1742. *February* 10. CAPTAIN CAMPBELL *against* ELIZABETH and JEAN CAMPBELL.

[*Rem. Dec.* No. 25.]

THIS cause I have before taken notice of, December 1, 1738; and the subject of the present question, as well as the question then, was the obligation in Colonel Campbell's contract of marriage, to provide 30,000 merks, and the conquest during the marriage to himself and wife in conjunct fee, and liferent, and to the bairns of the marriage in fee. This provision the Colonel never implemented, and all his estate, at the time of his death, stood in the person of him and his heirs whatsomever. The Lords, in the former case above-mentioned, found that the father not having exercised his power of division, the whole subjects of which he died possessed divided equally among the children of the marriage; and the question now is about the share of one of the younger sons, who died after his father, whether it accresced equally to all the rest of the children, or went to his heir of line, the immediate elder brother?

It was argued for the other children, That the child deceasing could transmit nothing to his heir, having died in a state of apparency, without making up his titles as heir of provision to his father.

ANSWERED for the heir,—That as the provision in the contract was not implemented, but remained in the terms of an obligation, the children have a *jus crediti* in them, which they transmit to their heirs; and not only the children have no occasion for a service, but there is really no possibility of a service, because there is no subject in which they could be served, and a service here would be as absurd as if a creditor in a bond should serve heir to his debtor.

REPLIED,—1*mo*, That, as the father was the first institute in the provision of the contract of marriage, he may be considered as having a *jus crediti* in his person, which may and ought to be taken up by service, and though the children are so far creditors, that they can bring an action against the father to implement, without being served, yet they cannot enjoy the subject, or transmit it to their heirs, without a service. 2*do*, A service is necessary to ascertain the death of the father, and that they are the children of the marriage. 3*tio*, There are many decisions finding a service necessary.

DUPLIED for the heir,—1*mo*, That if the father is creditor by the provision in the contract, it must be to himself, which is not easily conceived. 2*do*, It is not the only design of a service to ascertain the death of the predecessor, and that the purchaser of the brief is his nearest heir; but likewise to vest some subject in the heir, which was before in the defunct: in the case of an obligation, in a contract of marriage, to pay certain provisions to the younger children at the first term after the father's death, there would be the same reasons for a service, which, however, would be inept and absurd. 3*tio*, There are a great many decisions on both sides, but both the oldest and newest are on the side of the heir.

This cause was not determined by reason of the death of Captain Campbell; but the Lords had much reasoning upon it. Arniston and Elchies were both for the whole children, but upon different principles. Elchies thought a service necessary; as to which Arniston was very doubtful, but he thought that the subject being provided to the children conjunctly, if they all concur, then *partes concursu faciunt*,—if one fails then the rest take his portion *jure non decrescendi; veluti si res duobus conjunctim legata sit, uno defuncto, alter, jure non decrescendi, capit ejus portionem.*

1742. *June* 22. ANNE MOSMAN *against* ROBERT CARMICHAEL.

[Kilk., No. 3, *Competition*; C. Home, No. 197.]

IN this case there were several questions; 1*mo*, Whether an arrestment of a debt due by the Bank of Scotland could be used in the hands of the treasurer? The Lords found it might, in respect the treasurer was mentioned in the obligation, and payments were made to and by him.

2*do*, Whether, upon an arrestment laid on during the life of the principal debtor, a decreet of forthcoming could be obtained after his death. It was argued that an arrestment was but an inchoate diligence, which fell by the death of the principal debtor, in the same manner as a process of adjudication, begun against a debtor, cannot be transferred against his heir if he should die during the dependence, but must be begun *de novo* against the heir; that an arrestment certainly did not take the subject *ex bonis defuncti*, as was evident from a posterior poinding being preferable; therefore the subject, being *in bonis defuncti*, at the time of his death, could not be carried by an arrestment but by a confirmation *qua* executor-creditor; and for this there was an express decision observed by Dirleton, 6*th December* 1666, *Leslie* against *Bayne*. The Lords found, that the forthcoming might be pursued after the death of the principal debtor; in respect that arrestment attached the subject, and the decisions since the 1666 had run otherwise.

3*tio*, A creditor, having arrested a debt due to his debtor, pursued a forthcoming after his death; compeared, another creditor, who had confirmed the same debt as executor-creditor, and claimed to be preferred, as having used the first complete diligence. The Lords preferred the executor-creditor without a division, though the contrary has been more than once found. See Dict., Vol. I., p. 179 and 180.

N.B. It was not alleged here that the arrester was *in mora*.

4*to*, One Hardie, being creditor to Colin Mackenzie by bill, did assign that debt to the bank in security of a debt which he owed the bank, and the assignation contained this provision, "That, in case the bank should receive more than was due to them, they should be accountable to Mr Hardie." The ques-