heirs of line have the effect of transposing a large security from the heirs-male to the heirs of line?

PRESIDENT. I shall not be ashamed of *blundering*, with Craig, Spottiswood, and Hope, (alluding to a rough phrase of Lord Braxfield's.) I lay aside all questions as to creditors, for they proceed on different principles. *My* opinion is founded on the civil law, though Lord Monboddo has abandoned his old mistress. When a *hæres* took, *successit in universum jus:* a *legatarius* is much the same as an *heir of provision.* The *legatarius* was in effect the heir. The same is the case as to the feudal law. When an heir makes up titles, he is universal representative. We have *heirs-male* and of provision, so called because a title must be made up; but still they are *legatarii.* The heir of line is not the favourite of the law. It is the heir of provision whom the testator has preferred. When the defunct inclines to lay the burden on any particular heir, he may do it: if he does not, the heir of line must be liable.

HENDERLAND. By the law of Scotland no heir is more *eadem persona cum defuncto* than another. The principle laid down by Lord Braxfield seems the just one. [He quoted Voet, *Familiæ Erciscundæ* and *De Acquirenda Hæreditate.* Voet speaks of countries in which the Roman law takes place.]

On the 8th December 1786, "The Lords ——————.

1786. *December* 15. MRS BARBARA LOWTHER *against* MURDOCH M'LAINE.

ALIMENT—HUSBAND AND WIFE.

Aliment to a Wife, not entitled to legal or conventional provisions, found due by the Husband's Heirs.

[*Fac. Coll. IX.* 456; *Dict.* 435.]

JUSTICE-CLERK. It is admitted by the pursuer, that, if the marriage dissolves within year and day without there being a child born alive, the terce is not due; and that even a formal settlement by the husband will, in such a case, be good for nothing, unless the parties, having the law before their eyes, dispense with it. It would be strange, then, were the widow to be entitled to an aliment, which is the same thing as a terce. If the wife has such a right, so also must the husband. This case must have often occurred, and yet no such claim was ever made. Marriage is *juris divini* and *juris gentium* as to its constitution; but the effects of marriage will vary according to the practice of different nations.

Braxfield. The question is, "Whether is the heir of the husband bound to aliment the indigent widow?" Legal and conventional obligations fail by the dissolution of the marriage within year and day, without a living child. But the connexion between husband and wife is so close, that death cannot have the effect of leaving the wife to starve. This principle is from the very nature of man. In the case of *M'Culloch* against *Thompson*, the funds belonging to the widow were small, and the Court added to her aliment upon that principle for which I speak. A woman is as much a wife after a month as after a year or ten years: the Justice-clerk talked of the case of courtesy. I hold that an indigent husband must be provided for.

Hailes. The same rules ought to apply to husband and wife, with this difference, that our practice has been more favourable to the wife than to the husband. A continuance of the marriage for a year entitles the wife to a *terce*: but there must be a living child to entitle the husband to the *courtesy*. I never heard till now that a husband, having no right to a *courtesy*, could claim an aliment from the heirs of his deceased wife. That which is called *the courtesy of Scotland* is not peculiar to our own country. In England it is called *the courtesy of England*. It prevailed at a very early period in Normandy, as appears from the *Grand Coustumer*, in the territories of Venice, amongst the Grisons, and, if I mistake not, in the kingdom of Arragon. But I never heard that an aliment was allowed to the husband, when the circumstances of the case debarred him from the courtesy. The case of *M'Culloch* was not fully argued at the bar: we have been told that the parties understood one another. There was hardly any thing said unless by one judge, (that was Lord Braxfield.)

Monboddo. If I sat here as a legislator I should be clear to alter the practice of Scotland. It proceeds on a gross mistake, as if a *dos* and *donatio propter nuptias*, in the Roman law, were like a *tocher* and a *jointure*. But errors are not to be extended to consequences: the natural obligation to be alimented continues, however prematurely the marriage may have been dissolved.

Swinton. I should think it proper to inquire, first of all, Whether the pursuer be in indigence? The argument for the pursuer proceeds on the notion of a natural obligation; but *that* ceases by the death of the party: all that remains is a moral obligation, which law does not inforce.

Henderland. We must suppose that the husband's fortune is sufficient to afford an aliment. Our law is singular in the matter of marriage. By the old Roman law, a wife was one of the husband's family, like a daughter, and she had a share in the husband's succession. Afterwards, the obligation to provide for a daughter was laid on the father. If the wife, by the law of nature, be part of the husband's family, she must be provided by the heir: in all the cases quoted by the defender, except one, there were legal provisions.

Eskgrove. I am none of those who wish to alter the law of the land. We are sometimes forced to determine cases which have never been determined before. The doctrine of the Roman law, misunderstood, has introduced a harsh rule into our law. But we are not bound to go any farther than that rule has gone. Here there are neither legal nor conventional provisions; so we must resort to natural law. The thing pleaded, as a bar to this claim, is the very thing which makes me think that an aliment is due: a like claim would be competent at the instance of a husband in indigence. We are told that it is other-

wise in the law of Normandy; but *that* is not our law, and, I hope, never will. I distinguish between a claim for aliment and a claim for legal provisions.

ROCKVILLE. At first I was afraid that so much could not have been said for the claim as I see there is. Without resorting to old decisions, I go to the case of *M'Culloch*, in 1778, which proceeds on the same principle with this claim.

PRESIDENT. I was not in Court when the decision in the case of *M'Culloch* was pronounced: if it was not an amicable one I should never have given it. I am an old man, and I do not wish to see any alteration of what I was taught in my youth to be law.

On the 15th December 1786, "The Lords repelled the defences, and sustained the claim for an aliment."

Act. R. Cullen. *Alt.* Ilay Campbell.

Diss. Hailes, Justice-Clerk, Swinton, President.

N.B. Some of the judges who carried this question, told me that they did not mean that Mrs M'Laine should have any aliment, in case she married again: if so, they have shown little favour to a handsome young woman of irreproachable character.

1786. *December* 15. WILLIAM SANDIEMAN and COMPANY *against* THOMAS ADAIR, Factor on the Sequestrated Estate of GAVIN KEMP.

FRAUD—

Of one purchasing goods, knowing himself to be insolvent.

[*Faculty Collection, IX.* 428; *Dictionary,* 4,947.]

ESKGROVE. It is too late to alter the rule established in the case of the *Creditors of Cave.* But here is a question of actual fraud, which would be good after *three months* as well as after *three days.* The giving a promissory-note is not inconsistent with the proposal of discounting. Kemp never meant to pay the price.

HAILES. This matter may be simplified in this way: Kemp knew, when he bargained with Sandieman, what we now know, that the goods were to have been received clandestinely, shipped in like manner for America, with the property fictitiously transferred to a bankrupt: supposing Kemp to have premised his commission, with this brief narrative, would Sandieman and Company have trusted him to the value of sixpence? There is deliberate cool fraud in every step of the business.

BRAXFIELD. Joseph Cave bought the goods *bona fide*: but the Court found that he could not *bona fide* receive them within three days of his bankruptcy. I do not understand this: the maxim, that sales of goods delivered *infra biduum vel triduum* of the bankruptcy are null, proceeds on this principle, that the