circumstances of the transaction ought to be considered. Mr Orme, a confidential person, an estimate of grassums altogether speculative, and deeds after deeds taken. But I think that no claim lies against the heirs of entail; and in that view I consider Mr Orme as an innocent man, and Leslie Grant as one doing no more than justice to a benefactor. Even a minor could not have been restored against such a lease. Friend as I am of entails, I will not stretch them. The heir of entail, in this case, is not limited as to granting leases: and, in the case of *Fraser of Belladrum*, the House of Lords found a lease of 900 years good even against singular successors.

WESTHALL. The lease of the house of Fetterneer, and the gardens, cannot be supported in consistency with the decision in the case of *Greenock*. As matters now stand, the heir of Balquhain has not a cot-house on his estate, where he may reside, for fifty or sixty years to come.

HAILES. The house of Fetterneer may not, perhaps, be in good repair; yet it is the capital messuage. And if the estate fell to heirs-portioners, it would belong to the eldest without division.

BRAXFIELD. I doubt as to the tack for the fifth nineteen years: that lease is not an act of administration, but an exertion of a power of disposing of the estate, which was not in the granter.

On the 2d March 1779, "The Lords reduced the tack of the house and gardens of Fetterneer; and also the lease for the fifth nineteen years;" altering so far Lord Covington's interlocutor.

Act. R. Blair. *Alt.* D. Græme.

Diss. as to fifth nineteen years, Kaimes, Kennet, Gardenston, Covington.

1779. *February* 12, and *March* 9. MARY and JEAN RUSSELS *against* JOHN RUSSEL.

CONQUEST.

Where Conquest-lands have been sold, the *jus representationis* takes place upon the price.

[*Fac. Coll. VIII.* 147; *Dict.* 3072.]

JUSTICE-CLERK. Although it were granted that the father might have settled his estate on the eldest heir-portioner, with burdens to the other heirs, yet the present case is different; for the father has limited himself, by the marriage-contract, not to do any fact or deed to alter the course of succession. *Here* he has done more: he has settled the estate on the *second* son of a younger daughter: if this is lawful, what is the use of such clauses in marriage-contracts?

MONBODDO. Many decisions are quoted on either side; but I would determine every cause on its own circumstances. There is a distinction between the lands and the conquest, which consists of money. By heirs is meant heirs one or more. The lands, in the present case, must go to heirs-portioners; and the father cannot prefer one daughter to another. As to the conquest, there is

more difficulty: *there* the father has a power of division; but it is another question, whether he can pass over the heirs of the marriage altogether.

GARDENSTON. There is a special clause, limiting the power of the father; and therefore he cannot disappoint the heirs.

KENNET. The father has not made a settlement of any part of the estate on the heirs of the marriage; but he has bestowed it on the second son of a younger daughter.

BRAXFIELD. When the settlement is an *heir's*, the father may make a distribution: his powers are discretionary but not arbitrary. But the great difficulty *here* is, that he has settled the estate on the younger son of the younger daughter.

COVINGTON. I do not think that the clause in question prevents a distribution by the father: but here the father has given nothing to his daughters; for an alimentary provision during life is nothing in respect to an estate.

KAIMES. *Here* is an example of the bad effects of a man tying himself down by a marriage-contract: had the father been free, the distribution might have seemed reasonable; but, unhappily, he was bound, and could not do what was reasonable.

On the 12th February 1779, "The Lords found, that, by the failure of the issue-male of the marriage, the *jus crediti*, under the marriage-contract, was vested in the daughters of the marriage, as heirs-portioners and of provision, and of which it was not in the father's power to deprive them by any voluntary gratuitous deed: and found that the after-settlement, executed by William Russel, was in defraud of the obligations in the marriage-contract; and therefore reduced the same;" adhering to Lord Covington's interlocutor.

Act. W. Baillie. *Alt.* J. M'Laurin.

BRAXFIELD. Here is a special provision of lands to the heirs of the marriage, and a like provision of conquest. Part of the special provision of lands was sold by the father. This is a contravention. The value, coming in place of the lands, must go to the heirs who would have had the lands: other lands were purchased during the marriage, and afterwards sold. I think that the same is the rule as to them: as long as the marriage subsists, there is no *jus crediti*; but the period of the dissolution of the marriage is the time for ascertaining the extent of the conquest. If the father dissipates the conquest, he is liable in warrandice,—purchasers will be safe, but not gratuitous disponees. The action of damages arising from the warrandice will lie at the instance of the party who suffered the damages,—that is, the heir of the predeceasing child, as well as the child itself. The title to be made up by the heirs of conquest, in the marriage-contract, must be a service. Such a title, it is admitted, might be made up; and I do not know what other title could be made up. There is a difference between making up titles to a provision, and making up titles to a sum provided. A jury serves upon no other title but the marriage-contract: if so, it follows that the *jus representationis* must take place. If the mother must have made up titles by service, the child may. Besides, by the L. 102, *de Condit. et Demonst.* under the word *child*, used in this marriage-contract, grandchild may be understood.

COVINGTON. I agree as to the first point, which indeed exhausts the cause. A general service would have been proper as a title; but I do not think that

such general service would have carried moveables. The Roman law made no distinction between heritable and moveable; but the case is different with us. A general service cognosces heirs to be heirs, but it gives no title. It would not be sufficient to authorise the exacting of payment: confirmation or special service would be necessary to complete title.

JUSTICE-CLERK. The grounds of law laid down by Lord Braxfield are just. There is no such thing as a conveyance to heirs whatsoever, while the father is alive: if there were, the subject might be conveyed by them; but the succession cannot open to them, because the father is fiar.

On the 9th March 1779, "The Lords found that the heir of the body of Agnes, the predeceasing daughter, has a right *jure representationis.*"

Act. Ilay Campbell, J. M'Laurin. *Alt.* W. Baillie, D. Rae. Hearing in presence.

1779. *June* 18. FRANCIS BENSON, Merchant in London, Petitioner.

PROCESS.

FRANCIS BENSON set forth, in a petition, that his character, as a man and as a merchant, has been severely attacked in a case between *Mozely* and *Black*, to which he is no party: and he, therefore, craved to be allowed to reply to the aspersions thrown out.

The Lords were of opinion that he who is no party in a cause cannot be received to reply in the cause; but that, if he is *incidentally* injured, he must seek redress by an *incidental* complaint.

On the 18th June 1779, "The Lords refused the petition, reserving to the petitioner to apply by way of complaint."

Act. G. Buchan Hepburn. *Alt.* Neil Ferguson.

1779. *June* 23. JOHN WOOD of the Island of St Christopher's *against* ELLEN GRAINGER.

FOREIGN—ANNUALRENT.

A debt contracted abroad being sued for in this country, found that the interest must be restricted to 5 *per cent.* though a larger rate was allowed in the *locus contractus.*

[*Faculty Collection, VIII.* 153; *Dict.* 4532.]

COVINGTON. In the case, *Sinclair* against *Fraser*, the House of Lords found that the decreet of a foreign Court was *prima facie* evidence of its being just, reserving every challenge against it. The foreign court gave no judgment as to the *quantum* of the attorney's claim: the decree is purely in absence; the person claiming must show that the charge is reasonable. The interest must be *secundum leges loci.*

GARDENSTON. If the defender had gone to the Island of St Christopher's,