1700. *February* 27.

MARY GRAY, Lady Edinglassie, *against* FOTHRINGHAM of Poury, and Others.

No 187.
The act 1617 introducing the vicennial prescription of retours, was found chiefly to relate to erroneous services, where a remoter agnate is served heir in prejudice of a nearer, and not to heirs served, to quarrel their own retours, seeing minority and lesion was a ground of reduction before that statute, and needed no new law.

GRAY of Ballegerno, father to the said Mary, being debtor to Poury and his cedents in certain sums of money, and he pursuing her on the passive titles, and producing her retour as heir served to her father, she, for eviting the debts, raises a reduction and improbation of her retour, and of the testament containing a nomination of tutors, and the warrant and procuratory given by her tutor to serve her, as being done in her minority to her evident and enorm lesion; and craving, that Poury might take a term to produce the writs called for. He *alleged*, He could not be obliged to take a term, because this service being in 1674, it was prescribed by the 13th act 1617, declaring, If retours were not quarrelled within 20 years after their date, they stood irriversible; and it is now 26 years past since this retour. *Answered*, 1*mo*, It is within the 20 years, deducting her minority, which is a natural and perpetual defence against prescription, being founded on the common rule of *non valentis agere*, and they need not be expressly excepted in laws; likeas, the old act 1494, to which this late act 1617 relates, expresses that they must be of perfect age against whom the prescription is used. 2*do*, This act was only made against competing heirs, that if one was erroneously served, being of a remoter degree, the nearest in blood must quarrel it within 20 years, else he is never to be heard. 3*tio*, This service is null, having no warrant or foundation, the pretended tutor having no right, &c. *Replied* to the *first*, No regard to minority, for then a retour may subsist 40 years, and then be reduced, which is against the design of the act of Parliament, and would insecure all our conveyances of property; and the immediate preceding act, introducing the grand prescription, excepts minority, which shews it was under the Parliament's consideration, and being omitted here, it has been done *de industria*, even as in the composition of apprisers omitted to be repeated in the act of adjudications, *et casus omissus habetur pro omisso*. 2*do*, The act is general and indefinite, and not singly anent heirs competing, for it bars any party whatsomever from being heard after the 20 years. As to the *third*, about the grounds and warrants, there is no law to force production of them after so long a time, for then *omnia præsumuntur solenniter acta*; and it is so with executions of apprisings after 20 years; see 16th November 1666, Purves *contra* Blackwood, No 5. p. 5167; and 29th July 1680, Laird of Strowan *contra* the Marquis of Athole, No 27. p. 5195. Then it was farther *contended*, That, notwithstanding of the said act of Parliament, you must produce the retour, because I having libelled improbation; no prescription defends against the reason of falsehood. *Answered*, If you restrict to the improbation, then you can never recur to the reasons of reduction, but must pass therefrom, as Hope, and all our formalists teach, *exceptio falsi* being *omnium ultima*; and if the pursuer declare in these terms, then Poury is content to take

No 187. a term to reduce it. The Lords thought the case deserved farther deliberation, and therefore continued the determining of it till June next, in regard this Session was now near its end.

1701. *July* 11.—The cause mentioned, 27th February 1700, betwixt the Lady Edinglassie and Poury being reported, the Lords found, though the 13th act of Parliament 1617 does not expressly except minority from that vicennial prescription of retours, yet it was included in the act, and behoved to be deducted from the 20 years of prescription; and found the said act mainly referred to erroneous services where a remoter agnate was retoured heir to the prejudice of a nearer on life, and that it was designed for such competitions only, and not for heirs served, to quarrel their own retours, seeing minority and lesion was a ground of reduction before that act of Parliament, and needed no new law for it. But as to that other point, they thought it of great import, whether Poury, who used this service to bind a passive title on the Lady Edinglassie, could be obliged to produce the grounds and warrants of that service after 26 years, they being her own evidents; and therefore resolved to hear the parties thereanent in their own presence.

1702. *July* 28.—Poury having pursued the said Lady Edinglassie for some of her father's debts, and for proving the passive titles, produced her retour as heir-portioner with her sister. This service being expede when she was an infant of five or six years old, she raised a reduction of the said retour, and the grounds and warrants thereof. Poury *contended*, He was not obliged to produce these, they being her evidents, and not his; and if this burden were laid on creditors, then they could never fix any passive title on their debtors' heirs, for they might easily abstract the grounds and warrants, and then raise an improbation. *Answered*, This was a singular circumstantiate case, of an infant served heir only to convey a superiority in Forgandenny, and had no benefit imaginable by it, and never heard of it till Poury produced it, and sought to subject her to vast sums thereby. It was not denied, that where a major is served heir, or even a minor, where the tutors have acted otherwise, such a service cannot be quarrelled after their *quadriennium utile*; but this was not the case. The Lords, in respect of the specialties in this case, found Poury obliged to produce the grounds and warrants of this retour, and granted certification against the same, unless he would offer to prove, that the Lady either made use of it, or otherwise knew it before her complete age of 25, when she might have revoked and reduced it, as done to her lesion in her minority.

On the 16th of January 1703, Poury thinking himself leased by this interlocutor, offered his protest for remedy of law to the Parliament.

Fol. Dic. v. 2. *p.* 113. *Fountainhall, v.* 2. *p.* 93, 119, & 157.

*** Dalrymple reports this case:

No 187.

Gray of Ballegerno having left three daughters, he gave a bond of provision to two younger daughters, and provides his land estate to his eldest daughter, but omits a superiority of small value, in which the daughters were apparent heirs-portioners.

The third daughter having deceased, the two surviving daughters were served heirs-portioners for establishing the right of the untailzied estate in their persons, the second daughter being then a pupil.

Poury's second son having married the heiress, and having paid several debts, and taken assignations, and intromitted considerably, after his son and daughter-in-law's majority, he takes a discharge, and gives a *pactum de non petendo* to them, as to the debts of Ballegerno, he had acquired, but reserves action against all others, as accords.

This Poury, as having right from his father, pursues the Lady Edinglassie, the second daughter, as heir-portioner to her father, for the equal half of certain debts libelled.

The defender, to obviate the effect of that process, raises a reduction and improbation of her own service, calling for production thereof, and the grounds and warrants, and particularly the commission for serving her heir.

It was *alleged* for Poury, the defender in the improbation; *1mo*, He being a creditor, could not be obliged to produce any warrants of the service, which could never come in the hands of creditors, but were in the power of the heir served, who, by withdrawing these warrants, might at any time quarrel the service, if that were allowed, and yet have the benefit of the succession, if they found it profitable.

2do, et separatim, No process for reducing the service, because the same stood unquarrelled more than 20 years; and, by the 13th act, Parl. 1617, anent reduction of retours, it is provided, that, if summons of reduction be not pursued within 20 years, the same shall prescribe, and no party to be heard to pursue thereafter.

It was *answered* for the Lady, to the *first;* That she was served heir-portioner by her tutor in her pupillarity, without any deed of her's intervening; that she had never any benefit or prospect of advantage by the service; nor did she ever use or homologate it any manner of way; and, however an heir receiving benefit, owning or acknowledging his service, cannot be admitted afterwards to impugn the same, yet she is not in that case; and, if she were not allowed to call for the warrants, any person might be served, without their knowledge, by creditors, or others, who might have a benefit by subjecting them to debts.

As to the *second*, That reduction is not competent after 20 years, it is *answered*; *1mo*, The Lady was then pupil, the time of the service, and the years of the minority being deducted, the 20 years are not run; for, albeit the act

No 187. doth not, in the statutory part, deduct minority, yet the same is to be understood excepted by the tenor of the act, in so far as it doth narrate and extend the 13th act, Parl. 1494; whereby it was statute, that summons of error against members of inquest in services, should be pursued within three years, the person being of lawful age; and that because the meaning of that act of prescription related only to the persons of inquest, and was not to prejudge the righteous heir of the succession in the right of blood, therefore it was provided, that the said act should not prejudge the nearest heir to pursue a reduction within 20 years; so that the design of the last act being to clear and extend the former, the exception of minority in the first act is to be understood as repeated in the last.

2*do*, *et separatim*, The said act does not at all concern this case; for that act relates only to erroneous services, where a remoter degree is served in prejudice of the nearest heir in blood, which may be quarrelled by the nearer heir, at any time within the space of 20 years, and so relates only to the case of competing heirs; whereas here there is no competition, but the nearest heir pretends to repudiate the succession, as wanting warrants, or to her enorm lesion.

"The Lords found, that the act of Parliament implied an exception of minority; and also found, that it did only concern the case of competing heirs, and declared they would hear the parties in their own presence on the other point, whether Poury, as creditor, was bound to produce the warrants of the service, which was necessary to be determined for deciding the cause, in respect that, though the prescription was not found to be run, yet the service not being quarrelled *intra annos utiles*, it was contended, there was no place now to revoke; and therefore the Lady did insist to quarrel any warrant for serving her, and craved the same to be produced."

Dalrymple, *No* 24 *p.* 29.

1714. *January* 15.

Anna Helena Edmonston *against* James Edmonston of Broick.

No 188. Found the reverse of Hamilton against Hamilton, No 186. p. 10956.

In an action at the instance of Anna Helena Edmonston against James Edmonston, for payment of a holograph bond granted by the defender's father to the pursuer's father in *anno* 1665, the Lords found, 1*mo*, That the said holograph bond was not liable to the prescription of 20 years, introduced by the act 9th Parl. 1669, which extends only to holograph writs made after that statute; 2*do*, They found that inhibition used, the bond is a sufficient document to interrupt prescription.

Fol. Dic. v. 2. *p.* 113. *Forbes, MS. p.* 15.