1754. *July* 2. LUDOVICK STRACHAN *against* CREDITORS of STRACHAN.

JAMES STRACHAN of Dalhaikie became bound by a post-nuptial contract of marriage, to pay certain sums to the children, to be procreated, according to their number. These sums were made payable at the first term of Whitsunday or Martinmas immediately following the death of the said James Strachan and his wife.

By the same contract, James Strachan further bound himself 'to educate the haill children of the above marriage sufficiently at schools, and to aliment them in meat, lodging, and washing, and to furnish and provide them with clothes, and all other necessaries, according to their rank and quality, till the term of payment of the several provisions above mentioned, settled by him upon them, in the respective cases above set down.'

Ludovick Strachan was the only child of this marriage.

The father having become insolvent, and a ranking and sale of his estate having been brought by his creditors, the son, in the first place, brought an action against his father, for the purpose of constituting the aforesaid obligation in the contract of marriage to aliment him, and he obtained a decree for L.20 sterling for yearly aliment, till the provisions settled upon him should become due. He likewise obtained a decree of adjudication of his father's heritable estate for payment of the aliment, and in security of the sum of 18,000 merks, provided to him by the contract of marriage.

These decrees having been produced as the son's interest in the ranking, the creditors of the father, besides stating several objections in point of form to the adjudication, maintained that Ludovick Strachan had no right in competition with his father's onerous creditors, either to claim aliment or to claim the provision settled upon him by the contract of marriage. The Court repelled the formal objections to the adjudication; but in the question upon the merits, they held that the son had no claim either for aliment or for his provision.

The pleas of the parties, and the views adopted by the Court, upon the question of aliment, and upon the formal objections to the adjudication, are thus stated by Lord KILKERRAN:—

"The creditors first object to the validity of the decree of aliment.

"*2do*, Supposing it formal, to its effect in point of law in competition of creditors.

"The first consists of two branches.

"*1st*, The nullity of the decree, for want of proof that the pursuer, Ludovick, was a son of the marriage.

"*2d*, The exorbitancy of it. And on the second, its effect in point of law, that it cannot compete with creditors.

"ANSWERED for Ludovick,—No necessity, in a process against his father, to prove he was the son. And as to exorbitancy, it is not an aliment, *super jure naturæ*; but upon an obligation, where the measure of the aliment is not the capacity of the father, but the aliment proper for the claimer, (a strange distinction;) and as to the point of law, its efficacy in a competition of creditors;

"ANSWERED,—That though, where an obligation to aliment is limited to the age of sixteen, it may be considered as only exegetic of the obligation *super jure naturæ*, yet where an obligation to aliment is, as in this case agreed while provisions become due, it cannot be exegetic of the obligation *ex jure naturæ*.

" The next point in dispute is the adjudication for the 18,000 merks of provision by the contract, payable the first term after the father's death.

" OBJECTED,—No proof that Ludovick, the adjudger, was the only child, and as such entitled to the whole sum.

" ANSWERED,—In a process against his father, such proof was unnecessary. If the creditors say there was another son, they must prove it.

" *2dly*, Adjudication null, as proceeding without a previous constitution.

" ANSWERED,—It might competently proceed upon the obligation.

" *3dly*, The two alternatives of the act 1672 are not libelled.

" ANSWERED,—Not necessary, being only an adjudication in security, which is a remedy in equity by the Court of Session, and is none of these adjudications that come in place of apprisings.

" *22d January*, 1752.—On report of the Lord Murkle, the Lords find, that Ludovick Strachan's decreet of aliment cannot compete with the other creditors of Dalhaikie; but repel the objections against the adjudication, at the instance of the said Ludovick Strachan."

The cause having been again called before the Lord Ordinary, and Ludovick Strachan insisting upon his right to be ranked for his provision of 18,000 merks, in virtue of the decree of adjudication, the creditors, as has already been mentioned, maintained that he had no right to claim this provision in competition with his father's onerous creditors. This question having been reported to the Court, July 2, 1754, the Lords 'find the contract of marriage gives only a right of succession, and therefore prefer the creditors.'

Lord Kilkerran has the following note of the opinions delivered by the Judges:

" The question is, How far he is *creditor* of the 18,000 merks bond, or only heir? (The aliment was formerly determined.)

" The President spoke first, and gave his opinion as follows:—

" That as the genius of our law was to prefer creditors to children's provisions and contracts of marriage in our practice commonly so conceived, the general rule of law stood for preferring the creditors. That it might be true, contracts might be so conceived as to constitute the children proper creditors for their provisions; but then he thought the words behoved to be very strong, which in this case he did not consider them to be; for this rather seemed intended to express a succession, where it is at best a conditional debt, as becoming only such in the event of their surviving their father; and till that happen it is no debt at all.

" To this KAIMES spoke, and said that he considered two questions to be here; one, *voluntatis;* the other, *potestatis.* As to the first, *voluntatis*, he took the words as they stood in the contract, as expressing clearly the will and intention of the father to create a debt, and not to give a succession; and so far he differed from the President. But then said, he had a difficulty on the other, viz. *potestatis.* For it did not well occur to him how the father could create a debt in favour of his children *nascituri*, but that this he only threw out as a doubt.

" To which it was ANSWERED by *Elchies*, That there is no doubt but that a man may bind himself to the children of another person *nascituris;* and, therefore, it is possible that he may also bind himself to his own children *nascituris.* But, then, said he, the genius of our law is to consider provisions to a man's own children *nascituris*, as destinations of succession, where the words will admit that

construction. And that the only case to be found where the words were thought not to admit it, is where the obligation was upon the father to pay to the children at a certain age, *e. g.* the age of sixteen. This was in the case of *Easterogle*, and of which decision the *ratio decidendi* is expressed, that the father was bound to pay at a certain age, whereby the father might have been obliged to pay in his own time. In such a case *dies* both *cedit et venit;* but in any other case there is nothing to hinder a Court to construct the words as importing only a destination of succession. Where contracts are so conceived that the father is to secure such a sum to the children, then there is no doubt but that it is only considered as a succession. And the only doubt in the present case arises from the word *pay;* but it is plain enough that it is a word improperly used, as it is applied also to the conquest. And to this opinion, and that given by the President, all the Lords agreed, and added some additional reasons, such as the bad consequences and danger to creditors that might attend a contrary judgment, for what creditor was safe, should such a clause in a latent contract of marriage, which would never come to light in the father's time, give the children the same rank with creditors who lent their money, seeing the father possessed of an opulent estate; I say, of what dangerous consequences might it be, if, in such a case, creditors should be in no better case than children, whose provisions had not a being when their debts were contracted, and which come only to start up debts on the father's death?"

This case is reported by *Elchies (Adjudication*, No. 41, and *Aliment*, No. 14.) It is also reported in *Fac. Coll. (Mor.* 996.)

1754. *July* 16. THOMSON and DUNCAN, Merchants in London, *against* ANDREW LOGIE, Merchant in Aberdeen.

THE pursuers claimed payment from the defender of L.44, 2s. as the balance of an account-current. The defender objected to this claim, on the ground that the pursuers were liable to him in damages for the loss he had sustained upon a cask of claret, which he had sent to them, to be disposed of along with other wines, they being commission-agents in London. It appeared that the pursuers, on receiving the wine, put it into the hands of a wine-cooper; and it was farther proved, that in consequence of the wine-cooper having neglected to fill up the cask regularly, while it remained in his possession, the quality had been so much deteriorated as to make it unmarketable.

The question was, whether the pursuers, who were not themselves dealers in wine, but to whom the wine in question had been sent, as factors and commission-agents, to be disposed of for the defender's behoof, were liable for the neglect of the wine-cooper, to whose custody they entrusted it. The Court held that the pursuers were liable. Lord KILKERRAN'S note of the proceedings is as follows:

"*July* 16, 1754.—The Lords, by the President's casting vote, found the pursuers liable for the damages sustained in the hogshead of claret.

"For the negative—Milton, Minto, Kaimes, E. Marshall. For the affirmative—Drumore, Strichen, Kilkerran, Shewalton, Woodhall, and the President's casting vote.

"It was on all hands agreed that it was a trespass to let the hogshead of claret