William Ayton Esq; - - - *Appellant;*
Dame Margaret Colvill, Widow of Sir John Ayton of Ayton, and Robert and Andrew Ayton their Sons, - - - - *Respondents.*

Case 50.
Fountainhall, 23 Feb. 1706.
18 July 1710.
Dalrymple, 27 Nov. 1716.

23d *Feb.* 1718-19.

Representation.—An eldest son of a marriage is retoured *legitimus et propinquior hæres* to his father *cum beneficio inventarii.* In the inventory he gives up not only the lands settled upon him in his mother's contract of marriage, but also certain other lands; and afterwards brings a reduction of the provisions in a second contract of marriage, alleging, that he was only heir of provision in virtue of his mother's contract of marriage, and as such might still quarrel his father's deeds, the narrative of the retour designing him heir procreated between a certain man and woman; it is found, that he was served heir of line to his father, and as such could not quarrel any of his father's deeds.

BY contract of marriage in 1670, between Sir John Ayton, the appellant's father, and Mrs. Magdalen Stewart, daughter of Sir William Stewart of Invernity, the appellant's mother, Sir John Ayton the grandfather, obliged himself to resign and surrender his estate of Ayton, and certain other lands, in favour of Sir John his son, and the heirs male to be procreated betwixt him and the said Mrs. Magdalen Stewart, whom failing to his heirs male of any other marriage, whom failing to his heirs, and assignees whatsoever, reserving a life-rent of part of the estate to the grandfather and his lady. In terms of this contract a crown charter was obtained, and infeftment taken by the appellant's father in 1671: and in 1672 that charter and instrument of sasine were ratified and confirmed in Parliament. In 1684, the appellant's mother died, leaving him the only child of that marriage.

In 1701, Sir John the appellant's father, married the respondent Dame Margaret sister of the Lord Colville his second wife. By the contract upon that marriage, Sir John provided the said Dame Margaret in the life-rent of one half of the estate settled upon the heirs of the first marriage, and also in the life-rent of one half of the estate of Kincraigie, (not contained in his first contract of marriage); and he settled the fee of that estate of Kincraigie, to the children to be begotten of the second marriage; and further bound himself and his heirs to pay to the said children the sum of 2222*l.* 4*s.* 5*d.* sterling, with interest after they arrived at the age of seven years. Thereafter Sir John conveyed to his children, the respondents Robert and Andrew Ayton, the sum of 1333*l.* 6*s.* 8*d.* sterling, of personal estate; and left his debts to be paid by the appellant. The appellant states, that these debts amounted to 4000*l.* sterling; and that the yearly income of the estate descending to him did not exceed 300*l.*, of one half whereof the respondent Dame Margaret was to enjoy the life-rent.

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Sir John the father died in 1703; and after his death the appellant was ſerved heir in ſpecial to him *cum beneficio inventarii*, in the lands and barony of Ayton. The words of the ſervice were " Qui jurati dicunt, quod quondam Dominus Joannes Ayton de " eodem, pater Magiſtri Gulielmi Ayton nunc de eodem pro- " creat inter illum et Magdalenam Stewart, ejus primam " Sponſam, latoris præſentium obijt ultimo veſtit. et ſaſit. " &c. et quod dict. Magiſter Gulielmus Ayton eſt legitimus et " propinquior hæres dict. demortui Joannis Ayton ſui patris de " omnibus et ſingulis prædict. terris, &c. cum beneficio In- " ventarij ſecundum actum Parliamenti, &c." In the inventory given up by the appellant, after the ſervice, he not only ſpecified the lands contained in the firſt contract of marriage, but alſo the eſtate of Kincraigie and lands only mentioned in the 2d marriage contract. In 1705, the appellant brought his action of reduction, improbation and declarator before the Court of Seſſion againſt the reſpondents, for ſetting aſide the grants and proviſions made by his father in favour of the lady and children of the ſecond marriage, as exorbitant, and as being done, to the prejudice of the firſt marriage ſettlement, and of the appellant as heir of the firſt marriage.

The reſpondents made defences, that whatever the proviſions in their favour were the appellant could not queſtion them, becauſe he was ſerved heir general to his father, and thereby ſo repreſented him that he could not call in queſtion any deeds done by him.

The Court on the 18th of July, 1710, " Found that the ap- " pellant was ſerved heir of line to his father, and remitted to " the Lord Ordinary to proceed accordingly." The appellant reclaimed againſt this interlocutor, and after ſundry proceedings, the Court on the 11th of July 1716, " Found that the appellant was " ſerved heir of line to his father, and that as ſuch he could not " quarrel any of his father's deeds and aſſoilzied the reſpondents."

Entered, 17 Jan. 1717-18.

The appeal was brought from " two interlocutory ſentences and " decrees of the Lords of Seſſion of the 18th of July 1710, and " 11th of July 1716."

Heads of the Appellant's Argument.

The eſtate the appellant claims was ſettled upon him both by his father and grandfather in his mother's marriage ſettlement, which was completed by charter and ſaſine, and could not be voided by any gratuitous deed of his father.

The proviſions given by the appellant's father to his ſecond wife and her children were very exorbitant, being far beyond what his circumſtances could bear; and the reſpondents enjoy an opulent fortune, whereas the appellant has not bread, but by the favour of his father's and grandfather's creditors, from whom he has a ſmall allowance yearly, until the event of this appeal be known.

An heir ſerved in ſpecial to a certain eſtate whereof his predeceſſor died poſſeſſed, and whereof the ſucceſſion was provided to him

him by a marriage ſettlement or other deed, is to be underſtood heir of proviſion and not heir general; and therefore not liable for deeds done to the prejudice of the heir of proviſion; and the appellant's ſervice pointed him out heir of proviſion upon his mother's marriage ſettlement as being William Ayton, now of Ayton, and the ſon of Sir John Ayton by Magdalen Stewart his firſt wife.

The reſpondents contended, that by the words *legitimus et propinquior hæres* the appellant was ſerved heir general, and ſo liable univerſally to all his father's debts and deeds. But all briefs directed forth of the Chancery in Scotland, to warrant the inqueſt to ſerve heirs, are formed in general and uniform terms without making any diſtinction what ſort of heir is to be ſerved, or upon what title the ſervice is to proceed, and the return of the inqueſt anſwers the propoſitions of the brief regularly, and in like general terms. The additions of the return of the inqueſt, viz. *Hæres proviſionis vel Talliæ*, are only of late uſed though required by no law, it does not follow therefore that every heir ſerving as *legitimus et propinquior hæres* is heir general, becauſe that diſtinction muſt appear from the heir's claim, or from the title of his predeceſſor, and not from the modern additions in the retour of the inqueſt. The words *legitimus et propinquior hæres* muſt be underſtood *ſecundum ſubjectam materiam*, viz. If of an heir of entail it is underſtood *hæres ſecundum talliam*; if of an heir of proviſion, by a contract or marriage-ſettlement, it is underſtood *hæres proviſionis virtute contractus matrimonialis*. And although the words *hæres proviſionis* be not added to the retour of the appellant's ſervice, yet the reſpondents cannot thence conclude, that he is not heir of proviſion, or that he is liable to all his father's deeds as heir general; for it is certain that the only title Sir John, his father, had to his eſtate, was the ſurrender thereof made to him by Sir John the grandfather in his marriage-ſettlement, whereby the fee is provided to the appellant, and therefore his ſervice as heir to his father muſt be as heir of proviſion in right of that marriage-ſettlement. Beſides, the appellant knew that he had conveyed his other real and perſonal eſtate to the reſpondents, the children of the ſecond marriage, and that they were poſſeſſed of the ſame, and conſequently nothing remained for him to be ſerved heir to, but what was provided to him by the marriage-ſettlement; ſo that his ſervice muſt be circumſcribed by the nature of the inveſtiture upon which the inqueſt made their retour.

If the appellant had been ſerved *legitimus et propinquior hæres maſculus virtute contractus matrimonialis*, then the Court would have retrenched the exorbitant proviſions made to the children of the ſecond marriage; and notwithſtanding his ſervice was general, wanting the words *virtute proviſionis*, &c. that did not alter the caſe, ſince where there is a ſpecial proviſion by marriage-ſettlement, the law is anxious to preſerve the firſt ſettlement from being voided by any poſterior deed, eſpecially a ſecond marriage-ſettlement. So that it is not ſo much the perſon that the law takes notice of, whether he be heir general or not, but the deed that is done in fraud of the firſt marriage-ſettlement, and whether

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the party ſerved heir be entitled to the proviſions of that ſettlement. For, here the ſubtlety of law, that *hæres eſt eadem perſona cum defuncto* muſt yield to this undoubted principle both of law and equity, that he who has bound himſelf by a marriage-ſettlement, which is always onerous as to the heir of the marriage, cannot voluntarily and gratuitouſly evacuate that firſt ſettlement; and it is certain, that ſo far as proviſions in a ſecond marriage-ſettlement are exorbitant they are gratuitous; and there were ſeveral precedents of the Lords of Seſſion in the like caſe. It is not to be imagined that the appellant would make up a title, in order to give up to the children of the ſecond marriage the proviſions made by his grandfather in his favours, by his mother's mariage-ſettlement; and though by that ſettlement he was entitled to the eſtate, yet it was neceſſary for him to be ſerved heir before he could call in queſtion ſuch deeds as were done by his father, tending to diſappoint his ſucceſſion, but that ſervice gave him no further title to the eſtate than he had formerly.

The reſpondents contended, that it further appeared that he was ſerved heir general, becauſe in the inventory given up by him he had included the lands of Kincraigie, which were not ſettled upon him by his mother's marriage-contract, as well as the eſtate to which he was entitled by that contract. But the giving up inventory to the ſheriff of the ſhire did not alter the nature of the ſervice: the claim for the ſervice recited that the appellant was to be ſerved heir *cum beneficio inventarii* conform to act of
1695, c. 24. parliament 1695, and that act requires no inventory to be made up at the time of the ſervice; but only requirès that ſuch inventories, when made up, containing the whole eſtate of the deceaſed, ſhould be recorded before the ſheriff in the ſhire where the eſtate lies; and that they be again recorded in books, appointed by the Court of Seſſion, that creditors may know what eſtate belonged to their debtor at the time of his death, and that his heir ſerving *cum beneficio inventarii* might be no further liable to his debts than the value of the eſtate in that inventory. The making of ſuch inventory, therefore, could never ſubject the appellant to the gratuitous debts and deeds of his father; and more eſpecially in the preſent caſe, for this reaſon, that Mr. Colvill, who formed the appellant's claim, and the retour of his ſervice as the ſheriff's clerk, and made up the inventory, neglected to order the ſame to be recorded in the books of Seſſion, whereby the appellant loſt the benefit of that law, and made no uſe of the inventory. And as the appellant had no benefit by giving up inventory of the lands of Kincraigie, it cannot ſubject him to the gratuitous debts and deeds of his father.

Heads of the Reſpondents' Argument.

The deſcription of the appellant by his father and mother could not be any evidence that he was only to be ſerved heir, as claiming a particular proviſion by the marriage-articles for that deſcription was equally proper to a general ſervice as heir of line, and is proper, if not neceſſary, in all ſervices. Had the intention been only

only to ſerve the appellant heir of proviſion by virtue of his mother's marriage-contract, there had been no occaſion for mentioning her to be the *firſt* wife, becauſe an heir of proviſion has right to that proviſion, whether his mother be firſt or ſecond wife: but ſince he was to be ſerved heir of line, it was neceſſary to find, that his mother was the firſt wife, becauſe otherwiſe he could not have been ſerved heir of line. Though in the recital of the ſervice he is deſcribed as ſon of his father by Magdalen Stewart, his firſt wife, yet in the ſervice itſelf and retour of the jury, he is only found *legitimus et propinquior hæres*, without referring to the marriage-articles or any other proviſion whatſoever, which could never have been done had the ſervice been as heir of proviſion as the appellant contends.

Nor does it alter the caſe, that the infeftment upon the contract of marriage, whereby it appeared that the lands were ſettled upon the appellant as heir male of the marriage, was produced; for the appellant being both heir of line and heir of the marriage, he might very well be ſerved heir of line, as he was, whereby, beſides his right to the lands provided to him by his mother's marriage-contract, he made a title to all other lands his father died ſeiſed of.

It was likewiſe the appellant's intention to ſerve himſelf heir of line; for otherwiſe he muſt have confined himſelf to the lands ſettled by his mother's marriage contract; but this he did not, for amongſt the lands given up in the inventory, and to which he claimed right to ſucceed by virtue of this ſervice, are contained the lands of Kincraigie. Theſe were no part of the ſettled eſtate; and yet the appellant would now pretend, that he was only ſerved heir of proviſion, which could never entitle him to thoſe lands of Kincraigie, which were not ſettled upon him. This is likewiſe confirmed from this, that the appellant brought an action, as heir to his father to avoid and ſet aſide a conveyance made of theſe lands to the reſpondents, the minors, by their father; but this could not be as heir of proviſion, for theſe lands are not contained in the ſettlement, and conſequently he muſt have conſidered himſelf as heir general or heir of line.

When an heir has made up his right or title as heir of line, he thereby becomes by law univerſally liable to the payment of all the debts, and performance of all the deeds of the perſon to whom he is heir. The law never will allow him, after ſubjecting himſelf to that univerſal repreſentation, to avoid any of his predeceſſor's deeds, eſpecially where they are for valuable conſiderations, as the demands of the reſpondents are; being ſecured by articles before marriage, in conſideration thereof and of a marriage-portion paid. And therefore ſince the appellant's ſervice does give him a right to all his father's real eſtate, as well as that provided to him by his mother's marriage-contract, the conſequence muſt be, that he muſt be as univerſally liable, as his title gives him an univerſal right; and therefore he is tied up from queſtioning the deeds in favour of the reſpondents made by his father, whom he thus claims under. This has always been the

uninterrupted opinion of all lawyers, and thus the judges have determined.

Judgement, 23 Feb. 1718-19. After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the two interlocutors therein complained of be affirmed.*

For Appellant, *Ja. Stuart, Tho. Lutwyche, Hum. Henchman.*
For Respondents, *Rob. Raymond, Will. Hamilton.*

Vide the case Home *v.* Home, No. 15. of this Collection. One remarkable difference between that case and the present is, that here the son in the inventory, (which nevertheless is said to have had no effect for his benefit) gave up lands which were not settled upon him by his father's contract of marriage. In the case of Home *v.* Home, there were no lands to succeed to but those contained in the contract of marriage, and settled upon the heir.

Case 51. Fountainhall, 28 Feb. 1710. Forbes, 23 June 1713.

William Scott of Raeburn, an Infant, by his Guardians, - - - - *Appellant*;
Walter Scott of Harden, alias Highchester, an Infant by his Guardians, - - *Respondent.*

9th *March* 1718-19.

Tailzie—A person receives right to an estate from his father, and the son afterwards executes a procuratory of resignation for an entail of the estate, with prohibitory and irritant clauses, to himself in life-rent and to his father in fee, and failing of him to the heirs male to be procreated of his own body, and failing them to other heirs of entail: This procuratory was registered in the register of Tailzies, and inhibition used against the grantor, but no charter or sasine taken thereon: It is found, that there being no antecedent onerous cause for making this entail, especially in favour of heirs to be begotten and born, and seeing it remained in the terms of a personal right, without being perfected by charter or sasine, it was revocable by the maker thereof, with consent of his father the first institute.

SIR William Scott, the elder, of Harden, in the county of Berwick, had two sons, William and Robert, and two brothers, Gideon Scott of Highchester, (the respondent's great grandfather,) and Walter Scott of Raeburn, his youngest brother, (the appellant's great grandfather).

In March 1673, upon the marriage of William the son (who was then also Sir William) with Jane Nisbet, daughter of Sir John Nisbet of Dirleton, Sir William the elder bound himself to settle the lands of Harden and others on Sir William the son, and the heirs male of his body of that marriage, whom failing to the heirs male of his body of any other marriage, whom failing to his heirs and assignees whatsoever. In 1674, a deed was executed by Sir William the father in terms of the said obligation, upon which infeftment was taken by Sir William the son.

In