No 35.

sides, supposing that the legitim behoved chiefly to be applied for payment of creditors, even, in that case, it would not be in the father's power to disinherit his child. An innocent misfortune is no sufficient cause of exheredation; nor can it be thought a matter of indifference to the son, that he is, by receiving the share of his father's succession, enabled to discharge his just debts, and set up on a new footing in the world, to gain his livelihood by an honest industry, without any impediment or distress: And it is established in our practice, that the legitim cannot be excluded by any settlement made by the father, to take place at his death. So it is laid down by Lord Stair, lib. 3. tit. 4. § 24.; and so the Court decided, February 28th, 1728, Henderson and Husband against Henderson, No. 33. p. 8199.; and, therefore, as the father has no power to prejudice the legitim by any settlement of succession, there is no room to enquire, in such cases, whether insolvency may be a rational cause of exheredation or not. The law has excluded every cause, in order to prevent arbitrary questions, which would render the properties of the lieges precarious and uncertain.

"THE LORDS repelled the defence; and found that the pursuer was entitled to his legitim."

Reporter, *Lord Kames.* Act. *Ferguson.* Alt. *Burnet.*

J. M. *Fac. Col. No* 91. *p.* 202.

1775. *February* 28.

Captain MONTGOMERY-AGNEW *against* Lieutenant-Colonel JAMES AGNEW.

No 36.

A deed of assignment *inter vivos* by a father in favour of his eldest son, of particular *nomina debitorum*, (the bulk of his fortune) burdened with the payment of the granter's debts, and some legacies, and reserving his liferent, but containing no power of revocation, found to exclude the claim of legitim, at least as to the principal sums.

CAPTAIN Montgomery-Agnew, third son of the deceased Major James Agnew, brought an action into this Court against Colonel James Agnew, the eldest, as universal intromitter with the effects of their common father, for payment to him of the sum of L. 2000 Sterling, as his supposed rateable share of the moveable effects, falling to him as one of the younger children of their deceased father, unforisfamiliate, as the legitim to which, by law, he was entitled.

The defence was founded upon a deed executed by Major Agnew, in favour of the defender, dated August 1st, 1770, whereby, upon the narrative of love and favour to the Colonel, his eldest son, the Major gave, granted, and disponed to the said 'Colonel, his heirs, or assignees, the several debts and sums of 'money therein after specified, being those which had been lent out upon 'securities in Scotland, to the amount of L. 6833 Sterling, *viz.*' (here the sums due by each debtor, and the nature of the security are narrated, being all personal bonds, one excepted, which was heritable,) 'as also, the sum of 'L. 600 Sterling, of the consolidate three *per cent.* Bank stock, in England, 'with such annualrents as shall be due on the foresaid bonds at the time of

'his decease, burdened with the payment of all just and lawful debts owing 'by him by bond, bill, or otherwise, at and preceding the date hereof; and 'with the payment of a yearly liferent annuity of L. 90 Sterling to his young-'est daughter, Eleonora, after his, the said Major's death,; and with the fur-'ther burden of two small sums thereby bequeathed to the said Eleonora Ag-'new, his daughter, and to Mary M'Queen, his grand-daughter; reserving 'his own liferent of the premisses; but reserving no power of alteration.' No 36.

For some years prior to 1770, Major Agnew had resided at Bishop-Auckland, in the county of Durham. It appeared that he had, at different times, executed wills, disposing of his effects, in the event of his death; one, in particular, about two or three years before his death, executed in the proper form of a testament, and which was in subsistence, when, in 1770, being then valetudinary, the Major made a journey to Scotland, in order to visit his relations, and for the benefit of his health; and, upon the 1st of August said year, while at Edinburgh, he executed the deed above recited; and having soon after returned from Scotland to England, died upon the 21st October that year, having some days before made a nuncupative will, respecting his moveables in England, also in favour of his eldest son, who had been for some time in Ireland with the regiment, but had a house in the neighbourhood of Bishop-Auckland, where his Lady and family resided at this period.

The first ground insisted on by the pursuer was, That the deed had not been delivered by the Major; whereupon it was *argued*, That the deed, being to be construed as still in the Major's power, did not effectually denude him of the property of these sums; which fell, therefore, to be considered as still *in bonis* of the Major at his death; and, of course, subject to the pursuer's claim of legitim. But a proof having been brought of the actual delivery of the deed by the Major to the defender's Lady, in his absence, the Court, upon this point, were of opinion, that this was equivalent to delivery to the donee himself.

The pursuer *contended*, 2*do*, That, supposing this deed to be delivered, yet it was to be construed as executed by the Major *dolose*, or with a fraudulent intention to disappoint or impair his other childrens right of legitim, (of whom, besides the pursuer, there were two more, Alexander and Eleonora, unforisfamiliate;) and it was thereupon *argued*, That the legitim could not be impaired by a deed under such circumstances, though, by conception, it be a deed *inter vivos*, and though executed and delivered in *liege poustie*.

The Court, by their first interlocutor, found "the pursuer is not entitled to any legitim out of the sums assigned by the deceased Major Agnew, in favour of the defender, by the deed in question.'

The pursuer reclaimed; and

Pleaded, 1*mo*, That the deed was of such a nature as necessarily did require acceptance by the Colonel to give it effect; and, consequently, that, as it was not accepted of by the Colonel at any time during the Major's life, the sub-

No 36. jects remained with the Major at his death, when the younger childrens right of legitim took place.—But the defender, in answer to this argument, besides maintaining the irrelevancy of it, and also the improbability of the supposition on which it was founded, did, in order to refute it, in point of fact, refer to a letter which he had written and sent to the Major on the first notice he had received of the deed in his favour being delivered to Mrs Agnew, as containing the most explicit acceptance of the deed; one passage whereof, in particular, was in these words: 'My wife has, by your directions, transmitted 'to me the copy of instrument executed at Edinburgh in my favour. Thanks 'in words can ill express my gratitude for this strong mark of your affection; 'but be assured, Sir, I will indeed comply and execute, most faithfully, every 'part it enjoins me.'

Next, 2*do*, Upon the supposition of his being over-ruled in the preceding argument, the pursuer stated, That there remained a third point, which seemed well to merit consideration, *viz.* the acknowledgment made by the defender's Counsel upon the hearing in presence, (and which, from the whole circumstances, evidently appears to have been the case,) that the sole purpose of executing the deed was to disappoint the claim of legitim.

On this head, the pursuer now *contended*, That the legitim was a right of very ancient standing, founded upon the principles of the highest expediency, approved of by the laws and practice of all nations, from the earliest period down to this day: That the right of legitim stands precisely upon the same footing with the wife's right to a third of moveables, and is treated as such by every Lawyer that writes upon the subject: That, whether the right which the father formerly had shall be characterised a right of absolute property, or an unlimited and uncontroulable right of administration, the result of the whole is one and the same; the wife and the children have a vested right in them, (the wife from the date of her marriage, the children from their respective births,) to a certain share and portion of the free moveables which remained with the father at his death; neither of which can be frustrated or impaired, either by death-bed deeds, testament, by deeds granted *mortis causa*, to take effect after death, or by any other device. What cannot be done fairly and avowedly, neither law nor justice will permit to be done indirectly, *et per ambages*. No *gravamen* whatever can be laid upon the legitim, but by bare acts of administration in *liege poustie*. In the present case, the deed was not only granted in contemplation of death, and when the granter was *moribundus*, but with an avowed purpose to disappoint the childrens right of legitim; and they are equally entitled as the wife, to the protection of the law, against every deed calculated to frustrate or disappoint their right. So the rule is laid down by Dirleton, with respect to the childrens legitim, *voce* LEGITTIMA LIBERORUM; Stair, B. 3. Tit. 4. § 24.; and Erskine's Institutes, B. 3. Tit. 9. § 16.

But, at any rate, whatever shall be the judgment of the law, with respect to the import and effect of said deed, so far as regards the principal sums thereby assigned, it can have no such operation or effect with respect to the annual-rents due at the Major's death; so that thus far, at least, the interlocutor will fall to be explained or varied; and it is equally clear, that, as the aforesaid deed of assignment was granted with the express burden of what debts the Major was then owing, neither the annualrents of these sums due at the Major's death, nor any other of his executry effects, intromitted with by the Colonel, can be exhausted, in whole or in part, by the debts which the Major was owing at the time. No 36.

Answered, The law has already sufficiently fettered the powers of the father, when it protects the childrens legitim, (a peculiarity indiscriminately adopted from the Roman law,) against death-bed, or testamentary deeds; but it would run into the most arbitrary disquisitions, were the Court to permit children to canvass every transaction of their father, with regard to every part of his moveable estate, upon the pretence of these transactions being unfavourable to the claim of legitim, although such transactions are neither executed upon death-bed, or by deeds of a testamentary nature, to take effect after death; but by deeds *inter vivos*, and executed at a period when the father is the unlimited proprietor, and has the unlimited disposal of his whole estate, both heritable and moveable.

The defender has no occasion to maintain, that a fraudulent deed will have the effect to cut off the legitim. Fraud never can have effect; but then the pursuer must point out such a legal fraud as the law can take notice of. If the pursuer admits, that the father is the unlimited proprietor and disposer of his moveable estate by deeds *inter vivos*, it is absurd to talk of his acting fraudulently when he executes such deeds. No man can act *dolose*, *qui jure suo utitur*.

The authorities of our Lawyers are precisely agreeable to the principle maintained by the defender; Reg. Maj. lib. 2. c. 36. and 37.; Balf. Pract. p. 216. ch. 1. 217. ch. 7.; Stair, b. 3. tit. 4. § 24.; b. 3. tit. 8. § 32. 35. 39. 42. 43.; b. 1. tit. 5. § 6.; Bankton, vol. II. p. 380. § 15.; and the following decisions of the Court are conformable thereto; 17th November 1638, Fraser against Bishop, No 1. p. 3941.; 16th July 1678, Murray against Murrays, No 9. p. 2372.; February 1728, Henderson against Henderson, No 33. p. 8199. 17th June 1762, Allan against Callender, No 35. p. 8208.

The right of legitim is a mere right of succession, which arises to the children upon the death of their father; but, when the widow claims under her *jus relictæ*, she is claiming a share of those very moveable effects which, during the subsistence of the marriage, did belong to her in common with her husband. It is true, that it is a community where the husband has a right of ad-

No 36. ministration, almost equal to a right of property; but still there is, in the eye of law, a communion, or legal co-partnery, formed upon the moveable effects belonging in property to the husband, or belonging to the wife, either prior to, or acquired during the subsistence of the marriage. But it is an abuse of words to talk of the children of a marriage being sharers in that communion, to which neither in fact, nor by the operation of the law, do they contribute one sixpence of their estate. That belongs to themselves, exclusively of any right in the father, either of property or disposal. But the claim of the wife has a real foundation in substantial justice, in so far as, by her marriage, she is sunk in the coverture of her husband, so as to be deprived of all property in, and all acquisition of any exclusive moveable estate whatever. Accordingly, the distinction between these different rights is laid down by Stair, b. 1. tit. 4 § 21.; b. 1. tit. 5. § 7.; Sir George M'Kenzie, tit. Succession in Moveables, § 6.; tit. Marriage, § 16.; Bankton, vol. II p. 383. § 25. p. 384. § 26.

Upon what ground Mr Erskine can, in the passage quoted, represent the father's right over the goods in communion, to be only a right of administration, *quoad* the childrens interest as well as the wife's, the pursuer is at a loss to account for in any other way, than by presuming it to have proceeded from inadvertency in not attending to the proper distinction which he himself, (tit. Marriage, § 12. *et sequen.*; and again, § 53.—58.) as well as our other Lawyers, have laid down between the nature and origin of the wife's interest, and that of the children; which is the rather to be presumed, considering, that, if Mr Erskine had here meant to explode a distinction, explicitly adopted by Stair and M'Kenzie, and repeatedly inculcated by Lord Bankton, he would (as he generally does in other places) have quoted the authorities whereby it is supported, and given his own reasons for differing in opinion from them.

With regard to the case of Thomson, cited in Stair's Decisions, (No 141. p. 5939.) upon which alone Mr Erskine seems to found his doctrine of the *jus relictæ* and legitim being entirely on a similar footing; neither from the nature of the case, nor from the argument stated upon it, on either side, does there appear the least vestige of authority for applying or extending to the right of legitim what was there found with respect to defrauding the *jus relictæ*; for how can there be supposed *termini habiles* for presuming fraud against a father upon which children can plead?

Lastly, Though, by the Major's reserved liferent, he had the full power of uplifting and discharging the annualrents; yet, in so far as not uplifted or discharged, he was fully denuded, and could grant no deed conveying these bygone annualrents, in prejudice of the deed in question: Neither can they ever be considered as *in bonis* of the Major at his death; for, suppose no such claim of legitim had been made, no person could pretend to confirm them *qua* nearest in kin; but the disponee would take them directly on the disposition without confirmation.

THE LORDS adhered to their former interlocutor; and found, that the deed in question bars the legitim as to the principal sums; but remitted to the Lord Ordinary to hear parties as to the annualrents, and any other points in the cause. No 36.

Act. *Ilay Campbell, Dean of Faculty.* Alt. *W. Baillie, Sol. Dundas.*
Clerk, *Kirkpatrick.*

Fol. Dic. v. 3. *p.* 382. *Fac. Col. No* 165. *p.* 54.

1803. *June* 7. MILLIE *against* MILLIE.

No 37.
The claim of legitim not affected by a general disposition of a father to his eldest son, upon which no actual delivery ensued, although the disposition was declared irrevocable.

IN the year 1791, David Millie, manufacturer in Pathead, by a general disposition, conveyed his estate, heritable and moveable, to his only son, under the burden of an annuity of L. 100 per annum, which he reserved to himself; and by a deed of the same date, he provided a small annuity to each of his daughters. This disposition was declared to be irrevocable, and was recorded.

The father and son had been for many years engaged in a copartnery for carrying on business. But the effects of this copartnery were never regularly delivered over by an inventory to the son, although notification was made to some of their correspondents, that the affairs of the company were to be wholly managed by him after the date of this general conveyance. Nor did the annuity reserved to the father appear to have been regularly drawn. In 1793, a submission was entered into between Millie and his Son, upon the one part, and Elizabeth, his daughter, on the other, narrating, that no settlement had been made upon her, nor any discharge granted by her to the claims competent to her out of the estate and effects of her father. But after some procedure, the submission was given up by the arbiters, without pronouncing any final decision.

Millie senior died in 1795, possessed of a considerable fortune; and his daughter soon after brought an action against her brother, concluding to have the disposition in his favour set aside, on the head of imbecility and circumvention, and for payment of L. 10,000 as her legitim. She brought likewise an action for payment of her share of her mother's executry; but some circumstances prevented her from following out her claims, and the defender was assoilzied from the conclusion of both processes.

Elizabeth Millie, however, raised a new action against her brother, concluding for payment of her legitim; and the plea of *res judicata* being repelled, she

Pleaded, The general disposition executed by her father, was intended for the sole purpose of defeating the legitim, which the law provides for younger children. A father may virtually defeat this claim, by converting his moveable into heritable property, or by divesting himself of his moveable effects altogether. But he cannot defeat the provisions of law by a simulate conveyance. The