Diss. Strichen, Kaimes, Gardenston, Coalston; Elliock. At the second advising, *Diss.* Gardenston. (Coalston absent.)

1768. *November* 25. MRS CATHARINE SINCLAIR and OTHERS *against* DAVID THREIPLAND SINCLAIR.

PROVISION TO HEIRS AND CHILDREN.

Extent of the father's power of distribution of the conquest provided to the children of the marriage.

[*Sel. Dec.* p. 338; *Dictionary*, 13,007.]

COALSTON. Where a father obliges himself to provide a sum, or conquest, to the children of the marriage, they are partly heirs, partly creditors. As creditors, they may take, without service, and may reduce fraudulent grants. A father has a power of division, not arbitrary, but rational. He cannot disappoint any one. If he divides, he must divide the whole. Yet he may transact with his children, and take discharges. If he does this as to the whole children, there will be an end of the obligation. The only question is, as to the effects of this case, where one or more children discharge, and one does not discharge. The obligation is *familiæ*, but still each is an heir and creditor conditionally, if alive at the death of the father. Here is distinction: When one or more grant a discharge to the father, and die before him, that will only enable him to impute. But, if otherwise, there must be a bipartite division. The case of *Allardice* seems in point; and I would give great authority to a decision of the House of Peers. The only difference between that case and the present, is, that *there* the discharge was granted after the dissolution of the marriage; but that matters not, because children may die after the dissolution of the marriage, and before their father. One may discharge a conditional uncertain obligation. Marjory's *share* was the conquest, and her share is discharged.

ALEMORE. I cannot see what advantage children can gain by the defender's doctrine. Besides, not only their interest, but that of the bride's friends, must be considered. A father is bound to perform specially, though he may divide rationally. The difference of *Allardice's* case from this, is, that, at the period of the decision, it was supposed that children had a right to an equal share of the subject.

KENNET. This is a general and a delicate question. Great regard ought to be had to marriage-contracts, so also great regard to the father's powers. What Marjory accepted must stand for her half; the children are creditors, and may transact: this is for the benefit both of father and children. I think that Marjory is bound by her marriage-contract; for she is a party, and signs it, in an obligation, for a precise sum. The father is debtor to the children, and he may transact; why should his transaction benefit third parties? If there had been

one child only, he might have transacted; and so also if there had been many: If each child was to succeed *per capita*, the father might also transact; why not in this case? Whenever any fraud appears, there will be redress; but here there is none; and Katherine cannot complain, for she gets one full half of the conquest. Had Marjory not discharged, Katherine would have got no more.

GARDENSTON. Here are two daughters entitled to conquest: one of them discharges her share; what is her share? As there is no distribution by the father, it is the one half; if so, what can the other claim more than the other half? Suppose the conquest had turned out to be no more than 12,000 merks, and 10,000 merks given to one, should the heir have right to say, I will give you but 2000 merks? No: he would be bound to give 10,000 merks to the one, as the father had given 10,000 merks to the other; and thus, by the partial transaction, 20,000 merks would go for a conquest, which amounted to but 12,000. When the advantage is on the father's side instead of the children's, the rule must be the same. We are bound to support the discretionary power of the father when no fraud appears. Katherine has now as much as she would have had upon a rational division, namely, one half. Children may bring an action against the father for ascertaining the quantity of the conquest. They are creditors equally under the father's power of division, which is conditional. How can Katherine say she is hurt?

AUCHINLECK. Marriage-contracts ought to be fairly and honestly implemented. The father may bargain with his children: for he is debtor, and they are creditors. But then the father is also trustee for his children: this is an ample and a favourable trust. If the father make a fair transaction, it is good, because it is a transaction between debtor and creditor; but, if the transaction is *contra fidem tabularum*, contrary to the trust, and, instead of fulfilling the obligation, seeks to put money in his own pocket, the case is different: were this allowed, there would be an unlawful transaction, by which he ought not to profit. Here the question is, Whether Southdun has been enabled to do anything for disappointing the contract? He has given a share to one: the question is, whether the other is thereby affected? How can the discharge exoner Southdun beyond what he has paid? In so far as he has paid, he is bound.

JUSTICE-CLERK. I do think that the decision of *Allardice* is in point: at the same time, I am not unaffected with the bad use that may be made of this power in the father. I hope that the law will be strong enough to disappoint any fraud, if it should ever be attempted. I wish I saw a provision made in law so as not to allow the father to transact with children; but I see no such provision: I was at first struck with the idea of a trust in the father; but I think this is not agreeable to the ideas of people of this country, for then a thousand cases would have occurred of children calling their fathers to account. I am apt to believe that the case of *Allardice* has been adopted by the nation as law. Whatever difficulty I might have entertained, had I then sat on the bench, it is now too late to look back and throw the country loose.

HAILES. I also am determined by the judgment in the case of *Allardice*, given in this Court, and affirmed in the House of Peers. This is a rule to walk by, where the principles do not seem clear, and where the expediency on the one side or other is extremely dubious.

MONBODDO. The interlocutor contains an argument: I can neither agree in the *premise* nor in the *consequent*. The interlocutor says that Marjory did discharge her

share: I do not think that the marriage-contract did this. It would be extraordinary if the father's becoming bound to pay a sum to the father of the bridegroom should be understood as a discharge by Marjory. *Pactum de hæreditate viventis* was improbated by the Roman law, and so also in other countries; it is permitted in our law, but then express words to that effect are necessary. Here is a common clause of style: the clause discharging is omitted; this must be supposed done *dedita opera*. A father to transact with his child, and to take the right of succession of herself to himself; I would require strong words for that, which I do not see here. Join to this the ample form of Southdun's second deed, which Marjory did not accept: that second *deed* shows the father's idea of the first. As to the consequence in the interlocutor, that this discharge implies a restriction of Katherine to one half of the conquest, this is implication upon implication. I lay great weight upon this, that, at the time of Marjory's marriage-contract, Southdun's marriage was subsisting; at that time, therefore, Marjory had nothing but a *spes successionis*. Is there in practice any example of a child conveying a right of this kind, *stante matrimonio* of the father? The share of the child may be affected by a transaction; but still this will not impair the right of the other children. Were the contrary doctrine established, it would give rise to many evil transactions. It is said, that, in every case where a debtor takes a discharge, a conveyance is implied: I deny this. When a debtor pays, and simply takes a discharge, this is no conveyance. So it was by the Roman law, and even by our law: if an heir of entail pays debts of his predecessor, and takes a discharge, he cannot rear up such debts: there is no reason here for making an exception. Here was not a debt, but a right of succession; there is no principle of law, nor analogy of law, for this decision. Conquest is no more than a *spes successionis*; if any of the children die, they transmit nothing to their brothers and sisters. The only difference between this and the legitim is, that legitim is affected by gratuitous deeds, conquest only by onerous. In this view of the case, the argument for legitim is strong. Neither is there the authority of any lawyer for the decision. As to the decision of *Allardice*, there the son had not discharged; but the daughters had expressly discharged and renounced after the dissolution of the marriage; and both Courts understood that this discharge, made after the right had accrued, was with the view of enabling the father to make provisions for the children of another marriage.

KAIMES. When a father exercises his power of division, he must make the whole effectual to the children: if a father has not, or if he renounces this power, then each child has a separate power, and the father may transact separately with each. I am thus reconciled to the decision of *Allardice*; at that time it was not thought that the father had a power of division. The present case is where a power of division was reserved to the father; he keeps it in his sleeve, and transacts with a child for less than the probable half of the conquest. A man may know the extent of his conquest, though nobody else does; he may concuss his children one after another. *Quæritur*, On which side does the inexpediency preponderate? Here Marjory gives a discharge, and what shall be its effects? It must, in strict law, accrue to the father, for there is no third party concerned in it; but here there is a consideration in equity: a child is not at liberty to refuse to transact. Marjory could not thwart her father; for,

had she disobliged him, he would have given much the largest share to her sister. If there had been a certain sum provided to the children, this would have been strong; but here there was an uncertainty arising from the unknown extent of the conquest. The argument, that *nihil deest* to Katherine, because she has her full half of the conquest, is also strong. Upon the whole, I am so doubtful that I decline giving my vote.

PRESIDENT. I think Katherine is to be preferred. The provision of conquest is an obligation: the power of division in the father is politically good;—he cannot, however, pocket up any part of it. The sum in the provision is *familiæ*, and must be given *familiæ*. If a provision is made to be divided *equally*, then the father may transact, because each child has a separate right: the father here has not said that he has cut off Katherine's right: he has not made a division. A father may send out a son into the world, and he may transact with him, providing he gives the rest to the other children. Thus all is well: but it would be dangerous to give him a greater power. I would support the *patria potestas*. I would allow liberty to provide for the children of another marriage; but I think there is much hazard in going any farther. There is a confusion and perplexity in the case of Allardice:—there the son had got one full third, and it was thought that he had claim to no more.

PITFOUR. The words of Marjory's marriage-contract clearly discharge Marjory's share, and must accresce to the father. Her *share* is the same thing as in satisfaction. She has not discharged the legitim, &c. but that will not hinder the discharge from being effectual, so far as it goes. It is said that this does not import a division, but only an extinction of Marjory's share; but there is no difference between an extinction and an assignation where the debtor is the only party: no man will seek an assignation of his own debt. The objection as to a society among the children is nothing, for every child may separately pursue. It is commonly impossible to get all the children together, to grant a joint discharge. The case of Allardice was in point,—a decision *in jure*, affirmed by the House of Peers. True, there was no power of division *there*; but that was implied. True, that there the marriage had been dissolved; *here* not. This makes no difference, as the provision was of doubtful extent, although the marriage had been dissolved: indeed, it was possible, in Allardice's case, to ascertain how the conquest stood at the dissolution of the marriage; and, consequently, there might have been more ground for a challenge of fraud in that case than in the present. The question, To whom does the discharge accresce, in a transaction *in re dubia?* was most solemnly determined in Allardice's case; and from that time I considered the point as fixed. Let us consider the ground of the decision. In the nature of the thing, what is the import of the deed? *Actus agentium non operantur ultra eorum intentionem.* Neither Southdun nor Marjory had the right of the third party in view. As to expediency, I should be sorry if no man were to enter into a marriage-contract till he could give as great provisions as the bride's friends might expect. It is not the best contract of marriage that makes the best testament: most contracts of marriage are upon conquests. When sons go abroad, or daughters are to be married, a case like the present one occurs. It has been asked, are there any instances in practice of a transaction like this? I answer,

there are just as many as there are instances of sons going abroad, or of daughters being married during the subsistence of a marriage wherein conquest is provided. Were it otherwise, a father must only give payments in part to his children, and so leave law-suits behind him, both as to the right of the child who gets, and of the child who does not get the provision.

On the 26th July 1768, The Lords found that the words of Mrs Marjory Sinclair's contract of marriage, in 1748, import a renunciation and discharge of the half of the conquest provided to her by her father's contract of marriage in 1722; and, consequently, must restrict her sister Katherine's share of said conquest to the other half, and, therefore, prefer the heirs of line of Southdun to that share of the conquest now in question, which would have fallen to Marjory, if she had not been excluded by her contract of marriage.

On the 25th November 1768, they adhered, altering Lord Auchinleck's interlocutor.

Act. G. Wallace, A. Lockhart. *Alt.* D. Rae, R. Dundas. *Diss.* Auchinleck, Barjarg, Monboddo, Strichen, Alemore, (not present at last hearing,) President, Kaimes, (*non liquet* at last hearing.)

1768. *December* 1. ROBERT ARTHUR *against* MESSRS HASTIE and JAMIESON.

SALE.

Interest of consignee in goods shipped to him from abroad, and of which the bill of lading has been transmitted to him.

[*Faculty Collection, IV.* p. 165; *Dict.* 14,209.]

MONBODDO. I doubt as to the principle of the interlocutor and its consequences. The goods were put into the hands of the shipmaster, in order to be delivered to the Glasgow merchants; still, however, on the risk of the Virginia merchant: but the rule, *res perit suo domino*, admits of various exceptions. Supposing no transfer of the property, the consequences drawn in the interlocutor will not hold. If I have a personal right to a subject, and no more, still this will be a burden on the subject after arrestment.

PRESIDENT. No arrestment can carry the property of another man.

GARDENSTON. If remittances of goods by foreign merchants were liable to arrestments, the consequences would be dangerous. I wish for an inquiry into the practice of other nations, especially England. I hold that a consignation of goods for payment is, in reality, an assignation. If there had been a formal conveyance and assignation, there would have been no question; though, in strictness of speech, the property was not thereby transferred. I do not see the difference between that case and the present.

PRESIDENT. That hypothesis is not consistent with the tenor of the contract between the parties.

GARDENSTON. I do not go upon that contract, but upon the bills of loading and the letters.