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.

No 29. It was premised, that an obligation to pay certain sums to children of a marriage, at a certain age, or at marriage, must be distinguished from an obligation to settle a subject, whether land or money, upon the husband and wife, in conjunct fee and liferent, and upon their children in fee. In the former case, the children are creditors and fiars of the stipulated sums, and therefore a service is no more necessary, than where a bond of borrowed money is granted to them.

The other case, which is that under consideration, is more intricate; and to clear it, the condition of the children shall first be considered, and next, that of the father. The children acquire several powers or faculties by such a settlement; 1*mo*, They have a faculty to compel their father, or whoever is the obligant, to secure the sum in terms of the contract, and this faculty they have even during the father's life; 2*do*, After the money is secured, whether upon land, or by the bond of a responsal debtor, the children are entitled to challenge every alteration or alienation made by the father, contrary to the *bona fides* of the contract; 3*tio*, Supposing no contravention, the children, as heirs of provision, are entitled to succeed, and to enjoy the subject.

The two first faculties mentioned, are no more than what belong to every heir of entail, immediate or remote, in order to preserve the subject entailed for their use. And it is with regard to these faculties, that heirs of a marriage, or of provision, are understood to be creditors, Stair, Tit. HEIRS, § 19. These faculties they can exercise without a service; for the action is competent to the immediate substitute, during his father's life, when he cannot be served, and is also competent to a remoter substitute, who possibly may never succeed. But then, it must be observed, that privileges of this sort, which do not suppose the fee or property to be in the pursuer, are no other than personal faculties or powers, which, not being derived from any predecessor, require not a service: each substitute in the settlement has, by the entail, a title to oblige the obligant to fulfil, and also can challenge any deed done against the settlement; and he must, consequently, have an action to make good his claim. If this needs any explanation, it will be evident by a familiar example. An heir-apparent is entitled to reduce deeds done by his predecessor upon death-bed. This is no *jus crediti* nor fee, in the heir-apparent, derived from an ancestor; it is a personal privilege, which belongs to him in his own right; and, if he die without exercising this privilege, it dies with him. The like action is indeed competent, at the instance of the next heir-apparent; but it is competent to him in his own right, not as deriving right from the deceased heir-apparent, the rule in law being, that a proprietor, upon death-bed, cannot hurt any of the substitutes in his estate, whether immediate or remote.

As to the last-mentioned power, or faculty competent to the children, which is, to succeed to their father, as heirs of provision, it must be evident, supposing the sum secured to be existing, that they cannot make that power or faculty effectual, otherwise than by a service. The only question is, supposing no performance of the obligation during the obligant's life, whether they can insist

against his heirs of line, to pay the sums to them directly as creditors, without the intervention of a service? To handle this point with precision, two different cases must be stated. It happens commonly in contracts of marriage, that the husband's father, if he be alive, and hold the estate, becomes bound to provide a certain subject, money or land, to his son the husband, and the son's wife, in conjunct fee and liferent, and to the heirs or children of the marriage in fee. In this case, the husband is the institute or creditor in the obligation, and therefore, whatever action the children of the marriage may have to force performance in their own right, they never can enjoy, nor hold the subject, but in the right of their father, the institute or creditor. He was entitled to enjoy the subject, in the first place, and they only as deriving right from him. Supposing next the husband himself to be obligant, he, in that case, supports two different characters; he is debtor or obligant; he is, at the same time, creditor or institute in the entail; and, therefore, though the children, in their own right, may have an action against him *qua* debtor, to perform his engagement; yet, as they are but substitutes, they cannot hold or enjoy the subject, but as deriving right from their father, *qua* institute, and consequently a service is necessary. No 29.

And thus the question is in effect answered. If the subject be secured, in terms of the contract, it is agreed, that a service is necesssary: The same must obtain, though the subject be not secured. The children, in this case, have two separate faculties to be separately exerced: They have an action to force performance, which they have in their own right without a service; but then, as the father's representatives are not bound to make payment directly to them *qua* creditors, but substitutes to their father, they must be served as heirs of provision, in order to have the subject established in them, as much as they would be bound to do if the subject had been secured during the father's life.

The fallacy of the argument urged against the necessity of a service, will now plainly appear. "It is admitted, that a service is necessary when the sum or subject is actually secured in terms of the contract of marriage; but that, while the obligation stands unperformed, the bairns are creditors; that, when the action is pursued against the father, it can have no other effect than to oblige him to perform, that is, to secure the subject, in terms of the contract, to himself in fee, and to the children; but that, when the action is laid against his representatives, it resolves into an action for payment, because the father's fee dies with him, whereby the bairns of the marriage fall into the full right. This is the very reasoning upon which the Lords, 3d February 1732, Campbell *contra* Duncan, No 39, p. 12885. in a case similar to the present, sustained process for payment, at the instance of an assignee of an only child of the marriage, after the child's death, and found no necessity for a service." This reasoning is obviously inconclusive. It is true, that the father's fee dies with him, and the bairns of the marriage fall into the full right; but how do they fall into the full right? Here lies the fallacy. They do not fall into the full right as fiars or proprietors: They fall into it as any other heir does after his predecessor's

No 29. death; that is, they have access to make up their right to the subject by a service, and thereby to establish a fee or property in themselves.

The death of Charles Campbell prevented the determination of this point; and the controverted matters were afterwards finished by a transaction. However, the Court will probably hereafter find a service necessary, as they have hitherto done, except in the single case of Campbell against Duncan.

Rem. Dec. v. 2. No 25. p. 39.

1747. *November 16.* ANDERSON *against* The HEIRS of SHIELLS.

No 30.
Though action for implement lies to an heir of provision, without a service, yet without a service the right does not transmit.

ANDREW SHIELLS having a son and two daughters of a first marriage, entered into a second marriage with Margaret Syme; and by his contract of marriage with her, became bound to employ 2000 merks on land, or other security, in favour of himself and heir, and longest liver in conjunct fee and liferent, and of the heirs, whatsoever, to be procreated of the marriage, which failing, in favour of the said Andrew Shiells, his own nearest heirs and assignees in fee; and to provide the half of the conquest in the same terms.

Of this marriage there was procreated one daughter, Jean; and Andrew Shiells, by his testament, appointed Thomas, his son, of the first marriage, to be his sole executor and universal legatary, under certain burdens, whereof one was payment to Jean of the special sum of 2000 merks, provided to the issue of the second marriage, but made no mention of the conquest.

Thomas dying soon thereafter, appointed his own three daughters, Janet, Elizabeth, and Margaret, his sole executors, and intromitters with his goods and gear, with the burden of the 2000 merks above-mentioned. Jean, the heir of the second marriage, survived her father and brother, and died without making up titles to the provision in her mother's contract of marriage; and Agnes, one of her two sisters *consanguinean*, having confirmed executor to her, and conveyed her right to William Anderson, he brought a process against the daughters of Thomas Shiells, as representing both their father and grandfather, to make good to him his cedent's half of the special sum and conquest provided to Jean, the only issue of the second marriage.

As to the special sum, there was no question, in respect the same was vested in Jean, the heir of the second marriage, by the testament of Andrew her father. But, as to the provision of conquest, the ORDINARY found, "That, by the death of Jean, the only daughter of the second marriage of Andrew Shiells, without issue, or her claiming implement of, or conveying the provision of conquest in favour of the heirs whatsoever of that marriage, the provision of conquest was extinguished."

And the LORDS "adhered."

THE LORDS considered, that in all cases of this kind, where a provision is made to the heir of a second marriage, who exists and dies without making up