

1784. November 18.

RICHARD CAMERON, and Others, *against* JOHN ROBERTSON, and Others:

JOHN CAMERON, by contract of marriage, provided to his children *nascituris*, the sum of 55,000 merks, "to be distributed amongst them in such proportions as he, while in life, should be pleased to appoint;" and in security of that provision, he "disponed and made over (directly) to them, whom failing, to himself; and his nearest heirs and assignees," certain lands and other heritable subjects. A procuratory of resignation in the same terms, but not a precept of sasine was subjoined.

The children of this marriage were eleven in number; to all of whom, except the eldest son, Mr Cameron granted bonds of provision for sums exceeding the amount of those formerly destined. To the eldest son he conveyed his estate; and, in the disposition, expressly burdened him\* with the payment of these provisions. This son, who at the time of his father's death, was in opulent circumstances; having afterwards suffered great losses in trade, became bankrupt. Adjudications were deduced against his lands; but before any of his creditors had completed that diligence by infeftment, the children who, under the contract of marriage, had been served heirs of provision to their father, and on that title had executed the procuratory of resignation, were infeft in the subjects disponed to them in security.

By virtue of this prior infeftment, the children claimed a preference before the other creditors of Richard their brother. These creditors objected to the validity of that right; and

*Pleaded*; The contract of marriage ought to be considered as containing an obligation to provide the children, rather than as forming an actual settlement of provision in their favour. They were thus their father's creditors, and the debt which he owed was that of securing to them the specified share in his succession. It was a conditional debt indeed; the condition of his leaving a sufficient extent of funds beyond the onerous debts that his power of administration enabled him to contract, being implied. But since they were creditors, and not heirs, the service of the children was totally inept; 3d February 1732, Campbell *contra* Duncan, No 39. p. 12885.; 16th November 1747, Anderson *contra* Shiels, No 30. p. 12868.; Moncrieff *contra* Moncrieff, 8th December 1759, No 31. p. 12871.; Porterfield *contra* Gray, 9th December 1760, No 32. p. 12874. At the same time, it is no doubt equally clear, on the other hand, that if the father had afterwards effectuated the settlement, the children would have become heirs, and of course ceased to be creditors, his debt, in this manner being extinguished. That, however, was not the case.

But let the contract be viewed even as a present conveyance to the children *nascituris*, and their service will appear equally inhabile. The disposition and the procuratory are conceived directly and immediately in their favour; and,

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A provision by a father, payable at his death, together with a disposition in security of it, having been granted in favour of his children *nascituri*; whether the titles could be properly established by service?

\* See Allan against Creditors of Cameron, No 78. p. 10265.; *voce* PERSONAL AND REAL.

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consequently, vest them with the right of disponees or creditors, and not of heirs. It is to ascertain this last character that a service is employed, and by no means to prove the identity of a person claiming as a disponee; though, in some ancient decisions, this point seems to have been differently understood. One might destine an estate to the heirs *nascituris* of a stranger; but surely a service would then appear an inhabile mode of effectuating the conveyance; and it must, in the present instance, be equally improper. The legal and requisite methods are those of adjudication as creditor, of adjudication in implementation, or of process of declarator.

Another objection, entirely distinct from the former, is, that the father, by the obligation laid on his eldest son to pay even larger provisions to the other children than those of the contract were, actually discharged the debt which he had thereby come under. He thus gave to them the credit of a responsible man, from whom they might easily have operated payment, and to it therefore this credit was equivalent.

*Answered*; It is only when their provisions are payable during their father's lifetime that children are to be understood to have a *jus crediti* against him. If payment is not due till after his death, they then take their provisions as successors or representatives subject to his debts or deeds.

That point however is perhaps little material to the present question. By the disposition in security to the children *nascituris*, the *jus crediti* was completed into an actual settlement of succession. For such it was, and not an immediate transference of property, although neither fee nor liferent were expressly conceived to the father; this reservation being in practice understood in such cases as implied when not explicitly declared.

Even in the character of disponees, the right of the children would be equally good, they are in fact the very persons to whom the procuratory was granted; and if that certification be necessary, they have been declared to be such by the regular and solemn form of service, the authority of which is not inferior to that of any declarator. To this security, which could not be diminished by the father's substituting for it the personal obligation of his son, the other children are still entitled to recur.

The cause was reported by the Lord Ordinary, when

The opinion of the COURT in general was, That there were not *termini habiles* for the service of the children; but some of the Judges thought that there were such, and rested their judgment on the father's having implemented his obligation, by constituting the other children creditors to his eldest son.

"The COURT repelled the claim of the children of John Cameron." And to this judgment they adhered, after advising a reclaiming petition, with answers.

Reporter, *Lord Monboddo*.  
Alt. *Lord Advocate, W. Craig*.

For the Children, *Cullen, H. Erskine*.  
Clerk, *Hume*.

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*Fol. Dic. v. 4. p. 185. Fac. Col. No 175. p. 275.*