1759. *December* 8.

Sir WILLIAM MONCRIEFF *against* The CREDITORS of Sir THOMAS MONCRIEFF.

No 31.
Right of the heir of a marriage to challenge deeds contrary of the marriage contract, without a service.

By contract of marriage in the 1701, betwixt Thomas Moncrieff, afterwards Sir Thomas, and Margaret Smith his wife, the two estates of Moncrieff and Fordell, and 100,000 merks more, were provided by his uncle Sir Thomas Moncrieff to the said Thomas, and the heirs of the marriage.

Sir Thomas, the nephew, succeeded to these estates, but it does not appear that any part of the 100,000 merks was paid to him. He sold the estate of Fordell, and bought certain other lands, viz. Boghall, Craigie, and Magdalens.

This Sir Thomas the second, being dissatisfied with the conduct and marriage of his eldest son Thomas, made exorbitant provisions, over and above those contained in his contract of marriage, to his wife, and to his younger children; particularly, he disponed to his second son, David, the lands of Boghall, Craigie, and Magdalens, &c. and he died in 1739.

His son Sir Thomas the third expeded a general service as heir-male and of provision, in terms of the contract of marriage, to his father, and raised an action of reduction of these exorbitant provisions.

By destination he succeeded to the estate of his uncle David Moncrieff, in Jamaica; and vested it in Trustees, for the behoof of his creditors, himself, and his two sons, William and Patrick.

A few months after his father's death, Sir Thomas the third died, in 1739, without making up titles to the estate of Moncrieff.

Sir William, his son, during his pupillarity, was served heir in general to his father; and his tutors, who were the same persons who had been appointed trustees to the Jamaica estate, granted a factory to certain persons residing there to manage it.

Sir William insisted, for some time, in the reduction raised by his father, of the exorbitant provisions made by his grandfather to his younger children, to the prejudice of the heir of the marriage; but after his majority, for certain valuable considerations, he ratified and confirmed these provisions.

Thereafter, within the *quadriennium utile*, he raised a reduction of his general service, on these grounds, That it was unnecessary, and to his lesion.

It was unnecessary, because the only subjects he could have right to, as heir of the marriage, were the estates of Moncrieff and Fordell, and the 100,000 merks, or the right of action for implement of the provisions, contained in the contract of marriage, in so far as it had not been fulfilled. The land-estates of Moncrieff and Fordell could not be carried by a general service; and he succeeded to the first of these as heir to his grandfather, passing by his father, who was neither infeft nor three years in possession; the other estate (that of Fordell) was sold by Sir Thomas the second, who had powers to sell it; and supposing the price of it had been *in medio*, it could not be carried by this ser-

No 31. vice; it would have gone by confirmation to the executors of Sir Thomas the second, not to the heir; and the 100,000 merks could not be carried by it, as this subject did not exist. So that the only right he could be supposed to acquire by this service, was the right of action for implement of the contract of marriage, of which he was the heir, and to reduce deeds done in contravention thereof; but this right of reduction he had without being served heir; he, as heir of the marriage, being creditor on the contract, might insist in that reduction, without being served; his service, therefore, was quite unnecessary and inept.

It was to his lesion, as it subjected him universally to his father's debts, to which he was not otherwise liable, as he did not represent him.

His father's creditor *objected* to this reduction, *1mo*, That the service was proper and necessary to entitle Sir William to insist in the action commenced by his father, for reducing the gratuitous deeds granted by Sir Thomas the second to his lady and younger children.

By the law of Scotland, a service is necessary, both to ascertain the propinquity of the heir, and to transmit to him the heritable subjects of the defunct, whether it be a right to a certain subject, or a right of action. And this holds with regard to the heirs of provision by a contract of marriage, as well as to other heirs. So it was found in the case of Hay of Drummelzier against the Earl of Tweeddale, 21st July 1676, No 21. p. 12857. In consequence of this position, Sir Thomas the third was rightly served heir in general to Sir Thomas the second; and on this title he raised the action of reduction of the gratuitous deeds executed by Sir Thomas the second, to the prejudice of him the heir of the marriage.

If Sir Thomas the third had not expeded any such service, his son Sir William was equally obliged, as heir of the marriage, to serve himself heir, in order to entitle him to enjoy the subjects descending to the heir of the marriage, or to challenge deeds done in contravention of the contract of marriage; but after these subjects were properly vested in Sir Thomas the third by his general service, it became absolutely necessary for his son Sir William to serve heir to him, in order to transmit them from his father to him, although it should be admitted, that had Sir Thomas the third not been served, Sir William, as creditor by the contract of marriage, might have taken them up without a service; for they being once vested in the person of Sir Thomas the third, they could not be transmitted to his heir without a service.

Answered, The intention of a service is to enjoy the rights vested in the predecessor, not to challenge deeds done by him. The only purpose of either Sir Thomas the third's service, or Sir William's, was to challenge the deeds granted by Sir Thomas the second; for there remained no other rights to be carried by this service; and for this purpose a service was quite unnecessary, for the heir of the marriage was creditor to the contracting parties. As creditor, he was entitled to insist for implement of the provisions in the contract,

without a service, and to challenge, by reduction, deeds done to his prejudice. No 31.
Such processes have been often sustained to the children of a marriage without a service; January 13. 1665, Wallace *contra* Wallace, No 20. p. 12857.; December 15. 1681, Sir William Binning *contra* Sir William Maxwell, No 47. p. 12891. and July 28. 1688, Chalmers *contra* Chalmers, No 26. p. 12861.; December 7 1697, Cuming *contra* Kennedy, No 41. p. 6441.; February 3. 1732, Campbell *contra* Duncan, No 39. p. 12885. The decision of Drummelzier can be of little authority, as it proceeded on the concession of a party, Drummelzier having offered to produce a service and retour *cum processu*.

The granter of these gratuitous deeds was debtor to his son Sir Thomas the third and to Sir William, as heirs successively in the provisions in the contract of marriage. That the creditor should serve heir to his debtor is unnecessary; it was therefore improper in Sir Thomas the third or Sir William, to expede any service, in order to entitle them to carry on the reduction of the deeds granted by Sir Thomas the second, in prejudice of the heir of the marriage.

Objected, 2*do*, *Res non sunt integræ*. Sir William after being served heir in general to his father, and after his majority, discharged the action of reduction of the gratuitous deeds of his grand-father, and ratified and confirmed the said deeds. By this act of Sir William's, the creditors of his father are prejudiced. The right of reduction was competent to them; this right he has discharged, and he cannot now restore it to the creditors.

Answered, At the time of granting this confirmation and ratification, Sir William had two rights in him; the right of creditor, as heir of the marriage; 2*do*, The improper one, as being served heir to his father. In granting the ratification, he exercised the first, not the second. This appears from the deed of ratification, in no part of which is his service mentioned or founded on. Besides, these creditors are not thereby prejudiced; he only discharged his own right to reduce, not his father's; if they, as his father's creditors, have any title to reduce these gratuitous deeds, it is still competent to them.

Objected, 3*tio*, That Sir William is not lesed by this service. By the succession through his father to the Jamaica estate, he is greatly benefited more than to the extent of the debts due to these creditors.

Answered, The Jamaica estate is not within the territory of the judges of this country, and cannot be carried by service before them; 2*do*, It was vested in trustees. Sir William's father was divested of it, and it could not be carried by a service to him; 3*tio*, Sir William has not received any thing out of that estate. It was vested in trustees for the benefit of these creditors, the defenders, and for certain other purposes; he has not been benefited by his succession to it, or any other subject descending through his father.

THE LORD KAMES ORDINARY found, "That the late Sir Thomas Moncrieff, to whom the estate was provided, might, in his own right, as creditor, without the aid of a general service, challenge any deed of his father's contrary to the settlements in the marriage-contract; and that he having died without making

No 31. up proper titles to the estate, the pursuer thereupon became heir of the marriage, and had the same right to challenge that his father had; and that he had also right, without the aid of any service, to discharge his claims, or transact the same; and found, That the general service in the person of the said pursuer, was inept and unnecessary; and therefore sustained the reasons of reduction of the said service libelled; and found the said pursuer, by the general service, expede in his favour during his minority, is not subjected to or liable in payment of his father's debts; and decerned and declared accordingly; reserving to the defenders to instruct, in habile terms, that the pursuer is benefited by the succession to his father, in order to subject him in payment of his debts."

"THE LORDS adhered; and remitted to the LORD ORDINARY to hear parties, how far the pursuer is benefited, or has taken any subject by service to his father."

N. B. THE COURT was much divided on the first point. It was proposed to vary the interlocutor, and to sustain the reasons of reduction, without finding the services unnecessary or inept; but it carried by a casting vote, to adhere to the whole interlocutor. See SERVICE AND CONFIRMATION.

J. C. *Fol. Dic. v.* 4. *p.* 184. *Fac. Col. No* 202. *p.* 361.

Act. *R. Ferguson, Dundas.* Alt. *Graeme, Lockhart.* Clerk, *Gibson.*

1760. *December* 9. ASSIGNEES of JAMES FINLAYSON *against* JEAN FINLAYSON, or PORTERFIELD *against* GRAY.

No 32.

Where there is a provision in a contract of marriage of a certain sum to the husband and wife, and the longest liver in liferent, and to the heirs and bairns of the marriage in fee, is it requisite that the heir of the marriage should be served to this provision?

FRANCIS FINLAYSON, in his contract of marriage, "Became bound to employ '7500 merks to himself and his spouse, the longest liver in liferent, and to the 'heirs and bairns of the marriage in fee; which failing, to his heirs and assig-'nees whatever.' Mr Finlayson died, leaving Hugh the only child of the marriage, who, for love and favour to his cousin James Finlayson, settled upon him whatever estate heritable or moveable he should be master of at his death; and particularly, whatever he had right to by the decease of Francis Finlayson his father. The Assignees of James Finlayson insisted to be preferred upon the effects of Francis Finlayson, to the extent of the said 7500 merks provided by him in his contract of marriage, as above mentioned. Their competitor was Jean Finlayson, who, as next in kin to her uncle Francis, had obtained licence to pursue. For the Assignees it was *pleaded*, That Hugh Finlayson, the only child of the marriage, was not by the marriage articles a substitute, but creditor, as if the father had become simply bound to pay the sum to him. And in support of this proposition, the decision Campbell *contra* Duncan, *anno* 1732, No 39. p. 12885, was appealed to.

On the other had, it was *pleaded* for the Executrix, That in obligations like the present to provide a certain sum to the husband and wife, and to the bairns