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.

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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

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of the marriage, the husband is in reality both debtor and creditor. He is debtor in the obligation; and he is also creditor, seeing the obligation is to be performed to him in the first place, and in the next place to the bairns of the marriage as his representatives, liable as heirs of provision to pay his debts: Therefore after the father's death, the children cannot demand implement but *qua* heirs of provision, a character that requires a service. Had the money been lent out in terms of the obligation, it must be admitted that the children could not have demanded payment without a service as heirs of provision. And it would be incongruous that the father's retaining the money in his own hand should convert his children into pure creditors, entitled to demand payment without representing their father or being liable for his debts. To illustrate this doctrine, the supposition was made, that the father of Francis had become bound to lay out the 7500 merks upon good security to Francis and his wife, and to the children of the marriage. Here Francis is plainly creditor, and his children only heirs. The present case is the same, except that Francis Finlayson happens to be both obligee and obligant, which cannot affect the present point.

Upon the whole it was *contended*, That as Hugh died in apparency, without making up titles, his settlement for love and favour could not be effectual in law.

This settlement, however, was sustained, and the Assignees were found preferrable. Probably what prevailed on the plurality was the erroneous decision Campbell *contra* Duncan.

Fol. Dic. v. 4. *p.* 184. *Sel. Dec. No* 171. *p.* 232.

*** This case is reported in the Faculty Collection.

MR FRANCIS FINLAYSON, minister at Kilmarnock, in his contract of marriage with Margaret Hunter, in 1703, bound himself to lay out and employ 5000 merks of his own, together with 2500 merks of tocher paid him with his wife, and to take the securities to himself and his spouse, and the longest liver of them two in liferent, and to the heirs or bairns of the marriage in fee; and to provide the one half of the conquest of the marriage to his spouse in liferent, and the whole of that conquest to the heirs and bairns of the marriage in fee.

In 1707, Mr Finlayson took from Crawford of Crawfordland two bonds, the one for 3500 merks, the other for 1000 merks, to himself and his spouse, and longest liver of them two in liferent, and to himself, his heirs, executors, or assignees, in fee.

Soon after the date of these bonds, Mr Finlayson died, leaving only one child of the marriage. His widow lived till the year 1757, and liferented these bonds. Hugh Finlayson, the only child of the marriage, died in 1754, without making up any titles to his father. About six months before his death, he

No 32. had executed a disposition in favour of James Finlayson, writer in Edinbrugh, his cousin, whereby he conveyed to him particularly, all subjects, heritable and moveable, ' then pertaining and resting, or which should be pertaining and resting to him at his death, and to which he may succeed and have right by and through the decease of Mr Francis Finlayson, his father.' By another deed of the same date, he appointed the said James Finlayson his executor and universal legatar.

In 1755, James Finlayson conveyed to John Gray and others, as trustees for certain purposes, all subjects, heritable and moveable, then pertaining to him, or which should pertain to him at the time of his death; ' and particularly the whole debts and subjects to which he had right by the disposition in his favour by the said Hugh Finlayson.' Of the same date, he appointed the said trustees, his executors and universal legatars.

Upon the death of Margaret Hunter, the widow of Mr Francis Finlayson, the trustees confirmed themselves executors to James Finlayson, and gave up in inventory, the two bonds due by Crawfordland.

Mrs Porterfield procured herself decerned executrix, *qua* nearest of kin to Mr Francis Finlayson, obtained a licence to pursue, and brought a process before the Court of Session against Crawfordland, for payment of the two bonds above mentioned. Mr Crawford brought a process of multiplepoinding, and the parties appeared to dispute their preference.

The question upon which the decision of the cause depended, was, whether Hugh Finlayson, the creditor in the obligation in his father Francis's contract of marriage, could sue for implement of that obligation, or transmit the *jus crediti* to his representatives or assigness, without a service as heir of provision to his father.

Pleaded for the Trustees, It is an established point in the law of Scotland, That obligations and provisions made in contracts of marriage, in favour of children of the marriage, constituted such children creditors in the obligation and provision, so as to entitle them to challenge and reduce gratuitous or fraudulent deeds made by the father, to the prejudice of these provisions. This is so firmly established, that the children can pursue their father for implement during his life; 13th February 1677, Fraser *contra* Fraser, No 23. p. 12859.; March 1684, Paton *contra* Irvine, No 24. p. 12860.; 31st January 1705, Cairns *contra* Cairns, No 27. p. 12862. It is evident, therefore, that children in such cases, are just and proper creditors, and are not to be considered as heirs of provision, as it would be absurd to suppose an heir during the life of his ancestor. Stair, B. 3. T. 5. § 19.

If the father has implemented the obligation in his contract of marriage, by laying out the sum stipulated, and taking the securities as therein directed, the obligation is fulfilled, and the *jus crediti* that was in the children is satisfied. In such a case, the children must serve themselves heirs of provision, because there is a special subject in which the succession is destined to them; and which,

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as in the case of other successions, may be taken up by a service. But if the father did not implement the obligation, by making specific provisions in terms thereof, there being no special subject in which the children could succeed as heirs of provision, nothing remained to them but the *jus crediti* constituted by the contract of marriage. As creditors in the obligation, therefore, they could only have an action against their father's Representatives, to implement his obligation, by payment of the provision stipulated. As the children were creditors in such obligation, even during their father's lifetime, the right which was vested in them from their birth, must transmit to their Representatives or singular successors, without the necessity of a service; 13th January 1665, Wallace *contra* Wallace, No 20. p. 12857.; 28th July 1688 Chalmers *contra* Chalmers, No 26. p. 12861.

As this *jus crediti* is vested in the children without a service, it must follow, that no service is requisite to empower them to transmit their right to their heirs or singular successors; and so it has been often decided, 7th December 1697, Cuming *contra* Kennedy, No 41. p. 6441.; 3d February 1732, Campbell *contra* Duncan, No 39. p. 12885.

Agreeably to these principles and decisions, as the *jus crediti* of the obligation incumbent upon Francis Finlayson the father, was fully established without a service, in the person of Hugh Finlayson, the only child of the marriage; the trustees, his assignees, have right to demand implement of that obligation from Mr Francis, his heirs or executors, and consequently they must be preferred to Mrs Porterfield, who claims as his executor.

Answered for Mrs Porterfield, Where a subject is provided by a contract of marriage to the father in liferent, and to the heirs or bairns of the marriage in fee, the father is still considered as the fiar, and the children can only succeed to him as heirs of provision, Stair, b. 3. tit. 5. § 50.; Dirleton, tit. Fee, Quest. 1.; and Sir James Stewart's answer. Thus it has been decided in the following cases; 9th July 1630, Veitch *contra* Robinson, No 48. p. 4256.; 10th February 1672, Wemyss *contra* Macintosh, No 50. p. 4257.; 4th February 1681, Thomson *contra* Lawsons, No 51. p. 4258.; 25th November 1735, Children of Frog *contra* His Creditors, No 55. p. 4262. It is evident, therefore, that the fee of the provision in the contract in question, was in Mr Francis Finlayson, and was liable to be affected by his debts.

This being established, it is certain, that wherever a fee belongs to a man at the time of his decease, descendible to his heirs, the rule of law is, that the heirs must take by service. From this rule there are only two exceptions, *nominatim* substitutes in bonds, and heirs who succeed in tacks. It is also certain, that when any particular subjects, whether lands, tenements, annualrents, or sums of money, are vested in the person of a man during his life, under a destination to heirs of a marriage, these heirs cannot take without a service.

The only remaining question is, Whether an obligation to provide a sum or subject in the above terms, must require the same title, as if the sum or sub-

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ject was actually vested? The analogy of law requires that it should be so, and the general current of decisions confirms it. Suppose a proprietor executes a tailzie of his estate in favour of himself, and the heir of a second marriage; if the deed contains procuratory and precept, the heir cannot execute them, without serving himself heir of provision. If there is no procuratory or precept, a service is still necessary. The heir of line cannot be obliged to dispone the lands to the heir of entail, nor can he take such a disposition without a service, because the entail is not conceived directly in his favour, but under a substitution, and it is necessary that he should demonstrate by a service, that he has the right by this substitution. The only thing that has given occasion to any dispute upon this head, is, that it may sometimes happen, that an action may be necessary to the heir of the marriage, where a service is impossible, because the father is alive; and from thence it is argued, that an action is also competent to the heir after his father's death, and that he may also transmit his right without a service. An heir may, indeed, pursue his father during his life, not to give him the subject, but to secure it in terms of the contract; but when the father dies, a service is still necessary before the heir can take the subject which has thus been vested in his father; 21st July 1676, Hay of Drummelzier *contra* The Earl of Tweeddale, No 21. p. 12857.; February 1682, Sir John Clerk of Pennycuik *contra* His Sisters and Mr David Forbes, No 3. p. 6330.; 28th November 1684, Irvine *contra* M'Ittrick, No 7. p. 12843.; 26th July 1715, Lyon *contra* Garden of Laton, No 28. p. 12863.; 27th December 1716, and 23d January 1717, M'Intosh *contra* Laird of Aberarder, No 36. p. 12881.

This doctrine appears to be contradicted by the decision, Campbell against Duncan, No 39. p. 12835.; this decision, however, when strictly examined, will appear to be contrary to all the principles of law that have been hitherto established; and as the subject in controversy was but trifling, the objection to the title met with less attention than otherwise it would have done.

Replied for the Trustees, A service is indeed necessary, when any particular subject is vested in the father's person, but when no sum, nor any subject whatever, is laid out in terms of the contract of marriage, there is nothing in which the heir can be served. Nothing remains to the children but their *jus crediti*, which they must make good by an action.

THE LORDS preferred the disponees to Jean Finlayson, the executrix of Mr. Francis Finlayson.

Reporter, *Justice-Clerk.* For the Trustees, *A. Pringle.*
Alt. *Miller* and *Ferguson.* Clerk, *Home.*

P. M. *Fac. Col. No 255. p. 468.*