*Act.* T. Boswell. *Alt.* Claud Boswell.

There was no vote. Alva doubted. The Court found expenses due, that the opposers of the feu might be indemnified.

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1776. *December* 28. RICHARD and MARY DICKS *against* DR ROBERT LINDSAY and OTHERS.

PROVISION TO HEIRS AND CHILDREN.

A, by his marriage-contract, disponed to the children of the marriage his whole heritable and moveable property at his death, under the burden of a provision to his wife. Being displeased with the conduct of his eldest son B, he altered this settlement, leaving only a trifle to B's wife and children. B's wife and children failed in attempting to reduce the deed.

[*Fac. Coll. VII.* 342; *App. No. I, Provision to Heirs, No.* 2.]

KAIMES. I always doubted as to this clause of conquest in marriage-contracts: it is better, as Lord Dirleton says, that children be bound to parents, than parents to children. The only event in which such a clause is proper, is *that* of a second marriage. There is a difference between a general clause of conquest and special provisions: rational deeds will be good, notwithstanding the clause of conquest. *This* deed is rational, and what the parties themselves would have provided for, had the event been foreseen. If we find that a clause of this kind must be necessarily effectual among the lower rank of people, the consequence would be to encourage idleness, disobedience of parents, and debauchery. *Here* a father, under a clause of this kind, has left the subject *intra familiam.*

GARDENSTON. What I have heard from Lord Advocate has much shaken my opinion; yet I still have a doubt: the pursuer is entitled to the character of *heir of the marriage.* When there is nothing but a provision in a contract such as this, the general doctrine of the law applies, that the father cannot totally disinherit, but he may limit, and regulate, and burden; but still the heir of the marriage is a creditor. I do not think that this settlement is altogether rational: the pursuer is not a prodigal,—he is a weak man, but capable of carrying on business; his father was severe and penurious: at the end of many years, the son is L.200 in debt, and is cautioner for as much more; in such circumstances, the father went too far.

ALVA. Certain rational powers are reserved to the father, while the subject is still kept *intra familiam.* If the deed between Dick, the pursuer, and Thomson, his brother-in-law, has the effect of dividing the succession, and of laying the whole burden on the pursuer, it is a worse deed for him than any that his father ever made, and it justifies the father's settlements.

MONBODDO. The question is, Whether a father may give away a succession

from the children, and settle it on the grand-children. I think that the argument *here* will even go to the legal provision of *legitim.* A small matter is given to the daughter, and nothing to the son but an annuity of L.80. As the son has debts to the amount of L.300, he must be kept a prisoner for life, for he has an annuity, and the creditors will not be obliged to aliment him. Unless there were a proof of something very bad, the father could not do what he has done. There is an unpleasant inquiry here as to character and conduct, a sort of *querela inofficiosi testamenti,* which I did not think was competent in our law, It has been disputed whether a father had power of burdening the heir of the marriage with an entail; but it was never supposed that he had the power of passing him by altogether? It is a question whether a father has a greater power in general than in special provisions. Betwixt general and special provisions there is no difference in a deed of settlement. As to the decision in Fountainhall, without impugning its justice, it goes not so far as this case. [This was questioned by the President, and he thought Lord Monboddo misunderstood it.] This deed is most inofficious, as tending to starve a poor man, who seems to deserve a better fate.

BRAXFIELD. My opinion is for repelling the reasons of reduction. *Here* is a provision, not to the heir, but to the children of a marriage, and it is the provision of the *universum jus defuncti.* In the provision of a land estate, the father cannot hurt the *jus crediti* of the heir. In general provisions like this, the provision is *familiæ,* and the father has a power of distribution; but the present case is singular, and still stronger in favour of my doctrine: it is different from the case which commonly occurs. In provisions of particular sums, the father can do no deed to hurt the children: he may spend the money indeed, and thus deprive the children, but still the obligation on him continues. In the case of conquest, as usually provided, the chequer is shut at the dissolution of the marriage, and the situation of things must continue to be as it then is. But *here* there is a provision of what a man should have at his own death. This is the weakest of all obligations, for there is no *jus crediti* until the very moment of the man's death. Here, it is said, is a father who has disinherited his son. I think, on the contrary, that the deed is favourable to the son, and that he would be ruined were he to win his cause. Suppose that the children were grown up, and that the grandfather had bestowed most of his fortune in putting them out to trade, or settling them in the world, Could the son have had any cause of complaint? And what greater has he in this case? I have no favour for the creditors of the pursuer. I always admired the *senatus-consultum Macedonianum,* and I consider the creditors to have been *in mala fide* when they lent their money.

PRESIDENT. I rest much on the nature of the provision. The words of Lord Dirleton always had a great weight with me. Suppose that the pursuer had committed treason, Would the Court have preferred the Crown to his children? Instead of favouring, I detest the creditors: add to this the shameful paction *de hæreditate viventis.*

On the 20th December 1776, "The Lords repelled the reasons of reduction."

*Act.* R. Blair, A. Wight. *Alt.* Ilay Campbell, A. Murray, H. Dundas.

Concluded cause.

*Diss.* Monboddo. [Gardenston, though he spoke for the pursuer, was convinced, and voted against him.]

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1777. *January* 14. JAMES GRAY *against* WILLIAM WARDROP.

## RUNRIDGE.

**The office-houses belonging to the proprietors of Runridge Lands cannot be included in the division.**

[*Fac. Coll., VII. p.* 348; *App. I., Runridge, No.* 1.]

COVINGTON. I cannot enter into the views of parties. One may use a *right* to the prejudice of his neighbour, but the law will not interpose. Offices are part of the mansion-house in the eye of the law: if you strip the mansion-house of them, you leave the house bare. If we go on interpreting the law, we shall at length lose sight of it altogether. The houses proposed to be allotted to Wardrop are old and ruinous. The division of run-rig lands is most common in country villages: Would you in such case adjudge the offices of one man to another?

BRAXFIELD. Offices are part of the mansion-house and policy. The old house proposed to be given off as offices, is the mansion-house belonging to one half of the lands; so that in effect a mansion-house is here sought to be brought into the division. Wardrop could not force Gray to give this; and therefore Gray cannot force Wardrop to take it.

JUSTICE-CLERK. I am acquainted with the ground, and cannot but think that the opposition made by Wardrop is improper. Such salutary laws as that in 1695 ought to be liberally interpreted. I am not for starting difficulties about every little office-house. There are old kilns and barns in different fields: if they are not allotted *hinc inde*, roads must be left to them, which will be the same thing as if no division at all had been made. Why not allow a barn or a byre to be allotted to one or other party? The law does not consider prospects, but still it is emulous to hinder prospects. The reason and spirit of the law does not apply to offices of this nature, and we must determine every case according to its own circumstances.

HAILES. I should be sorry to see so loose an interpretation given to the Act 1695 as that of finding that office-houses are not comprehended within mansion-houses and policy. In this age of elegance, the kitchen is often out of doors, and not within the mansion-house: Would you, in order to better a prospect, or square the ground, take a man's kitchen from him and give it to his neighbour? A little-house is part of the offices of a house, and it is, by way of excellence, termed in English a *necessary*: Is it also for the sake of convenience to change its master? I cannot see how a distinction can be made between the