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the brieve ; and as in special services the heir would have obtained a precept for infefting ; so by virtue of a general service he may take out any letters upon personal rights competent to the defunct. The objection to the decision betwixt Renton and the Feuars of Coldingham is nothing to the purpose ; for the precept of *clare constat* never being completed by infeftment, was of so much less authority, as it is less solemn than a service.

THE LORDS found, that the contract of marriage *in anno* 1655, can be extended to comprehend no other lands than those particularly therein enumerated, and lying within the Sheriffdom of Haddington ; and that Alexander Livington's general retour as heir of line to his father, gave him the benefit of the provision contained in the said contract, and enabled him to dispone in favour of his brother, albeit he was not infeft.

Fol. Dic. v. 2. p. 345. Forbes, p. 53. & 74.

. Fountainhall's report of this case is No 69. p. 3261, *voce* DEATHBED.

1708. December 17. SIR ROBERT HOME *against* SIR PATRICK HOME.

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A PARTY, who was both heir-male and heir of provision to his father, being served *tanquam legitimus et proximior hæres masculus et provisionis virtute contractus matrimonialis*, and having challenged a disposition granted by his father, after inhibition served on the said contract of marriage, which the other party alleged he was bound to warrant as heir-male, and representing the defunct ; the LORDS found, that his retour did not singly make him heir of provision, (upon which title he might have challenged such deeds,) but likewise general heir-male.

Fol. Dic. v. 2. p. 345. Fountainhall.

. This case is No 55. p. 12905, *voce* PROVISION to HEIRS and CHILDREN.

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One person being both heir of line and of provision, served himself heir in a subject falling to him only as heir of provision ; but, at the same time, as he was

1710. July 18. The LAIRD of AYTON *against* The LADY.

SIR JOHN AYTON of that Ilk having married to his second Lady, Dame Margaret Colvil, he gave her a large jointure and liferent, and provided her children to 40,000 merks, besides the half of the lands of Kinraigie. Mr William Ayton, his eldest son of the first marriage, finding these provisions heavy and exorbitant, he serves himself heir to his father *cum beneficio inventarii*, and raises a reduction, improbation and declarator, against his mother-in-law, and her children, for restricting the extravagant provisions made in their favours, such as the estate, with the other debts on it, was not able to bear, and as being evi-

dently in defiance of his mother's contract of marriage, providing the estate of Ayton to the eldest son to be procreated thereof; whereas, if these subsisted, there would be little or nothing left free to him, who had served inhibition against his father on the obligations contained in the first contract; and though law sustains rational deeds given by parents in second contracts, yet it will never authorise, nor countenance, exorbitant provisions, which wholly absorb and exhaust the fund, by which only the first contract can be fulfilled. *Alleged* for the Lady and her children, denying their provisions were immoderate, the value of the estate, and fortune left by her husband, being considered, yet he could quarrel none of them, because he had served himself heir of line simply to his father, and so was bound to warrant all his deeds, *et quem de evictione tenet actio eundem agentem repellit exceptio*; for by his retour produced, (which is his active title in this process,) the inquest in answer to the second head of the brieve returns him, that he is *legitimus et propinquior hæres D. Joannis Ayton patris sui*; whereas, if he had designed to have entered only as heir of provision, and of the marriage, it would have bore, that he was hæres provisionis virtute contractus matrimonialis initi inter dictum patrem et matrem suam, which this does not; and in a late case, betwixt Sir Robert Home and Sir Patrick Home, No 11. p. 14011. the Lords found a service of this kind made him simply and universally heir. *Answered*, He opposes his service, which materially is *qua* heir of provision, though that reduplication is not expressly inserted; for in the narrative it cognosces him heir of the marriage, by designing him heir procreated betwixt Sir John Ayton and Dame Magdalen Stewart, his spouse, which must regulate all the subsequent clauses. *Next*, both the characters of heir lineal and of provision, meeting in his person, he may make use of any of them; and it is a mere quibble to confine him only to be heir of line. *3tio*, His entering *cum beneficio inventarii* speaks plainly his design of quarrelling these exorbitant deeds, for otherwise he would have entered simply, as was practised before the 24th act 1695. *Replied*, His designation by his parents signifies no more than if they had mentioned his grandfather and grandmother; for it relates to no special right arising to him as heir of provision, or any succession by virtue of a contract of marriage; and though he be vested with a double character, and both concur in his person, yet he has plainly elected to enter by the simple title as lineal heir, *aditio hæreditatis* being *actus legitimus qui nec recipit diem nec conditionem*. And as to the third, his *beneficium inventarii* frees him from any representation beyond the value of the estate, but gives him no privilege to make him a creditor as heir of provision, unless he had been so retoured; besides, by the act he was bound to have registrated his inventory in the clerk's books within the year, which he has neglected to do; so his making an inventory can be of no profit to him. Ayton cited also decisions for him, as betwixt the heir-male of Livingston and Menzies, No 10. *supra*; and Janet Kennedy, Howat and Cumming, No 41. p. 6441.; and it was a rigour no civility nor law could approve, upon the misplacing of a word, to cut him off from so well founded a

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retoured simply *tantum* *legitimus et propinquior hæres*, it was found his service was as heir of line.

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Fol. Dic. v. 2. p. 345. Fountainball, v. 2. p. 588.

. Dalrymple reports this case:

1716. November 27.—SIR JOHN AYTON, by his first contract of marriage, having provided the lands and barony of Ayton in favours of the heirs-male of that marriage, Mr William Ayton, the only son of it, pursues a reduction of certain deeds done by his father in favours of his lady, and son of the second marriage, whereby the said lands and barony of Ayton will be overburdened, in prejudice of the provisions of the first contract.

It was *alleged* for the Lady, That the pursuer was served and retoured heir of line to his father, and so could not quarrel any of his father's deeds, whom he universally represents; whereupon a debate ensued, whether the pursuer was to be considered as heir of line, or heir of provision by his retour produced; on which the LORDS found, that he was heir of line, and, as such, could not quarrel any of his father's deeds. He reclaims, and *allegeth*, That his retour did not instruct him to be heir of line, but heir of provision; because being retoured heir in special to the barony and lands of Ayton, the instruction of his title to that barony was and could be no other than the charter and infestment proceeding upon the pursuer's mother's contract of marriage, which charter and contract is the very title of this pursuit; so that albeit he be designed *legitimus et propinquior hæres*, yet the *res gesta* clears that nothing was meant, but that he was *hæres virtute contractus matrimonialis*; and the LORDS are in use to interpret retours according to the true meaning of them, and not to suffer parties to take captious advantage of words, as in the case of Ferguson against Irvine, 3d January 1712, No 24. p. 5261.; and the Earl of Dalhousie against Hawley, 13th November 1712, No 13. p. 14014. In both these cases, heirs-male being also heirs of line, and serving *tanquam legitimi et propinquiores hæredes* in a subject provided to heirs-male, and the said heir so served deceasing, questions fell in about the succession betwixt the heir-male, and the heir of line of the last infest. The heir of line claimed the succession, because the last infest was retoured heir in special, *tanquam legitimus et propinquior hæres* to the former fiar; which character of the *legitimus et propinquior hæres* would not agree to the last infest; yet the LORDS preferred the heir-male of the vassal last infest, because in his person did concur both the characters of the heir of provision and the heir of line; and therefore the destination of succession, in the original infestment, was to be the rule of succession. Just so, the pursuer having both the characters of heir of line and provision, and being specially retoured, only

in the subject falling to him as heir of provision, his service must be constructed to be in that capacity.

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It was *answered*, The decisions insisted on do not concern the present question. It is very true, indeed, that where an heir-male, or heir of provision, is likewise heir of line by serving *legitimus et propinquior hæres*, in the subject falling to him as heir of provision, he hath thereby a right to the subject destinate in favours of heirs of provision; but it is as true he has right to every subject that could fall to him as heir of line, and thereby, upon his decease, the subject falling to him as heir of provision, would descend according to the destination of succession contained in the provision, and what did otherwise belong to him, and his heirs and assignees, would fall to his heirs of line, agreeably to the decisions above mentioned. But it is as certain, that he, who having both the characters in his person, and is served *tanquam legitimus et propinquior hæres*, is universally liable to all his predecessor's facts and deeds, and consequently can quarrel no deed done by his predecessor; and thus the pursuer understood his retour to give him right to heritable rights falling to him as heir of line, in as far as being served *cum beneficio inventarii*, he gave up other lands belonging to his father, wherein his father was not infeft, to which he was served.

2do, The stile of a brieve and retour, as general heir, is different from the stile of a brieve or retour as heir of provision. The first bears, that the raiser of the brieve is *legitimus et propinquior hæres* simply, and the last bears *legitimus et propinquior hæres virtute provisionis*, and then mentions the special writ whereby the succession of the subject, to which he is to be served, is provided to him.

It was *replied*, It is true, he being served heir *cum beneficio*, did afterwards insert in the inventory, a subject not falling to him as heir of provision, which was an error; but that alters not the point of law, nor affords any benefit to the defender; because the question is, whether by the service *ipso momento* he become liable as heir of line to all his father's debts and deeds, or only as heir of provision. And, if he was not *ipso facto* liable, his inserting other subjects in the inventory could afford no further benefit than that the pursuer could affect him *in valorem* of these other subjects; but could not make him become heir in any other terms than his retour did import at the time of his service.

“THE LORDS adhered to their former interlocutor, and found that the pursuer, by his service, was heir of line, and could quarrel none of his father's deeds.”

Dalrymple, No 160. p. 224.