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BLAIR, &c. *v.* MONCRIEFF.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be affirmed; and it is farther ordered that the appellant do pay to the respondent £80 costs, in respect of said appeal.

For Appellant, *Thomas Miller, Fl. Norton.*

For Respondent, *C. Yorke, Al. Wedderburn.*

Note.—This case is not reported, but a subsequent case between the same parties appears reported. *Vide* M. 14939; Fac. Coll. iv. p. 221; by mistake, it is stated that this last case was appealed; but the judgment in the House of Lords there affixed, does not apply to that case, (which was not appealed,) but to the present case, now for the first time reported.

BLAIR and Others, - - - *Appellants;*

SIR WILLIAM MONCRIEFF, Bart. - *Respondent.*

House of Lords, *5th May* 1766.

CONTRAVENTION OF MARRIAGE CONTRACT—SERVICE—MINORITY—PASSIVE TITLE—RATIFICATION.—1. Held that the heir of the marriage is entitled to reduce a deed executed in fraud of the marriage contract, without expeding a general service; 2. Held such heir is entitled to set aside a general service expede in his name in minority, to his hurt and prejudice, in so far as it made him universally liable for his father's debts; 3. Also held, that as his ancestor died in apparency in regard to Moncrieff estate, he was entitled to pass him over and serve heir to his grandfather, without being liable for the debts; and as to the other provision, or estate of £5555. 11s. 1d., and 100,000 merks, he was not liable *passive*, he not having taken benefit from that estate, and that a sum of £2500 received to ratify these did not make him liable *passive*.

Sir Thomas Moncrieff having no issue, became a party to his nephew's marriage contract, and thereby conveyed his estates of Moncrieff and Fordell to him *and the heirs male of that marriage*. Provision was made by a jointure to the lady; and the nephew was strictly prohibited from executing any voluntary deed, to the prejudice of the heirs male of the marriage. Sir Thomas also bound himself to secure him and his said *heirs male of the marriage* in the sum of £5555. 11s. 5d., payable the Whitsunday after his death.

On Sir Thomas' death the nephew succeeded: he sold the estate of Fordell for £5555. 11s. 1d.; and invested the price in the purchase of lands, called Boghall, Craigie, and Magdalans, and placed the remainder on heritable security, taking these conveyances to himself and his *heirs and assignees whatsoever.*

Of this marriage there were two sons, and three daughters, and Sir Thomas (the nephew) having granted an additional jointure, and made large additions to his daughters, and conveyed the new purchases of Boghall, Craigie and Magdalans to his second son, David, the question was raised on his death, by his son, Sir Thomas, the third, that those conveyances were in fraud and contravention of the marriage contract; and that the money with which these lands were purchased, was the proceeds of the sale of Fordell, which was settled on the *heirs male of the marriage.*

With the view of supporting his reduction of these conveyances, Sir Thomas, the third, served himself heir of provision in general, under the marriage contract. But he died during the dependence of the suit, and before he had established in himself, by special service, a feudal title to the estate of Moncrieff, wherein his father died infeft.

The respondent succeeded him while in pupillarity; and while a pupil, he was served heir of provision and in general to his deceased father.

After obtaining majority, it turned out that his father's debts were considerable. He also found that his general service, expede by his guardians while a pupil, made him universally liable; and he therefore revoked that general service, and followed up this, by bringing the present action of reduction of it, as expede to his hurt and prejudice while in pupillarity. The appellants, as creditors interested, appeared to maintain the service, and the heir's liability. He contended it was also to his hurt, because Sir Thomas Moncrieff (the third) having died in apparency with reference to Moncrieff, the respondent might have taken up that estate, under the marriage settlement of 1701, and thus passed by, without representing his father, and, therefore, that the general service was not only hurtful but inept and unnecessary.

The Lord Ordinary found the pursuer had right to challenge the deeds done in contravention of the marriage contract, without service: and therefore found the service expede during his minority inept and unnecessary, and that he is not liable under the same to payment of his father's debts. July 29, 1758.

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On reclaiming petition the Court adhered, and remitted to the Lord Ordinary to ascertain how far he had taken benefit by said service to his father.

Dec. 8. 1759. Whereupon the appellant contended, that Sir William having got £2500 upon a transaction for confirming and ratifying the deeds executed in favour of Sir Thomas, the second's younger children, he was liable *passive*.

Sir William answered, that his father having died in a state of apparency *quoad* the lands of Moncrieff, he took no estate from him; and that the £2500 received from his uncle David could not be considered as part of his father's estate, the whole having been given by Sir Thomas the second to his younger children, being no more than a suitable provision for them.

Aug. 5, 1760. The Lord Ordinary found "that the pursuer's (respon-
"dent's) succession is confined to the estate of Moncrieff,
"nor pretends to take any benefit by the two provisions
"contained in his grandfather's contract of marriage, viz.
"the provision of the estate of Fordell, and the provision of
"100,000 merks (£5555. 11s. 1d.) by Sir Thomas the first
"to the pursuer's grandfather, and the heirs male of the
"marriage; therefore finds the pursuer is not liable *passive*
"to his father's creditors upon account of these articles."

Dec. 16, 1761. On advising a reclaiming petition, the Court pronounced this interlocutor:—"The Lords find, that it is averred
"for Sir William Moncrieff, and not denied by the procura-
"tors for the petitioners, that all the subjects which belong-
"ed to Sir Thomas Moncrieff, the respondent's grandfather,
"at his death, other than the estate of Moncrieff, even in-
"cluding the estate which he had made over to his second
"son, Mr. David Moncrieff, was no more than sufficient to
"pay the said Sir Thomas' debts, and a rational provision
"to his younger children, they adhere to the Lord Ordi-
"nary's interlocutor, and refuse the desire of this petition."

Feb. 23. 1762. On second petition the Court adhered.

Against these interlocutors the creditors brought the present appeal to the House of Lords, bringing up for decision the whole case.

Pleaded for the Appellants.—By the law of Scotland, there is no transmission of heritable rights from the dead to the living, except by service, which must be special where the ancestor is infeft, but general, where there is only a personal title. Sir Thomas Moncrieff the third, either by his general service, or in his own right as creditor, under

the marriage articles, had complete right in his person to the provisions, though with respect to the estate of Moncieff, he died in apparency, having only in him a personal right, which was affectable by his creditors. But the respondent has no ground for saying that he can sustain any damage from his service, as heir to his father, such as to entitle him to set aside that service on the head of minority and lesion. The real object of the suit is to enable him to take the estate of Moncrieff as heir to his grandfather, thus passing by his own father, in order to free himself from payment of his just and lawful debts. Besides, he has served himself heir in general to his father, which is a complete right to the £5555. 11s. 1d. provision, and to the other 100,000 merks, the price of the lands of Fordell, in which his father's right was complete; and under this service, which the respondent now seeks to set aside, he transacted with his uncle David, by which, for a sum of £2000, he agreed to ratify the deeds which were executed in contravention of the marriage contract.

Pleaded for the Respondent.—A general service as heir, in the law of Scotland, transfers all heritable rights *not completed by infeftment* at the time of the ancestor's death; but where the ancestor is infeft, a general service is inept and ineffectual; the estate in that case being only taken up on special service. There is also this important difference, that the heir by general service becomes universally liable for his ancestor's debts and deeds, both in his person and in his estate. The question, therefore, in the present case, was, whether the respondent was entitled to be restored against a general service as heir, taken out in his name during infancy, whereby he has been subjected to this liability? In regard to the proper estate of his father, consisting of the two provisions of £5555, it was clear that the debts against him far exceeded the value of that estate, in regard to which the respondent renounces all benefit, and it was therefore open to the appellants to attach it, if they saw cause, for their debts. The Court has reserved this power to them, and the respondent is ready to concur in every step that may be necessary for that end. Although his general service transmitted these sums, yet as creditor he had right to these without service. In regard to his own father's separate estate, in point of fact, there was none such. The barony of Moncrieff was never his, as he died in apparency. But even that estate was encumbered, and

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the respondent could only take it subject to the debts and deeds of his grandfather. These exceeded the value of the grandfather's separate estate; and, consequently, there could be no relief left to the heir except out of that fund; but as that belonged to the respondent in his own right, the heir, without representing his father, cannot be liable to communicate any share of it to his father's creditors. He, therefore, cannot take any benefit from this general service. All that the respondent took, as heir of the marriage, was the barony of Moncrieff; but as the general service will not apply to or carry that estate; and as this is only taken up by him, not as representing his father, but by serving heir in special to his grandfather, he was entitled to have the general service reduced, as expede to his hurt and prejudice in minority.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutor complained of be affirmed.

For Appellants, *F. Norton, Al. Wedderburn.*
For Respondent, *C. Yorke, Thos. Miller.*

Note.—The first branch of this case is reported in Morison, p. 12,871, and Fac. Coll. ii. p. 361; the latter branch not. In this appeal the whole case was taken to the House of Lords.

[Fac. Coll. iv. p. 207; M. 3287; Brown's Supplt. "Tait," p. 444.]

Mrs. PRINGLE and ROBERT ANDREWS and MARK PRINGLE, - - - - - } *Appellants;*
JOHN PRINGLE of Crichton, - - - *Respondent.*

House of Lords, 29*th January* 1767.

DEATHBED—FACULTY TO BURDEN—TESTAMENT.—A party disponed his whole estate to his heir-at-law, under a reserved power or faculty to burden at any time during his life, with provisions to younger children. By a codicil bearing no date, but executed ten months before his death, he altered this disposition so as to diminish the fund for the heir; and granted also an heritable bond of provision for £1000, in terms of his reserved power to burden, nine days before his death: Held that these deeds were reducible on the head of deathbed; but reversed in the House of Lords.

The late Mark Pringle was twice married. By his first