JAMES LINDSAY, and Others, Trustees of Mrs JANET CORBET, and Mrs CHRISTIAN CORBET, Appellants.—*Shadwell—Murray.*

Mrs AGNES ANN KERR, and Others, Heirs of the late GEORGE BROWN KERR, Respondents.—*Abercromby—Walker.*

No. 21.

Proof—Onus Probandi.—A party having been served lawful heir of another; and a reduction of the service being brought; and it being alleged that he was proved to be habit and repute a bastard;—Question raised and discussed as to whether it was incumbent on the party averring bastardy to establish that fact, or whether the proof of being so by habit and repute, threw the burden of proving legitimacy on the other party.

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1ST DIVISION.
Lord Hermand.

JAMES CORBET of Kenmuir, near Glasgow, went to North America about 1745, where he had a daughter, Ann Corbet, by Agnes Martin; and the question in this case was, Whether she was a lawful daughter or not? She was sent to Scotland for the benefit of her education, and whither her father, James Corbet, returned about 1750. After the death of Agnes Martin, he was married, in 1771, to Janet Berry, by whom he had a son James, and two daughters, Janet and Christian. His daughter Ann went back to America in 1764, where she was married to Samuel Kerr, by whom she had a son, George Brown Kerr, and several daughters, who were the respondents.

James Corbet having acquired considerable heritable property, took the titles to himself in liferent, 'and, after his decease, to 'James Corbet, his son, and the heirs whatsoever of his body, in 'fee; whom failing, to himself and his own nearest lawful heirs 'and assignees whomsoever.' In 1790 he made a will, written with his own hand, in which inter alia he bequeathed a legacy 'to Ann Corbet, my daughter, procreated between me and 'Agnes Martin, my first wife, and spouse of Samuel Kerr, mer-'chant, late in Virginia, now in New-York.' He died in the course of that year, and was succeeded by his son James. In 1806 James died unmarried and intestate; and Ann Corbet being also dead, George Brown Kerr, her son, took out a brieve and obtained himself served 'one of the nearest and lawful heirs 'of provision to the said James Corbet, junior,' and thereupon obtained himself infeft in the lands. At the same time Janet and Christian Corbets, conceiving that they had the sole right to the property, took possession; and thereafter the appellants, as their trustees, brought a reduction of the service of George Brown Kerr, and of his titles, on the ground that James Corbet and

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Agnes Martin had never been married, and that consequently Ann Corbet, the mother of George Brown Kerr, was illegitimate. This being denied, and George Brown Kerr having died and been succeeded by the respondents, his sisters, and a proof having been taken, and there being no direct evidence of the marriage, and the parties having produced witnesses, some of whom deponed that Ann Corbet had always been reputed illegitimate, while others swore that she had been habit and repute a lawful child, the question was raised, on whom the onus probandi lay?

On the part of the appellants it was contended, that, in considering this question, the circumstance of a service having been obtained could not be taken into consideration at all; that if proof were brought that the party claiming to be heir was reputed a bastard, it was incumbent upon the claimant to prove that the parents were married, or at least that they were habit and repute married persons; and that as the appellants had established that Ann Corbet was reputed a bastard, the burden of proving the marriage of the parents, and consequent legitimacy of Ann Corbet, lay upon the respondents.

On the other hand, the respondents maintained, that although the verdict was not conclusive, yet it was prima facie evidence in their favour, and must bear faith until cause for setting it aside should be shewn: that when filiation was admitted (which in this case it was), legitimacy is presumed; and therefore it was incumbent on the party disputing that fact to redargue the presumption; and as the appellants were pursuers, the onus probandi lay upon them.

The Court, on the report of the Lord Ordinary, and on advising a voluminous proof, repelled the reasons of reduction, and assoilzied the defenders; and on the 31st of May 1821 they refused a petition, which was too late in being presented, as incompetent.*

The appellants having entered an appeal, the House of Lords 'ordered and adjudged, that the appeal be dismissed, and the 'interlocutors complained of affirmed, with L.100 costs.'

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* See 1. Shaw and Ball. No. 47. It is stated in the respondents' case, p. 14. that 'their Lordships were clearly and unanimously of opinion, that, considering that it was 'the pursuers' business to prove their case, they had made out no case at all. It was 'held, that the weight of evidence preponderated so greatly in favour of the respondents, 'that this was not to be viewed even as a case of divided repute; but that, even holding it to be divided, by far the largest and most respectable mass of it was due to the 'respondents.'

Appellants' Authorities.—3. Bank. 4. 29.; 3. Ersk. 8. 66.; 3. Stair, 5. 42, 43.; Erskine, Jan. 8. 1736, (No. 1. Elch. Service); Speeches in Douglas cause; Hunter, July 8. 1812, (F. C.); Mack. Ob. p. 114.; 4. Stair, 14. 11.; King's Adv. Feb. 19. 1669, (12,637.); Cunningham, Jan. 13. 1670, (12,637.); Geddes, Feb. 25. 1796, (12,641.) April 6. 1824.

Respondents' Authorities.—3. Stair, 3. 42.; 1. Bank. 1. 62.

SPOTTISWOODE and ROBERTSON—J. RICHARDSON,—Solicitors.

(Ap. Ca. No. 28.)

Mrs ELIZABETH STEWART or RICHARDSON, Appellant.—*Keay—Murray.* No. 22.

Mrs CHRISTIAN STEWART or HAY, and Mrs CHARLOTTE STEWART or ALSTON, Respondents.—*Walker—Tait.*

Service—Clause—Marriage-Contract.—A party having, by an antenuptial contract of marriage, disponed his estate to the heir-male of the marriage, 'and to the heirs and 'assignees whatsoever of the said heir-male, in fee;' whom failing, the heir-male of any subsequent marriage, and the heirs of his body; whom failing, to the heir-female, or eldest daughter of the marriage, and who should always succeed without division; and a son of the marriage having existed, but died without issue, leaving three sisters;—Held, (affirming the decision of the Court of Session), That the three sisters had right to the estate, as heirs-portioners of their brother, and not the eldest without division.

April 8. 1824.

2D DIVISION.

ON the 10th of February 1766, James Stewart of Urrard, in the county of Perth, on his marriage with Miss Elizabeth Robertson of Tullybelton, entered into a marriage-contract, whereby he provided and disponed 'to and in favours of himself and the said 'Elizabeth Robertson, his promised spouse, and the longest liver 'of them two, in conjunct fee and liferent, with the said Elizabeth 'Robertson, in case she survive him, her liferent use and possession, during all the days of her lifetime, of an annuity of L.1000 'Scots money, free of all public burdens, to be paid to her yearly, 'out of the first, best, and readiest of the rents, maills, and duties 'of the lands and others underwritten, in manner and at the terms 'after-mentioned; and the said whole lands and others under-written, to the heirs-male to be procreate betwixt the said James 'Stewart and Elizabeth Robertson, of this intended marriage, 'and to the heirs and assignees whatsoever of the said heir-male