AFFLECK. From the whole circumstances of the case it appears that there is a debt subsisting.

BARJARG. The debtor must allege dereliction before the creditor can be heard to prove interruptions.

1766. *November* 19. JANET ANDERSON *against* ALEXANDER DONALDSON and OTHERS.

HERITABLE AND MOVEABLE.

A Debt being secured by Adjudication, and the subject adjudged being sold; *found*, that the interest due upon the creditor's share of the price was heritable.

On the 13th June 1766, the Lords found that the pursuer, Janet Anderson, in virtue of the decreet of this Court in 1729, is entitled to the sum of L.1000 Scots, as a part of the portion of 10,000 merks provided to her sister Elizabeth, by their father's contract of marriage, for which Elizabeth had adjudged his estate in the year 1726; and that the pursuer is entitled, in virtue of said adjudication, to insist for a decreet of maills and duties against the said tenements, for such part of the accumulated sums contained in the adjudication as shall appear to arise from the said L.1000 Scots, and interest thereof, adjudged for; and decerned in the maills and duties accordingly.

In applying this interlocutor before the Lord Pitfour, Ordinary, a new question occurred between the parties. Nicol, the husband of Janet, lived for many years after the sale of Anderson's tenements. The question was, Whether the annualrents of Janet's proportion of the price, which run during the life of Nicol, belonged to Janet herself, or to Nicol *jure mariti*. It became of moment to determine this point; for, if those annualrents should be found to fall under the *jus mariti* of Nicol, and to transmit to his heirs, the defenders offer to prove that Geddes of Scotstoun made advancements to Nicol sufficient to compensate those annualrents.

On the 7th August 1766, the Lord Pitfour, Ordinary, found that the annualrents of the pursuer's share of the price did not fall under the *jus mariti* of her husband.

The defenders reclaimed, and pleaded in manner following:—All annual profits, whether arising from land or money, whether on moveable bond or heritable security, are, with respect to bygones, considered as moveable, transmit to executors, and fall under the *jus mariti*.

The only difficulty arises from the case, *Ramsay* against *The Creditors of Clapperton*, Dict. vol. 1, p. 13, where it was found that the whole sums contained in an adjudication, principal, annualrent, &c. fall to the heir, and not to the executor. Hence the pursuer argues, that her debt was secured by adjudication; that such adjudication is not understood to be cleared by the sale, unless the purchaser has paid the price; and therefore that the annualrent of her share of the price is to be held as heritable, in the same manner as the debt itself would have been heritable had no sale happened.

To this the following answer occurs. An adjudication is an absolute trans-

ference of the property in satisfaction of the debt, with a faculty of redemption within a limited time; meanwhile the debt is understood to be extinguished, and the land comes in place of it. Hence the right of the land must go to the heir of the adjudger; the bygone rents not levied, to his executor. By a judicial sale the land is adjudged to the purchaser,—the price to the creditors: thus, as, in adjudications, the land comes in place of the debt, so, in a judicial sale, the price comes in place of the lands; and consequently the interest of the price is on the same footing with the rent of the lands. In this view, the principles laid down in the case of the Creditors of Clapperton, agree with those laid down by the defender. As bygone rents of land go to the executors of the adjudger; so also, upon a sale, ought the bygone annualrents of the price.

Although an adjudication be not purged by a sale, but remains an incumbrance upon the land until the price is paid, yet the incumbrance reaches no farther than to the share of the price allotted to the adjudger. The holder of the land, by paying that share, however small, disencumbers the land. Admitting, therefore, that this price, being a real burden, goes to heirs, and that it is upon the same footing with money heritably secured, the consequence is, that the capital must go to the heir, but the bygone annualrents to the executor; and, of course, fall under the *jus mariti*.

On the 19th November 1766, "the Lords adhered, and refused the petition."

For the Petitioner, James Ferguson.

OPINIONS.

PITFOUR. The petitioners compare an adjudication to a property in lands; whereas the decision, Creditors of Clapperton, considered it as a sale and the bygones as an eik.

AFFLECK. Here the pursuer, who competes with the petitioners, has right to a share in the adjudication itself.

1766. *November* 21. COLIN CAMPBELL of Ederline, Trustee for Angus Campbell of Dunstafnage, *against* Mrs ISOBEL M'NIEL, LILIAS and MARGARET CAMPBELLS.

FIAR.—PROVISION TO HEIRS, &c.

1. The fee of lands taken to the father in liferent, thereafter to the son in liferent, and his heirs-male; whom failing, the father's heirs in fee, found to be in the father, and, after his death, in the son.
2. How far the father can burden, in favour of the children of a second marriage, an estate settled upon the son of his first marriage by that son's marriage-contract.

[*Faculty Collection, IV. p.* 246; *Dictionary*, 4287.]

NIEL CAMPBELL of Achnard, afterwards of Dunstafnage, had, by his first marriage, a son, Angus, and a daughter.