1730.

MOODIE
v.
STEWART.

ELIZABETH MOODIE, Spinster, a Pauper, - - - - - - - - } *Appellant;*
JOHN STEWART of Burgh, *Respondent.*

6th February, 1730.

PROVISION TO HEIRS AND CHILDREN.—The heir under a marriage contract may, during his father's lifetime, renounce for himself and his successors all claims under the contract.

IDIOTRY.—In a reduction of a deed *ex capite furoris*, after the death of the granter, a general allegation of idiotry not relevant.

No. 6.
1638.

ROBERT, the son of Edward Stewart of Burgh, intermarried with Barbara, the daughter of Hugh Halcrow. By the marriage settlement, Edward Stewart, on the one hand, became bound to convey his lands of Burgh and others, in favour of his son Robert and the heirs of the marriage; and on the other part, Hugh Halcrow conveyed his lands of Cletts, &c. to the said Edward Stewart, who again conveyed them in favour of his son Robert, and the heirs of the marriage. Of this marriage there were born two sons,—Edward, who died young, and Robert,—and one daughter. Robert, the father,
1661. having survived his wife, entered into a second marriage, by the articles of which he settled all the above lands on the heirs to be procreated of the marriage. By this second wife he had issue three sons, of whom John (the respondent) was the eldest.

Robert, the father, by successive dispositions conveyed the whole lands in favour of his son John, and the last of these dispositions recites, as the consideration of it, that John had undertaken to pay all the granter's debts, and the portions which he had appointed for his other children.

Of this date, Robert, the father, with concurrence of John, conveyed the lands of Burgh in favour of his son Robert, in consideration of which, the latter executed a deed of renunciation, (which narrates this grant,) whereby he renounces all claim whatever competent to him under his mother's contract of marriage. February 1687.

In 1691, an agreement was entered into between Robert, the son, and John, whereby, upon John's granting a bond for an annuity to him and his wife of 300 merks per annum, and for a sum of 4000 merks to him and his wife in liferent, and their son in fee, he conveyed to John the said lands of Burgh. Robert the son enjoyed this annuity until his death, when he left the bond for 4000 merks to his son Robert. 1691.

This Robert (the grandson) assigned the bond for 4000 merks to Elizabeth Moodie, (the appellant,) who had been at the expense of his maintenance and education, and likewise executed in her favour a farther bond for L.60,000 Scots, upon which she obtained a decree of adjudication. Founding upon this title to pursue, she instituted an action of reduction for setting aside John's title as null and void, being at variance with the provisions of the foresaid contract of marriage. A second ground of reduction was, that the renunciation had been

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obtained by fraud and circumvention, the granter being *non compos mentis* at the time of signing it.

John produced as his title the several conveyances by his father in his favour, and likewise the agreement 1691, and the discharge and renunciation 1687, above mentioned.

It was pleaded for Elizabeth Moodie;—although Robert, the son of the first marriage, was heir presumptive of that marriage, yet in reality he had no right in him. During his father's lifetime, he had no more than an expectancy, which he could not sell or dispose of in prejudice of his successors; and he having died without serving heir, or making up any title to the lands, he never acquired the power either to convey or renounce his right, and his son Robert became the heir of the marriage to whom the provisions were made. The pursuer, therefore, having by her adjudication carried all right that was in him, had good title to insist that the renunciation, (granted by one, who, in his father's lifetime, could not possibly be his heir,) had no effect to bar the action of the subsequent heir, who had legally completed his titles.

Answered for John,—1. Robert being the only son of the marriage, *constitit certissime de persona*, that he was the person for whom provision was made under the marriage contract, and there could be no reason to hinder him from accepting present satisfaction in lieu of that provision. In consideration of that satisfaction, he might make what agreement he chose, and might renounce and discharge for himself and his issue who were not then in existence. If it were not so, then the heir

of a marriage could never, during his father's lifetime, make any bargain or arrangement for his present advantage.

2. Robert, the father, continued full fiar of the estate, notwithstanding the marriage contract, and he might burden or convey the lands. If the conveyance was gratuitous the son might challenge it. This was a right which the son had in him, even during his father's lifetime, and which he might renounce to the effect of validating his father's deed. Death-bed deeds may thus be made unchallengeable even during the granter's lifetime.

The pursuer (in a duply) offered to prove that Robert was a person furious and fatuous, and that he was circumvented when he granted the deed of renunciation.

The Lord Ordinary, of this date, pronounced June 11, 1726. the following interlocutor: "Repels the objections "against the writs produced, founded upon the "first contract of marriage, in respect of the reply, "and the discharge and renunciation by the heir "of that marriage also produced; and therefore "finds the writs produced by the defender sufficient to exclude; and makes *avisandum* therewith; but refuses to grant certification, without "prejudice to the pursuer to insist upon her further "reasons of reduction and duply, that the granter "of the said renunciation was a weak man, and "the discharge and renunciation was unduly elicited from him, or that he was fraudulently imposed "upon in the granting thereof, or that he was "furious, fatuous, or under other natural incapacities for granting of the deed."

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This interlocutor, being brought before the whole Court upon a petition and answer, was, of this date, adhered to; and a second reclaiming petition was refused without answers.

July 8, 1726.
July 24, 1726.

On the other ground of reduction, the Lord Ordinary allowed "the pursuer before answer to "prove *prout de jure* that Robert Stewart, the "granter of the said discharge and renunciation "founded on by the defender, was a weak man, "and that the discharge and renunciation was "unduly elicited from him, or that he was fraudu-"lently imposed on in the granting thereof, or "that he was furious, fatuous, or under other men-"tal incapacity for granting of the said deed, and "assigns the first of June next to the pursuer's "procurators for proving thereof, and grants dili-"gence."

February 21, 1727.

Against this interlocutor John petitioned, on the grounds, *first*, That even if it were true that the granter had been circumvented, his repeated homologation of the deed was proved by regular receipts for the annuity which were produced; and *second*, As to the furiosity, that it was not competent to plead it at a period so long after the granter's death; but at any rate, that the pursuer must particularise the circumstances from which the furiosity is inferred, and must also state that the granter was under the influence of the disorder, not only when he executed the deed, but likewise at the time of each subsequent act of homologation.

June 10, 1727.

The Court, of this date, "Find the general al-"legation of furiosity as proposed by the pursuer "not relevant, and ordain her to give in a parti-

" cular condescendence of the facts from which " she would infer the same, of the time and con- " tinuance of the furiosity, and the manner of " proof."

A reclaiming petition against this interlocutor was refused, and, of this date, the Court pronounced their final judgment on the whole cause assoilzieing the defender. January 17, 1728.

The appeal was brought from " several interlo- " cutors, of 11th June, 8th and 24th July, 1726; " 10th June, 18th day of July, 1727, and 17th Ja- " nuary, 1728, made on the behalf of John Stewart; " and praying that the same may be reversed, and " that the interlocutor of the Lord Ordinary 21st " February last may be affirmed." Entered February 9, 1728. Amended February 28.

The arguments in the House of Lords were the same as those of which a summary has been given above.

After hearing counsel, " it is ordered and ad- " judged, &c. that the appeal be dismissed, and that " the several interlocutors therein complained of " be, and are hereby affirmed." Judgment February 6, 1730.

For Appellant, *P. Yorke* and *Will. Hamilton.*
For Respondent, *Dun. Forbes* and *C. Talbot.*

It cannot be gathered with certainty from the appeal papers whether or not Robert survived his father. As this is an important point, and was inquired into with much anxiety in deciding the case of Routledge *v.* Carruthers, (May 19, 1812, Fac. Col. Dow, IV.) it may be remarked that several circumstances support the belief that the father predeceased. In particular, it is mentioned by the respondent, that " he " had enjoyed all his father's estate, except the lands of Burgh, for " more than 40 years; and the lands of Burgh he has possessed with- " out molestation from the year 1691." Now it is clear that John had not taken immediate possession in virtue of the conveyances by his father in his favour, because his father, in 1687, disponcs part of

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the lands with his concurrence. This is the last transaction in which the father is stated to have borne a part; so that it is probable his death happened soon after, which would be above forty years prior to the date of the appeal paper. In 1691, his son John is found transacting for the first time *alone* with Robert, who was then in possession of the lands of Burgh, settled on him by his father.

It is also founded upon in the argument, that Robert had died without serving heir to his father, which statement almost necessarily implies the fact that the son had survived.

This presumption is further supported by the probable age of the father, the marriage having taken place in January 1638, while the son lived, at least until 1700. There is some uncertainty as to the precise period of his death. In the appellant's case, it is said, that "Robert the son died in 1700;" whereas, in the respondent's case, he is said to have "received annually for *thirteen* years his annuity," which had been settled on him in 1691, according to which statement, he must have survived till 1704.

GEORGE SMOLLETT, Provost, *et alii*, Magistrates of Dumbarton, - } *Appellants;*

WILLIAM BUNTEIN, *et alii*, Burgesses of Dumbarton, - - - } *Respondents.*

19*th February*, 1730.

BURGH ROYAL.—DESUETUDE.—ELECTION.—The acts 1503, c. 80, 1535, c. 26, and 1609, c. 8, which disable persons not being actual traders and residenters within the burgh from being elected Magistrates, found to be in desuetude.

A councillor having been imprisoned on the eve of the election in virtue of a warrant obtained upon information of the adverse party—found not sufficient to avoid the election, there being such a number in favour of it as would have formed a majority notwithstanding he had been present.

No. 7. ON the eve of the election of the Magistrates for the burgh of Dumbarton, one of the councillors, named Porterfield, being forcibly carried off, and