Case 44. Fountainhall, 19 Dec. 1701. Forbes, 25 July & 22 Nov. 1705.

George Hamilton, an Infant, and William Hamilton of Grange, his Father, Tutor and Administrator in Law, - - *Appellants*;

Captain George Boswell, Brother to David Boswell of Balmutto deceased, - - *Respondent*.

10th *Feb.* 1717-18.

Representation.—A disposition is made by a person to one of his daughters, and the heirs of her body, whom failing to ———, his heirs and assignees: upon this disposition the daughter is infeft, and dying without issue, her sister is served *tanquam legitima et propinquior hæres* to the father and her: it is found that the service ought to have been as heir of provision.

Curtesy.—An heiress's infeftment, reduced after her death for informality, but not quarrelled in her lifetime, is sufficient to support the curtesy.

JOHN Bruce of Wester Abnie, deceased, had two daughters, Margaret and Elizabeth. Margaret the eldest was married to the respondent, Captain Boswell; and had issue one daughter, Margaret Boswell, who afterwards became the wife of the appellant William, and mother of the appellant George. John Bruce, the father, made a disposition of the said lands of Wester Abnie and others to his said daughter Elizabeth, and the heirs of her body, whom failing to ———— his heirs and assignees whatsoever. The said John Bruce soon after died, as did also the said Elizabeth his daughter, (to whom infeftment had been given on the disposition), without heirs of her body; whereby the said subjects descended to Margaret Boswell, daughter of the respondent and the said Margaret, the daughter of John Bruce, Margaret the mother being then deceased.

The respondent's daughter being under age, he had caused her to be served *in special tanquam legitima et propinquior hæres* to her grandfather John Bruce and her aunt Elizabeth; and after this service infeftment was taken, and the instrument of sasine duly recorded. The respondent entered to the possession of the estate, and received the rents and profits thereof.

By contract of marriage, entered into in October 1698, between the appellant William, and the respondent on the part of the said Margaret his daughter, it was agreed, that the respondent should give his daughter 6000 merks in marriage portion; and in consideration thereof, that she and the said William Hamilton, after their marriage, should make a conveyance in favour of the respondent, her father, of the estate she had succeeded to as aforesaid. The marriage accordingly took effect, and in consequence of the said contract or agreement, the appellant William, and his wife Margaret, who was still under age, executed a disposition of the premises to the respondent.

Soon after the appellant William and his wife brought an action before the Court of Session against the respondent for reduction of

of the ſaid contract or agreement, and the diſpoſition made in conſequence thereof, as being obtained by fraud, and while Margaret was under age. The purſuers ſtated, that at the time of the treaty for the marriage, the reſpondent repreſented the eſtate to be worth nothing, as being greatly incumbered, and inſufficient to anſwer the debts: that however out of regard to his daughter the reſpondent propoſed to give her the ſaid 6000 merks, in conſideration of their conveying the eſtate to him. And that the purſuers being entire ſtrangers to the circumſtances of the eſtate, and relying upon the reſpondent's veracity, agreed to the terms propoſed.

After ſundry proceedings in this action, and a proof relative to the leſion taken therein, the Court, on the 19th of December 1701, found "That Margaret Boſwell, being a minor when ſhe "ſigned her marriage contract and the diſpoſition, ſhe ought to "be relieved againſt the ſame; but, that William her huſband, "being of age, and having proved no concuſſion or circumven"tion, the reaſons offered by him were not ſufficient to relieve "him againſt the deeds ſubſcribed by him before and after his "marriage; and therefore aſſoilzied the reſpondent from his "action." And after a count and reckoning, the Court, on the 25th of July 1705, "reduced the ſaid deeds in ſo far as they "were granted or ſubſcribed by the ſaid Margaret Boſwell, and "could be any way extended againſt her and her heirs; and "found that ſhe ought to be reponed againſt them upon enorm "leſion and minority; and likewiſe reduced the ſaid obligation "entered into by the appellant William, whereby he under a "penalty obliged himſelf, that the ſaid Margaret ſhould convey, "but the appellant William being major aſſoilzied the reſpon"dent from the ſaid action ſo far as the ſaid appellant Wil"liam could have any right by his *jus mariti* or curteſy to the "ſubject diſponed by his wife and him to the reſpondent (a)."

Margaret, the reſpondent's daughter, dying in 1710, the appellant William, her huſband, cauſed their ſon the appellant George to be ſerved heir to John Bruce his great grandfather, and Elizabeth his great aunt: and thereupon commenced two ſeveral actions in the name of his ſon before the Court of Seſſion, againſt the reſpondent; the one to reduce and make void the rights and titles that had been eſtabliſhed in the perſon of Margaret the wife; and the other to remove the reſpondent from the life-rent eſtate.

The cauſes were conjoined, and after ſundry proceedings the Court, upon the 29th of June 1714, "Found that by the con"ception of the diſpoſition by John Bruce to Elizabeth, and ſhe "having died without heirs of her own body, the ſucceſſion did "not devolve upon Margaret Boſwell as heir of line to Eliza"beth, but devolved upon the heirs of line of John Bruce as "heirs of proviſion to Elizabeth, and that the titles the appellant

(a) Theſe interlocutors and affirmances thereof form the ſubject of a ſecond appeal between the ſame parties in 1721; but they do not enter into the preſent queſtion.

"had made up for his son carried only the right of superiority "and were not sufficient in a removing."

The appellant George's titles were made up of new in terms of that interlocutor; and it was contended on his part that his mother's service and sasine not being as heir of provision to Elizabeth, the same was void. The Lord Ordinary, by interlocutors on the 25th of January and 25th of February 1714-15, reduced the said Margaret's "sasine, and decerned the respondent to quit the possession, since Margaret was not served heir of provision to Elizabeth." But the Court, on the 24th of June 1715, "found that Margaret Boswell's relation was cognosced both to John and Elizabeth Bruce in terms of the foresaid interlocutor of the 29th of June, and remitted it to the Lord Ordinary to hear parties upon the nullities objected to Margaret's infeftment."

Parties being afterwards heard on the alleged nullities of the retour and infeftment, before the Lord Ordinary, his lordship, on the 15th of July 1715, "sustained the first nullity objected against Margaret Boswell's retour as heir to the deceased Elizabeth Bruce, in regard Elizabeth Bruce was infeft upon her father John Bruce his precept in all the lands disponed by him to her, whereby she held the lands of John Bruce the disponer, and not of the crown as the record bears. And as to the second and third nullities that the precepts for infefting the said Margaret were not directed to the proper officers sustained the same, and likewise the objection against the said Margaret's infeftment of the burgage lands, in respect her predecessor Elizabeth Bruce her infeftment therein was null, the same bearing to be past on the precept in John Bruce's disposition, and yet that precept of sasine does not contain these lands."

The respondent having reclaimed against this interlocutor, insisted, that though there might have been some omissions in the form of passing these sasines, yet although she had never been infeft the curtesy ought to subsist; and in support thereof he founded upon the act of parliament 1695, c. 24. intitled, "Act for obviating the frauds of apparent heirs." And he contended that she having been in possession for many years, the appellant her son could not pass by her, but must be liable to her deed, whereby the curtesy to her husband was supported. And 2dly, That the infeftments, not having been objected to in Margaret's lifetime, were sufficient to support the curtesy. The Court, on the 27th of July 1715, "repelled the defence upon the act of parliament, but found, that Margaret Boswell's infeftment not having been quarrelled in her own lifetime was sufficient to support the curtesy." And upon the 28th of July "assoilzied the respondent from the appellant's action."

1695, c. 24.

The appellants having reclaimed, the Court, on the 15th of June 1716, "found, that the respondent's right to the curtesy ought to subsist, in regard if his daughter's infeftment had been quarrelled in her lifetime, he might have made up the defects thereof by infesting her again." And to this interlocutor the Court adhered on the 4th and 20th of July thereafter.

The

The appeal was brought from "an interlocutor of the Lords "of Seſſion, made the 24th of June 1715, and from that part of "the interlocutor of the 27th of July following, finding Margaret Boſwell's infeftment not being quarrelled in her lifetime "was ſufficient to ſupport the curteſy; and alſo from the interlocutor of the ſaid Lords of the 28th of July 1715, the 15th of "June, 4th and 20th of July 1716."

Entered, 22 March 1716-17.

Heads of the Appellant's Argument.

Since the Court, by their interlocutor of the 29th of June 1714, found, that the ſucceſſion did not devolve upon Margaret Boſwell as heir of line to Elizabeth, but to the heirs of line of John Bruce as heirs of proviſion to Elizabeth, and upon this foot the appellant George was obliged to be ſerved of new; it is hard to conceive how Margaret could claim the ſucceſſion, ſince ſhe is ſerved only heir general to Elizabeth, which is entirely different from what the interlocutor requires; for in that caſe ſhe ought to have been ſerved *tanquam hæres proviſionis*, or *hæres virtute proviſionis*; and it is impoſſible that a perſon can be ſerved heir of proviſion, and the ſervice and retour ſay nothing of it.

The deed of conveyance made by the ſaid Margaret and the appellant William of the lands in queſtion to the reſpondent was reduced and declared null upon the head of minority and leſion, in ſo far as concerns the intereſt of Margaret and her heirs, but in ſo far as concerns the appellant William's curteſy it is not reduced. If Margaret the wife, however, was never infeft, then the huſband could convey no curteſy, becauſe he could have none. And it is an undoubted principle that the huſband can have no curteſy but of ſuch lands as the wife was in her lifetime ſeiſed in: but the wife in this caſe was not ſeiſed, or, which is the ſame thing, was not not duly ſeiſed, and her infeſtment was null. If then the wife was not infeft, or if her infeftments were null, and the ſucceſſion did not really devolve upon her, how can that infeftment ſuſtain a curteſy?

Heads of the Reſpondent's Argument.

Margaret was ſerved *tanquam legitima et propinquior hæres* to John her grandfather, and to Elizabeth her aunt; which being a general deſignation, applicable to all heirs *in ſuo genere*, though it did not expreſs the word *heir of proviſion*, the ſame muſt be underſtood under all the characters, whereby ſhe could repreſent them, and infeftment and poſſeſſion of the lands was taken upon that ſervice. The Court of Seſſion, by their precedents (in Forbes's Deciſions), Livington *v.* Menzies, 22d January 1706, and Lord Dalhouſie *v.* Lord and Lady Hawley, 13th November 1712, eſtabliſhed this doctrine. And the reaſon is ſtronger in this caſe, where Margaret was ſerved heir in ſpecial to her grandfather and aunt, which includes a general ſervice.

Though the ſaſines were reduced, yet the huſband's curteſy muſt ſubſiſt, becauſe there was no leſion to the heirs of the marriage; for when Margaret the heireſs died, ſhe ſtood infeſt, and

in poſſeſſion from the date of her ſervice to her death, which was ſome years, and her father accounted to her and her huſband for the rent of the eſtate till her marriage, and conſequently the curteſy once took place, and ſo accreſſed to the reſpondent all the time ſhe lived; and, if the reſpondent had not depended upon the diſpoſition made to him by his daughter and her huſband, he could eaſily have ſerved her heir to her aunt and grandfather in the ſame manner the appellant William has done his ſon. It will not be pretended, that the appellant George could have ſucceeded while his mother lived; and for the ſame reaſon, not ſo long as his father lives; for it is not to be ſuppoſed, that his own birth, entitled him both to the fee and life-rent of the eſtate, and ſo to exclude his father and mother's intereſt therein. And it is obſerved by Lord Stair, in his printed Deciſions, Gray *v.* Gray, 25 July 1672, that although an infeſtment or ſaſine were reduced as to the fee, yet that it did ſubſiſt as to the huſband's life-rent; becauſe, that there was thereby no leſion to the heirs, ſeeing it was preſumed the huſband would have cognoſced his ſpouſe heir, if that infeſtment had been quarrelled in her lifetime, and ſo enjoyed the curteſy.

Journal, 10 Feb. 1717-8.

After hearing counſel, *It is ordered and adjudged, that the ſaid petition and appeal be diſmiſſed this Houſe, and that the ſeveral interlocutors therein complained of be affirmed.*

On the point of the *repreſentation*, the precedent does not appear to be obſerved by former Collectors of Deciſions.

A part of the cauſe between the parties is given by Bruce but it ſeems merely interlocutory, being, in effect, ſubſequently reverſed by the Court.