*Act.* R. M'Queen. *Alt.* J. M'Laurin.
*Reporter,* Hailes.
*Diss.* Coalston, Auchinleck, Elliock, Hailes, President. Justice-Clerk did not vote.—*Absent,* Kaimes, Alemore, Stonefield.

This question interested the merchants very much; and they are said to have been clamorous without doors against the first interlocutor. The President observed that there were no *termini habiles* for putting any oath to Mansfield and Company; for that the debtor in the bill had not the same interest in requiring that oath which the arresters might have had, upon being admitted into the field: and thus, the holder of a bill may exact payment, although he should in reality be no more than a trustee. The President also said that this single decision should never be considered by him as establishing the law. There was rather more warmth in agitating this question than might have been wished.

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1770. *June* 13. GEORGE CAMPBELL *against* JOHN CAMPBELL of Ottar.

## CLAUSE—PROVISION TO HEIRS AND CHILDREN.

**Interpretation of Clauses in a Contract of Marriage, containing a special provision, and providing the conquest to the Heirs of the Marriage.**

[*Faculty Collection, V.* 87; *Dict.* 13,020.]

PITFOUR. The writings for proving the causes of complaint against George Campbell are incompetent, because not produced before the Ordinary; and irrelevant, because such causes of complaint will not authorise exheredation. As to the 8300 merks, 5000 merks were paid to the daughter as tocher. Here there was not a provision to the heirs-male of the marriage; but a provision to the heirs of the marriage, of a sum of money, by one who had no estate: I would therefore deduce the 5000 merks, but not the sums allowed to the son. Even in the case of collation, nothing comes in that was considered as sustenance: and here there was very scrimp sustenance. [Afterwards, moved by the arguments on the bench, he thought that the 5000 merks did not impute.] Lands purchased by money, to which one has succeeded, is conquest; as much as if the lands had been purchased by borrowed money. The succeeding to an adjudication is just the same as succeeding to an heritable bond. The adjudication could not be the capital title; for it extended over the whole estate of Tarbet. It is impossible to say that the legal, while not expired as to the whole, was expired as to a part.

MONBODDO. I do not think that the father had a power of punishing the son, however profligate, by taking his property from him. I doubt as to any

defalcation of the 8300 merks provided to heirs of the marriage. This expression must mean the son to the exclusion of the daughter; and, therefore, the provision of 5000 merks was no exercise of a power of division. The lands were bought from Tarbet; the adjudication was not the capital title, nor the purchase an additional acquisition to the adjudication. I am of the same opinion as to the lands acquired in 1708: it matters not by what money they were purchased.

KENNET. The special provision of 5000 merks is not good against the heir. It was provided to be secured heritably: small payments to the son are not to be considered as implement. But, if the father purchased lands to a greater extent than 8300 merks during the subsistence of the marriage, this should impute as implement of the clause providing 8300 merks to the heirs of the marriage, to be laid out on land, &c.

HAILES. This proposition seems most equitable. In 1700, Mr John Campbell provides 8300 merks to the heirs of the marriage. In 1704, he succeeds to a considerable estate. In 1705, he purchases land to the value of 10,000 merks. I hold that here 8300 merks bestowed in consequence of his obligation, and only 1700 merks conquest. According to the opposite hypothesis, Mr John Campbell could not fulfil the first obligation in his marriage-contract, by vesting the 8300 merks in land; for, as soon as he vested it, it became conquest, and fell under the second clause of his marriage-contract, providing the conquest to the heirs of the marriage. The consequence of this, after he succeeded to the estate of Ottar, was to oblige him to lay the burden of 8300 merks upon the estate of Ottar, contrary to the idea which he must have formed, when contracting, before his succession to that estate.

KAIMES. The conquest is provided in the same way as the 8300 merks to the heirs of the marriage; and yet no one will say that the heritable conquest goes to all the children of the marriage. In do not know any case where, in the same deed, the same words, without any interpretation by the granter, have been found to imply different series of heirs. If the adjudication of Tarbet's lands still subsists, it will be a debt against the eldest son; but the lands purchased will be his, the previous adjudication notwithstanding. Lands acquired by purchase must be considered as conquest: without this, the inquiry as to the extent of conquest would be inextricable. Still deduction must be made of debts left unpaid. Perhaps a man might exempt a purchased estate from under conquest, by declaring that it was purchased with a certain sum got by succession; but nothing of that kind occurs here, so that the ordinary rules of law must be followed.

JUSTICE-CLERK. The provision to heirs of the marriage will go to the eldest son; and yet the father, in such circumstances, might appropriate a part of it to his daughter, and declare that to be in implement *pro tanto*. But this is not the case here; for the daughter was not married till after the succession of Ottar opened to him; and there is no reference to the marriage-contract in the provision of tocher to the daughter. She was portioned as the daughter of the Laird of Ottar, not of Mr John Campbell the minister.

On the 13th June, the Lords "found that the pursuer, in virtue of his mother's contract of marriage, is entitled to the provision of 8300 merks, with interest from his father's death, to be paid out of the conquest of the marriage

in the first place; or, if there is no conquest, out of the father's separate estate; and that neither the 5000 merks of tocher paid to the pursuer's sister, nor the sums given to himself by his father, during his life, are to be computed in extinction thereof. Found that the pursuer is entitled to the lands of Barnentaig, &c., which were acquired by his father, during his first marriage, from M'Alister of Tarbet, and also to the lands of Daricnakeirichmore, acquired by him from Campbell of Kildalvan; but found that he cannot take both the conquest lands and the special provisions, unless so far as there shall appear to be sufficiency of conquest to pay the special provision, over and above the lands; and remitted to the Ordinary."

*Act.* J. Campbell, H. Dundas. *Alt.* R. M'Queen.

*Reporter,* Gardenston.

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1770. *July* 20. THOMAS LOCKHART *against* ARCHIBALD SHIELLS.

ADJUDICATION—GROUNDS AND WARRANTS—IRRITANCY.

An Adjudication proceeding upon a special charge to enter to the Predecessor, who was not himself infeft in the Subject, reduced and declared null and void.

Objections to a Decreet of Constitution.

The Irritancy in a Feu-contract, *ob non solutum canonem,* not incurred *ipso jure,* and capable of being purged before declarator.

[*Faculty Collection, V.* 121; *Dictionary,* 7,244.]

MONBODDO. The objection that the adjudication proceeded upon a special charge, not upon a general special charge, ought to be repelled. A general special charge is a fiction of the writers, not of the law. Whether the predecessor was infeft, or had only a personal right, it is all the same thing: if the heir is charged to enter heir in special, that is enough. It is argued that the irritancy could not be incurred without a declarator. I do not think that the irritancy was purgeable; and, consequently, there was no occasion for a declarator. But it is to be observed that the feu-duties were demanded in the decreet of constitution; and this demand takes away any plea of irritancy.

COALSTON. Conventional irritancies are purgeable when penalties are exorbitant; and here they are exorbitant from the rise of the rent of the ground. But he who asks equity, must give equity,—and therefore, as from equity, I allow the irritancy to be purged, so, from equity, I would sustain the adjudication as a security for the sums due, accumulated from the date of the decreet.

HAILES. I think this adjudication is too rotten to be mended. The adjudging for the penalty, in the personal contract, and for the duplicand, on the entry of an heir, is too much to receive countenance in any Court.