securing him in it. And if bankruptcy afford not, in this case, a reason for with-holding the legitim, it cannot in any other case of bankruptcy; for judges must act by general rules.

The Judges accordingly reduced the deed, as far as it deprived the pursuer of his legitim.

Fol. Dic. v. 3. *p.* 382. *Sel. Dec. No* 197. *p.* 262.

*** This case is reported in the Faculty Collection.

No 35.

1762. *June* 17.—JAMES ALLAN, some time before his death, granted a disposition of his whole effects to Margaret Callender, his wife.

James Allan having died, John Allan, his son, brought an action to set aside this settlement, upon the right of legitim, which solely belonged to him, his only sister being excluded by her contract of marriage, in which she had got a large provision.

John had been bred a merchant, but had not succeeded in his business, insomuch, that his creditors had come to a composition with him, and agreed to accept of 10s. in the pound; and his insolvency, at the time of his father's death, was pleaded as a sufficient reason for the father to dispose of his whole effects, and thereby exclude the pursuer from his legitim.

Lord Kames, Ordinary, took the cause to report, and ordered memorials.

Pleaded for the defenders, That a man is at liberty, by any deed of settlement made in *liege poustie*, freely to dispose of his moveables to whomsoever he pleases, without regard to any claim that his children may have for their legitim, provided only it be not done by a testament, or by any deed upon death-bed: But the deed in question was not executed on death-bed; and, certainly, is not a testament; for, it is not only in the form of a deed *inter vivos*, but it dispones heritages as well as moveables, and has a procuratory of resignation, and a clause of registration; it dispones both *de præsenti*, without suspending the right of the disponee, and contains only a power in the disponer to alter; and, therefore, this settlement cannot be set aside upon any claim that his son may have for his legitim.

2*do*, *Et separatim*, As the pursuer is confessedly bankrupt, he has no title to demand this legitim. It has been an established law in most countries, that children are supposed to have a right to a certain share of their father's moveables, for their provision and support, and of which right it is not in the father's power to deprive them. This, however, takes place solely on account of the children themselves, that they may be secured of a provision, which some fathers might be unnatural enough to deprive them of: But this cannot take place in behalf of creditors; and, therefore, cannot be demanded in the present case, where the infallible consequence of any money being put into the pursuer's hands is, that it will immediately be swallowed up by his creditors; he is not, therefore, entitled to claim his legitim, when it can be of no service to him.

Pleaded for the pursuer, The legitim here is claimed for his own behoof, in order to enable him, after paying his composition to his creditors, to carry on his trade in a comfortable manner, for the subsistence of his family; and, therefore, the defender has no reason to say that this legitim can be of no service to him, as it will go to his benefit in the most substantial manner. Be-

No 35.

sides, supposing that the legitim behoved chiefly to be applied for payment of creditors, even, in that case, it would not be in the father's power to disinherit his child. An innocent misfortune is no sufficient cause of exheredation; nor can it be thought a matter of indifference to the son, that he is, by receiving the share of his father's succession, enabled to discharge his just debts, and set up on a new footing in the world, to gain his livelihood by an honest industry, without any impediment or distress: And it is established in our practice, that the legitim cannot be excluded by any settlement made by the father, to take place at his death. So it is laid down by Lord Stair, lib. 3. tit. 4. § 24.; and so the Court decided, February 28th, 1728, Henderson and Husband against Henderson, No. 33. p. 8199.; and, therefore, as the father has no power to prejudice the legitim by any settlement of succession, there is no room to enquire, in such cases, whether insolvency may be a rational cause of exheredation or not. The law has excluded every cause, in order to prevent arbitrary questions, which would render the properties of the lieges precarious and uncertain.

"THE LORDS repelled the defence; and found that the pursuer was entitled to his legitim."

Reporter, *Lord Kames.* Act. *Ferguson.* Alt. *Burnet.*

J. M. *Fac. Col. No* 91. *p.* 202.

1775. *February* 28.

Captain MONTGOMERY-AGNEW *against* Lieutenant-Colonel JAMES AGNEW.

No 36.

A deed of assignment *inter vivos* by a father in favour of his eldest son, of particular *nomina debitorum*, (the bulk of his fortune) burdened with the payment of the granter's debts, and some legacies, and reserving his liferent, but containing no power of revocation, found to exclude the claim of legitim, at least as to the principal sums.

CAPTAIN Montgomery-Agnew, third son of the deceased Major James Agnew, brought an action into this Court against Colonel James Agnew, the eldest, as universal intromitter with the effects of their common father, for payment to him of the sum of L. 2000 Sterling, as his supposed rateable share of the moveable effects, falling to him as one of the younger children of their deceased father, unforisfamiliate, as the legitim to which, by law, he was entitled.

The defence was founded upon a deed executed by Major Agnew, in favour of the defender, dated August 1st, 1770, whereby, upon the narrative of love and favour to the Colonel, his eldest son, the Major gave, granted, and disponed to the said 'Colonel, his heirs, or assignees, the several debts and sums of 'money therein after specified, being those which had been lent out upon 'securities in Scotland, to the amount of L. 6833 Sterling, *viz.*' (here the sums due by each debtor, and the nature of the security are narrated, being all personal bonds, one excepted, which was heritable,) 'as also, the sum of 'L. 600 Sterling, of the consolidate three *per cent.* Bank stock, in England, 'with such annualrents as shall be due on the foresaid bonds at the time of