1765. *March* 1. SIR WILLIAM MONCRIEFF *against* CREDITORS of His FATHER.

IN this case the Lords determined unanimously a very general point concerning the transmission of our rights.

If a man, in his contract of marriage, obliges himself to pay or secure a sum of money in favour of the heirs of the marriage, and does not implement that obligation, or if he shall settle a land estate upon the heirs of the marriage, and afterwards shall sell that estate, but shall leave other subjects; in either of those cases there is a right of action in the heir of the marriage, which vests in him *ipso jure*, without any service, like a legitim, or a tack; and being so vested it will be affectable by his creditors, either during his life or after his death, by adjudication; and it cannot be transmitted to his heir without a general service. But we must distinguish this case from the case when the heir of the marriage has a right of action, not to recover a sum of money, or the value of a land estate sold, as in the cases above supposed, but the land estate itself settled upon him by the contract of marriage; as, for example, suppose the father has gratuitously alienated such land estate to his second son or any other person, the heir will have a direct action for reducing the disposition and evicting the estate from the disponee, and he may prosecute this action without a service, but he can never have any right to the subject without a service. For, though he were not only to insist in the action, but bring it to a conclusion, yet, if he die without service, the right to the subject would descend to the next heir of the marriage, in the same manner as, in the common case of a reduction upon the head of death-bed, which may be likewise pursued without service, both the subject and the concomitant right of action will descend to the next heir of the investiture; for it is an established rule of the law of Scotland, that, though obligations and rights of action may be transmitted from the dead to the living without a service, no land estate can.

1765. *March* 7. CHARLES ROSS *against* ROSS of ALDIE.

IN this cause there was a very general point mentioned among the Lords, *viz.* Whether an heir of entail, laid under no limitation but that of not altering the order of succession, can make a new entail, laying the other heirs under farther limitations against contracting debt and alienating?

Lord Pitfour said it was certain law that he could; and he mentioned a case in the year 1734, in which the greatest lawyers then in the house were consulted, and had given their opinion that there was no doubt in the matter. But some of the Lords expressed a good deal of doubt, and the case was decided against the additional entail, upon this specialty,—that the order of succession was altered as to one of the substitutions, and other things done which the heir had no power to do; and the Lords would not divide the tailyie, sustaining one part of it and rejecting the rest.