retoured; and a father was *in terminis* decerned to secure a sum, provided in a contract of marriage, 13th February 1677, Fraser against Fraser, No 23. p. 12859.; and, lately, in a process pursued by Thomas Wylie's children against him, upon their mother's contract of marriage, the LORDS found him obliged to implement the obligements, but gave him the power of distributing and dividing it amongst his bairns, as he thought they best deserved. THE LORDS sustained process, at the grandchild's instance, to cause his grandfather resign and infeft, in the precise terms of his obligement in the contract of marriage; but would not oblige him to take it *nominatim* to the grandchild, but only in general terms, to the heirs of that marriage; so that if this grandchild should die before his grandfather, (as his father had done) the nearest of kin would not be put to require the same to be re-implemented to him, but this would accresce and serve for all. No 27.

Fol. Dic. v. 2. p. 278. Fountainhall, v. 2. p. 264.

1715. *July* 26. HUGH LYON *against* GARDEN of Laton.

No 28.
An adjudication at the instance of an heir of a marriage, found defective as without a service.

IN a process of ranking, of the children of the first and second marriages of Lyon of Balgillo, upon their respective mothers' contracts of marriage, and diligence by adjudication thereon; this question having occurred, whether both their adjudications were null, their decreets of constitution, as heirs of provision, proceeding without a service? and, in general, whether services be needful, in case of sums provided to bairns in a contract of marriage?

It was *alleged* upon the one side, That, by our law, heirs, or bairns of a marriage ought to be served before they could assign or establish a title for doing diligence, as was found in the case of Drumelzier, the Earl of Tweedale's son of the second marriage, and his brother, the Earl, 21st July 1676, where Drumelzier was bound to serve heir of the marriage *cum processu*, to found his title, No 21. p. 12587.; 2*do*, It is certain, that the ordinary and legal way of establishing a right in the person of bairns of a marriage, is by serving them heirs of provision to their father, otherwise *non constat* they were children of the marriage, or how many survived.

Answered for the other side, That there is a distinction betwixt bairns and heirs of a marriage; for bairns require no legal solemnity, but *eo ipso* that they are procreated of the marriage, they have the designation of bairns; so that Balgillo's provision being in favour of the bairns of the marriage, it is effectually transmitted to them without any service; but the title of heir is a legal character, competent properly to such only, as have established the same in their persons, by the solemnities required in law. And, as to the decision, it did not meet the present case, seeing the provision, in the contract of marriage, to which it relates, was in favours of the heirs of the marriage; 2*do*, Our law makes a distinction betwixt lands and sums of money, as to manner of trans-

No 28. mission to heirs; for rights of lands being feudal, require charter and sasine to their constitution, and so ought to have the solemnity of a service to transmit them, that it may appear who are the heirs of the investiture; whereas, personal rights being of less importance, require no such solemn deeds to constitute them, and so may be more easily transmitted, when it appears *evidentia facti*, who are the persons that have right to such provisions. And this was lately found in a case betwixt John Carnagie and Kinfaun's brother, where an adjudication, at John's instance, was sustained, as heir of the marriage *designative* without any service, to carry a provision, made in his mother's contract of marriage, to the heirs of the marriage. And Dirleton, in the 11th Question, *De feudo pecuniæ, et nominum*, gives this reason for the distinction, in chyrographario si quidem debito, cum jus personale tantum sit, et ex chyrographo evidens sit substitutum succedere, ut substitutus adeat, nulla alia formula opus est; sed ex chyrographo agendo, vel alio quovis actu, jure suo agnito, adiisse censetur. Sin debitum hyphothecarium sit, non transit ad substitutum, nisi adierit et sasitus sit super præcepto de clare constat, vel ex inquisitione.

Replied, That the case there stated by Dirleton, is wholly different from that in question; for he states it of a debtor granting bond to his creditor for a certain sum *v.g.* to Sempronius, and after his decease to Titius and his heirs; in which case he indeed makes the above-mentioned distinction between *debitum chyrographarium*, and *hypothecarium*; but the reason of that is, because Titius is substituted *nominatim*; whereas the case in question is of bairns of a marrige, who could not be *nominatim* by the contract of marriage; and it was wrong to say, that only in real rights there must be *aditio*, but not in personal ones, which is not asserted in the general by Dirleton or any lawyers; for, supposing the provisions to the original creditor or substitute were to him and his heirs, secluding executors, that right behoved certainly to be established by a service, and yet it is merely personal.

Duplied, That albeit the case mentioned by Dirleton concerns a substitute specially named, yet the question there is concerning the reason that a substitute in a personal right doth succeed to the institute, without any service or solemity to establish the right in his person; whereas, a creditor, by a real right, must be infeft by a precept of *clare constat*, or retour; his *answer* is, That a personal right being of less consequence, and requiring fewer solemnities than a real one, the substitute *censetur adiisse*, by pursuing thereupon, or doing any deed to acknowledge his right; hence it appears, that the foresaid provision in favours of the children of the marriage being personal, there is no necessity to serve them heirs; but they may summarily pursue as bairns of the marriage, for implement of their provisions. This is more easily to be admitted, when it is considered that a father being by his contract of marriage, obliged to employ a sum upon security to him and his wife, and to the heirs of the marriage, process was sustained at the instance of the apparent heir of the marriage against the father, and he decerned to employ in the terms of the obligement,

7th July 1632, Young *contra* Young, (*see* APPENDIX.); 13th February 1677, Frazer *contra* Frazer, No 23. p. 12589. Now, if the heir *designative* can pursue his father in his own lifetime, why should he not, after the father's death, effectually pursue his representatives; or if the bairn of the marriage be the person who might be heir, why may he not assign *cum effectu* his provision to a third party, in order to affect his predecessor's heritage, since the death of the father rather confirms than weakens his son's right? No 28.

Triplied, That in that case a service (*aditio*) were unnecessary and impracticable, as was found in Drummelzier's case, that in all obligements, in favour of heirs of a marriage, to be done before the father's death, as to employ sums, taking of lands to themselves, and the heirs of the marriage, &c., heirs are here understood such as might be heirs, otherwise the obligement would be elusory. But, in other cases, it has been often found, that an heir of marriage requires a service, as other heirs do.

THE LORDS found both parties' adjudications defective, in so far as neither of the decreets of constitution proceeds on a service.

Fleming for Hugh Lyon. Alt. *Sir Ja. Dalrymple.* Clerk, *Gibson.*

Bruce, v. 1. *No* 130. *p.* 171.

1742. *January.*

CAPTAIN CHARLES CAMPBELL *against* REPRESENTATIVES of His Brother ARCHIBALD.

No 29.
In what cases a service is necessary to heirs of provision in a contract of marriage?

COLONEL JAMES CAMPBELL, in his contract of marriage, became bound to secure a special sum out of the conquest during the marriage, "to himself and spouse, in conjunct fee and liferent, and to the bairns, to be procreated of the marriage in fee, which failing, to his heirs and assignees." The Colonel died without performing his obligation, leaving three sons, Archibald, Charles and John, and a daughter Mary. John, having died without claiming his share of the said provision, it was disputed among the surviving children, by what rule the subjects contained in the said provision should be divided amongst them? For Charles it was *pleaded*, That an heir of provision, in a contract of marriage, is *eo ipso* creditor, requiring no service to vest the right in him; that the *jus crediti* established in John by the said provision, must, after his death, transmit to his heir Charles, who consequently is entitled to draw John's share, over and above what belongs to himself *jure proprio*. Archibald being dead, it was *pleaded* for his Representatives, that a provision in a contract of marriage does not vest in the heir or heirs without a service, and therefore that John, who died without a service, can transmit nothing to his representatives, which must produce a tripartite division. And, to support this side of the debate, the following chain of reasoning was employed.