

10 PROVISION TO HEIRS AND CHILDREN. [APPENDIX, PART I.]

No. 4.

In the cases founded on by the pursuer, the entails were unreasonable.

The Lord Ordinary reported the cause on Informations.

The Court were clear, that, in the circumstances of the case, the previous conveyance to the son did not weaken his *jus crediti* under the contract; and as to the father's power of entailing, the Lords, waving the decision of the general point, were of opinion, that the entails complained of were ineffectual against the heir of the marriage.

'In respect of the special circumstances of the case, the Lords sustained the reasons of reduction of the whole deeds libelled.'

Lord Ordinary, *Duninann.*  
Clerk, *Menzies.*

Act. *Cha. Hay.*

Alt. *D. Cathcart.*

*D. D.*

*Fac. Coll. No. 215. p. 487.*

1806. *January 21.* CHRISTIE and Others, *against* DUNN and Others.

No. 5.

Whether provisions to heirs and children vest without service or confirmation, to the effect of transmission?

ARCHIBALD ROBERTON, in his contract of marriage with Isobel Harvie, became bound to provide the whole property which he then had, and all that he might afterward acquire during the subsistence of the marriage, to himself and his wife in liferent, and to the children of the marriage, in fee. There were two sons, who both survived their mother; and, in 1793, Robertson executed an assignation *mortis causá*, distributing his effects between them. The younger died before his father, whose death happened in February 1800, and the elder died in Jamaica, in the month of November of that year; having, in August preceding, executed a settlement, bequeathing his whole property to his cousin John Harvie Christie, Esq. advocate, and certain other persons, whom he named his executors. In this will; no notice was taken of his father's death, or of any claim which he had upon his father's succession.

Mr. Harvie Christie took out a confirmation before the Commissaries of Edinburgh, under the son's testament, and afterward he executed another confirmation before the Commissary of Glasgow, with the view of taking up the son's right under the assignation by the father in 1793.

James Dunn, and the other nearest of kin to Archibald Robertson, applied for a confirmation of his effects in that character.

A process of multiplepointing was brought by the person in whose hands the property of the deceased was lodged, in which compearance was made for the executors of the son and the nearest of kin of the father.

The Lord Ordinary pronounced the following interlocutor: ' Finds, That in virtue of the marriage-contract between the said Archibald Robertson *senior*, and Isobel Harvie, bearing date the 6th day of December 1763, the provisions therein contained in favour of the children of the marriage came to be vested

‘ in Archibald Robertson *junior*, as only surviving child of the marriage after the death of his father and mother, so that he as creditor had right to the said provisions, without the necessity of any confirmation; and having such right, did effectually convey the same by his settlement in favour of the said John Harvie Christie, to the sums in the hands of the raisers of the multiple-poiding; and decerns in the preference, and for payment accordingly.’

No. 5.

Against this interlocutor, James Dunn, and the other nearest of kin of Robertson *senior*, presented a petition, and

Pleaded: When a subject is taken to a father in liferent, and to a child in fee, it can only be taken up by the latter by a service as heir. His case resembles that of the substitute of an entail, which contains merely a prohibition to alter the succession, who, although he may during the life of the institute raise an action to get the better of any alteration attempted in the succession, must, upon the death of the institute, be served heir, just as much as if the subject had been held in fee-simple; Hay against Earl of Tweeddale, 21st July 1676, No. 21. p. 12857. Lyon against Garden, 26th July 1715, No. 28. p. 12863; Macintosh against Macintosh, 27th December 1716, No. 36. p. 12881; Campbell against Campbell, January 1742, No. 29. p. 12865. Anderson against Heirs of Sheills, 16th November 1747, No. 30. p. 12868. Consequently, as Robertson *junior* was never served heir to his father, the right vested by the marriage-contract and assignation was never transmitted to him; and as it remains still in *hereditate jacente* of his father, it may be taken up by his heirs-at-law.

Answered: By the terms of the marriage-contract, the right vested in the children is not merely a *spes successionis*, but of the nature of a *jus crediti*, which is therefore transmitted to their representatives, without the necessity of making up titles by service or confirmation. If an estate is taken to a father in liferent, and a son in fee, there is no necessity for a service on the death of the father, because the fee of the subject was not vested in him, but in his son, who therefore transmits it immediately to his disponees without making up any title; Lyon against Creditors of Easter Ogle, 24th January 1725, No. 59. p. 12909. Gibson against Arbuthnot, 4th February 1726, No. 37. p. 12885; Porterfield against Gray, 9th December 1760, No. 32. p. 12874; Cameron against Robertson, 18th November 1784, No. 33. p. 12879.

The Lords, on advising the petition, with answers, ‘ adhered;’ and afterward unanimously refused a reclaiming petition without answers.

Lord Ordinary, Cullen.  
Alt. *A. Bell.*

Act. Inglis, Douglas.  
Agent, J. Weir.

Agent, T. Johnstone.  
Clerk, Mackenzie.

J.

Fac. Coll. No. 232. p. 525.