1742. *November* 12.

ELIZABETH CAIRNS *against* CREDITORS of GARRIOCH.

No. 25.
A service as heir-general will not carry subjects falling to heirs of provision, though both characters coincide in the same person.

A blank substitution in a bond, filled up by another than the writer, its effect.

JAMES CAIRNS of Minibuie had two sons, Alexander and William. *Anno* 1664, the said James Cairns lent to Cairns of Garrioch £600. Scots, and took the bond payable to himself, he being on life; and failing of him by decease, to William Cairns, his second son, heirs or assignees, secluding executors. William died before his father, and, upon his death, Elizabeth Cairns, the only child of Alexander, now deceased, was confirmed executrix, and served heir in general to her grandfather. In the ranking of the creditors of Garrioch, the creditors objected, That the adjudication which had been deduced on the above bond was null, in regard Elizabeth had made up no proper title thereto, her general service not being sufficient to carry it.

Answered for Elizabeth: When she served heir, she brought a proof before the inquest, that William died before his father James, as the retour expressly bears; which, it is believed, is sufficient, according to practice, in the affair of services, to carry the bond. If, indeed, William had survived his father, or left other heirs than Elizabeth, a service as heir of provision would have been necessary, in order to complete the title; but, as she was both heir-general and heir of provision, by the substitute's having left no separate heirs of his own, a general service is sufficient: For, when a person is served heir in general, he has right to every subject which pertained to his predecessor, not specially conveyed away to another; and no body can impugn that right, unless they can condescend upon another who has a better. In the next place, there is an implied termination of all substitutions being in the heir-general of the fiar; therefore, a service, as heir-general, is a sufficient title to carry every subject which belonged to the predecessor, when there is not another person claiming in virtue of a special right. Elizabeth does not deny, that a service as heir of provision would have carried this bond; but what she contends is, that as she had both rights in her person, a service as heir-general was sufficient: But, to remove all objection, she is now served heir of provision.

Replied for the creditors, That of old, when a man took a bond conceived in the manner above set forth, it was constructed that a substitution was not intended, but a conditional institution, so as that the person named in the second place could only have right, in case the creditor died before the term of payment, and therefore that his claim vanished altogether, in case the creditor survived the term; but this was afterwards altered in practice, because it was judged reasonble, that the person whom the creditor did prefer to succeed to him, in case he died before the term of payment, would be the same whom he would prefer in case he survived the term. And, according to this rule, there is no doubt, that, if William Cairns, the *nominatim* substitute, had survived his father, he would have

taken the bond, and not the father's representatives, though the father survived the term of payment. No. 25.

2do, Where a man takes a bond to himself, and failing him by decease, to Mævius, and his heirs, executors, or assignees; though Mævius die before the creditor, his representatives will be understood to be heirs of provision to the creditor, and they will take the bond in preference to the creditor's heirs of line or nearest of kin. This is no more than an extension of the former rule, and depends upon the same reason. What the creditor is supposed to have in view is, that, after his own death, Mævius should succeed to the bond, and his heirs after him, to the total exclusion of his the creditor's other heirs; and it cannot be supposed he meant a different thing, upon the unforeseen accident of Mævius's dying before him; therefore the creditors must take it for granted, that though William died before his father, yet his representatives, (supposing him to have had heirs of his body) would be entitled to take up the bond as heirs of provision to the creditor, and that the same would in that case not descend to Elizabeth the heir of line. These things premised, it was further answered, That Elizabeth's service, as heir of line to her grandfather, could not establish a right to the bond, because by that service there is no evidence brought that William died without heirs of his body; consequently it did not appear at all that she was entitled to succeed to the bond. *2do*, *Esto* it did appear that she is the person entitled to take up their succession, yet, as she has made her election to represent her grandfather as heir of line only, the service will give her no right to any subject she was entitled to take up as heir of provision. A service is a decreet, and partakes this in common with all other decreets, that the facts therein set forth must be both relevant and proved, otherwise it is null; the application of which to the present case is obvious, as there was no proof brought to the inquest, that William died without heirs of his body. With us there is no such thing as *sui et necessarii hæredis*; every heir may take up the succession or not as he pleases; and where two titles of representation coincide in the same person, it is in his power to represent upon one or other as he thinks fit; and if he chuses the one, it will not make him represent upon the other. Elizabeth, in this case, chose to represent as heir general, which can never have the effect of a service as heir of provision; and as this holds with respect to the active representation of heirs, so it must likewise hold in the passive, otherwise many fatal consequences would follow.

See the cases, Murray of Conheath, and Neilson of Chappel, 22d January, 1706, Livingston *contra* Menzies, No. 10. p. 14004, *voce* REPRESENTATION. Edgar *contra* Johnston, No. 17. p. 4325. *voce* FIAR ABSOLUTE LIMITED.

The Lords found, That by the conception of the within bond of £600 Scots, the same belongs to the heirs of provision of the institute James Cairns, and can only be carried by a service as heir of provision to him; and therefore, the pursuer not having made up her title in that way, but as nearest heir of line to her grandfather James Cairns, found the adjudication deduced on that title null, so as

No. 25. to found the pursuer in a competition with the other creditors-adjudgers of Garrioch.

But, on a reclaiming petition and answers, The Lords found the bond in question was originally blank in the substitution; and that it does not appear to have been filled up by the debtor, the writer of the bond, and so must be held still as blank in the name of the substitute; and therefore found, that the right to the said bond was established in Elizabeth's person, by her service as heir in general to James Cairns, the original creditor; and repelled the objection to the adjudication at her instance.

N. B. It appears from the above petition and answers, that some mistakes had happened in clerking the first interlocutor.

Fol. Dic. v. 4. *p.* 272. *C. Home, No.* 207. *p.* 343.

*** Lord Kames reports this case:

JAMES CAIRNS of Minibuie lent £600 Scots to Alexander Cairns of Garrioch, and took a bond for the sum "payable to the said James Cairns, he being in life; and, failing of him by decease, to William Cairns, his second lawful son, heirs or assignees, secluding executors, betwixt and the term of Lammas, 1694." William Cairns, the *nominatim* substitute, having died before his father, without issue, Elizabeth Cairns, his niece, only child to the eldest brother Alexander, did, after the death of her father and grandfather, expede a general service as heir of line to her grandfather, and also a confirmation as his next of kin; and, upon these titles, she led an adjudication upon the said bond against the debtor's estate. In the competition of his creditors, the following objection was moved against her interest: That the said bond, containing an express substitution, did not fall to the heir of line; nor was a general service as heir of line the proper title, because it could only be carried by a service as heir of provision.

Answered for Elizabeth Cairns, That she is both heir of line and heir of provision; and since she has the natural right to the bond, it was a matter of indifference what title she chose. 2*do*, The confirmation is the more proper title, which the following considerations make evident.—The creditor did not intend to entail this trifle; he meant no more but to make a provision for his second son, in case of his survivance; which event failing, the destination vanished, as if it had never been: The bond fell under the creditor's executry, and Elizabeth Cairns has right to the same, as being confirmed executrix to her grandfather. In short, William was a conditional institute, not a substitute.

To the *first*, the creditors replied, That Elizabeth Cairns is acknowledged to be the person who is entitled to succeed to this bond; yet, as she has made her election to represent her grandfather as heir of line only, her service in that character will not carry any subject she is entitled to as heir of provision. This proposition was endeavoured to be made out by the following chain of reasoning: *Sui et necessarii hæredes* not being known in the law of Scotland, it is optional to

every heir to take up or abandon the succession; for this reason, if two different titles of representation coincide in the same person, he may chuse the one title, and desert the other; consequently, if he make up his title in the one way only, this is, by construction of law, deserting the other: For what more proper indidication can he give of his will than by acting in this manner? And, indeed, were there any latitude of construction indulged here, it might lead to fatal consequences; for, as the active and passive titles always go together, if one intending to take up a particular subject as heir of provision, shall, by construction of law, have right to whatever he could claim as heir of line, the consequence must be, to subject him to all the predecessor's debts, though he never intended to be so liable. No. 25.

The creditors, in their reply to the *second*, endeavoured to make out, that this was a proper substitution; that the only title by which the bond could be carried was, as heir of provision to James Cairns, the creditor; and that it did not fall under his executry. To this effect they stated the following propositions: 1*mo*, When a bond is taken payable to a man at a certain term, he being in life, and, failing of him by decease, to another, it was formerly established, that a substitution was not intended, but a conditional institution; consequently, that the second person could only have right in case the person first named died before the term of payment; and therefore, that if the person first named survived the term of payment, the bond descended to his own representatives, as if there had been no provision of succession in the bond. But this was altered by later practice; for though the foregoing construction might be agreeable to the words of such a clause, yet it could scarce be thought agreeable to the creditor's intention: It was reasonably judged, that the person whom the creditor did prefer to succeed to him, in case he died before the term of payment, would be the same whom he would prefer in case he died after the term. Hence the strict way of interpreting such clauses, by conceiving them to be only conditional institutions, wore by degrees out of use, to give place for the more favourable construction of a proper substitution taking place equally whether the creditor die before or after the term of payment: And now it is universally received as a rule, that, *in dubio*, a substitution is rather to be understood than a conditional institution. And, according to this rule, there is no doubt left, that if William Cairns, the *nominatim* substitute, had survived his father, he would have taken the bond, and not the father's representatives, though the father survived the term of payment.

Next, where a man takes a bond to himself, and, failing of him by decease, to Mævius and his heirs, executors, and assignees, though Mævius die before the creditor, his representatives will be heirs of provision to the creditor, and will take the bond, excluding the creditor's heirs of line and nearest of kin. This is no more but an extension of the former rule, and depends upon the same reason. What the creditor is supposed to have in view is, that, after his own decease, Mævius shall succeed to the bond, and his heirs after him. If, in this case,

No. 25. which is principally in view, Mævius's heirs be preferred before the creditor's own heirs, it can scarce be thought the creditor intended a different succession upon the unforeseen accident of Mævius's dying before him: It would be whimsical to prefer his own heirs in that particular event, when Mævius's heirs are preferred in the event principally in view; and, therefore, this construction is not to be admitted, unless the expression be such as to leave no room for doubt. From these premises it follows, that though William died before his father, the substitution is not vacated; his heirs are called to the succession in his place; and, had he left a child, that child would have been entitled to the bond, by serving heir of provision to its grandfather. And Elizabeth Cairns can have no other title to this bond, but by qualifying herself heir to her uncle William, and in that character serving heir of provision to her grandfather.

"The Lords found, That the bond could only be carried by a service as heir of provision to James Cairns the creditor, and not by a service as heir of line; and therefore found Elizabeth Cairns's adjudication null, as proceeding upon a bond to which she had made up no proper title."

Rem. Dec. v. 2. No. 32. p. 48.

1761. *November* 28.

DUKE of HAMILTON and EARL of SELKIRK *against* ARCHIBALD DOUGLAS of Douglas.

No. 23.

THE Duke of Douglas, in July, 1761, executed an entail, in which he granted procuratory for resigning his estate in favour of himself, and heirs of his body; whom failing, the heirs whatsoever of the body of the deceased Marquis of Douglas, his father; whom failing, Lord Douglas Hamilton, &c. The Duke dying in the same month, Mr. Douglas, his sister's son, took out a brieve from Chancery, to be served heir of provision in general upon the said deed. The service being retoured in common form, Mr. Douglas thereby acquired right to the procuratory in the entail 1761, and put up a signature in Exchequer for a charter of resignation, that he might complete a feudal title to the lands. He also entered into possession, by appointing factors, &c. Meantime, the Duke of Hamilton and Earl of Selkirk having raised actions of reduction and declarator, as heirs of tailzie and provision to parts of the estate, and having obtained brieves to be served heirs in special, it was questioned, whether their services could go on, as Mr. Douglas, though he had not completed his titles by infeftment, was *in cursu* of completing a proper feudal title to these lands. While this question was in dependence, the Duke of Hamilton and Earl of Selkirk petitioned the Court to sequestrate the lands in dispute, and to appoint a factor for uplifting the rents till the issue of the competition, upon this ground, That it was unjust, where a succession is in dispute, and where there is a competition of brieves, that the one party should have so great an advantage as to be allowed possession of the