1784. *November* 18. RICHARD CAMERON and OTHERS *against* JOHN ROBERTSON and OTHERS.

PROVISION TO HEIRS AND CHILDREN.

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 titles can be properly established by service?

[*Faculty Collection, IX.* 275; *Dictionary*, 12,879.]

ESKGROVE. The defence of minority is no answer to the Act 1661, which makes no distinction between majors and minors. Neither, on the other hand, is the plea good that Cameron's service and infeftment, as heir to his father, must exclude the procuratory in favour of the children. If a man die after granting a procuratory, but before it is executed, his heir cannot, by making up of any titles, shut it out. If the provision had been merely personal, the children would have had a *jus crediti* without service: but here there is more,—a disposition of the lands to the children with procuratory. Of what is the service?—Not of the lands, for the children are not heirs. It is said that the service was to ascertain their relation to the defunct: this ought to have been by declarator; then an action would have followed against the heir, and, on that, adjudication in implement.

BRAXFIELD. When a father provides a land estate to the children of the marriage, and *takes infeftment*, the subject will go not to *heirs whatsoever*, but to the *children*, and the debts of the eldest child of the marriage will be effectual only against his own share. If a father does not so provide a land estate, but only a sum of money, and, in security, grants an estate, and takes infeftment, the consequences would be the same. Here no infeftment was taken; and the deed stood personal at the death of the father. The eldest son is heir of the investiture, and, in that capacity, he made up his titles. Can there be a doubt that the eldest son has the estate in fee simple? The younger children might have secured themselves, but they did not. His creditors adjudged, and so did the children, and they came in *pari passu*: but how can they, after lying by so long, execute the procuratory, so as to cut out the creditors of the eldest son? Here the provision is of a sum of money to the children in general. No one child has a claim for a particular sum: the father disponed the estate to the eldest son, and burdened him with provisions to the younger children, even beyond what was provided in the marriage-contract. They became creditors by this to the eldest son, and they must claim as such; and so indeed they formerly claimed, before this fancy of executing the procuratory occurred to their men of business.

ESKGROVE. How could the father be said to have executed the marriage-contract by making the younger children mere personal creditors of the eldest son? This was beyond his powers.

JUSTICE-CLERK. I do not see how the children can now overhaul every thing that has been done. The marriage-contract is of a singular nature; and, unless we are bound to it, I should be sorry to see it rendered effectual. This marriage-contract, with a procuratory in favour of unborn children, is not suited to a commercial country, and hurts the security of the records. The children had a *jus crediti* for the sum at large, not for any numerical sum to each. The father did not alter the investiture: he only granted a procuratory for securing. I do not think that the children had any thing wherein to be served. If the father had executed any deed in implement, then I can see how the children might have been served. What could the children be served to as matters stand? A service in the law of Scotland is in order to ascertain *who* died last infeft, that the *hæreditas jacens* may be taken up; but was the father vested and seized in their provision? Some old decisions have been quoted, in which it seems to have been supposed that a service was proper. A puzzle seems to have been somehow introduced, from the notion of ascertaining the relation of the claimants; but the later decisions have uniformly held such service to be inept and null. The children stand, first as personal creditors to the father, and then to the eldest son, both as heir and disponee: on that ground they claimed, and they obtained a preference to a certain extent. Now, by a side wind, they attempt to disappoint the creditors.

PRESIDENT. The former advisers of the children must have been very ignorant; for they made them plead things inconsistent with what they now plead. The truth is, that the inserting this strange procuratory in the marriage-contract was a blunder of the writer.

ESKGROVE. I lay my opinion on this, that the marriage-contract gave no right of service to the children; and that all that has followed on it is inept and null.

MONBODDO. The children were not obliged to acquiesce in the father's deed; but they might still recur to the marriage-contract. Had they taken a declarator, adjudged in implement, and then got themselves infeft before the creditors of the eldest son, they would have been preferred. The only question then is as to the manner of their making up titles. It has been found, that a thing payable after the death of the father, constitutes a bare right of succession. Here a particular subject was given, by the father in his marriage-contract, to children for their provision, which could only be taken up by service. The children would have been liable for the debts of the father, and, consequently, represented him to a certain extent; and, if they *represented him*, they might be *served* to him: their service was as to lands in which the father died vest and seized under an obligation to them.

On the 18th November 1784, "The Lords sustained the objection to the preference of the children."

Act. R. Cullen. *Alt.* Ilay Campbell.
Reporter, Monboddo.
Diss. Monboddo.