

*Answered* for the pursuer, He is regularly served heir-male to William, Earl of Dalhousie, his cousin, Earl William being truly and effectually served heir-male to Earl George, his father; for *legitimus et propinquior hæres* is a general designation applicable to all heirs *in suo genere*, according to the last investiture; and generally all brieves, even of heirs-male and provision, bear only *legitimus et propinquior hæres*; though, sometimes, the word *masculus*, or *provisionis*, (which is not *de essentia*) be added *ex superabundanti*. Besides, albeit a general service of an heir of line requireth no more for its foundation but the propinquity of blood; yet, in a special service, there must be a voucher and document for verifying to the inquest, that the person to be served is *legitimus successor* in these lands, viz. the sasine of him last infeft. Now, how could the inquest, who had Earl George's sasine produced in their presence, and under their consideration, have returned Earl William by a special service, to have right, as naked heir of line to the estate of Dalhousie, which, by the last investiture, was conveyed to heirs-male?

No 13.

THE LORDS found, that Earl William, being eldest son, and thereby both heir-male and of line to Earl George, and served *legitimus et propinquior hæres* to him in lands, wherein Earl George was infeft to himself and his heirs-male, ought to be understood as served in the terms of Earl George's infeftment; and therefore repelled the objection, and sustained process.

*Fol. Dic. v. 2. p. 345. Forbes, p. 630.*

1738. July 21. EDGAR *against* MAXWELL of Barncleugh.

In a contract of marriage, an estate being disposed to the husband, and his heirs-male of that marriage, which failing, his heirs-male of any other marriage, which failing, his heirs-female of that marriage; and their being daughters of that marriage, but no sons, a service by the eldest son of the second marriage, as heir-male in general to his father, was found not to carry the provision in the contract of marriage, though, at the same time, he was heir-male of provision; upon which footing the heirs-female of the first marriage, who claimed the estate after his decease, were preferred to his gratuitous assignee.

No 14.

*Fol. Dic. v. 2. p. 345.*

\* \* See this case by Kilkerran, *voce* SERVICE and CONFIRMATION. See also No 10. p. 3089. *voce* CONSOLIDATION, and No 17. p. 4325. *voce* FIAR ABSOLUTE LIMITED.

1745. June 5. MERCER *against* SCOTLAND.

No 15.

A NEPHEW having, from his uncle, a disposition *omnium bonorum* that should belong to him at his death, with a provision, that he should be liable for the

No 15. whole debts due by him; and having thereupon served himself heir of provision, was not found liable, universally, in payment of the debts, but *tantum in valorem* of the subjects which he had acquired.

*Fol. Dic. v. 4. p. 234. D. Falconer. Kilkerran.*

\* \* \* This case is No 119. p. 9786. *voce* PASSIVE TITLE.

No 16.  
A service as heir of provision to a subject, was found to carry it, though not provided, but falling to the same person as heir of line.

1749. June 21. BELL of Whitstonhill *against* CARRUTHERS of Dormont.

WILLIAM BELL of Winterhophead settled his estate on his daughter Mary, and John Carruthers of Dormont her husband, and their heirs of that marriage, under the burden of 4000 merks to Jean his second daughter, returnable if she should die, without leaving children who should attain to one year of age.

Jean married to John Bell of Whitstonhill, and deceased leaving Jean a daughter, who attained to one year of age, and was served heir of provision to her mother; and, upon her death, John Bell being served heir to his daughter, pursued for the provision.

*Answered,* It is not habilely transmitted; the child was not heir of provision, but heir of line to her mother; so that though by her existence the condition of return failed, yet the service being inept, did not carry the provision, but it falls to be taken up by the defender's mother Mary Bell, sister, and now heir of line to Jean.

*Replied,* By the intention of the donation, the child was heir of provision; but however the service being to this subject which had fallen to the person claiming, sufficiently carried it, though there had been a mistake in making the claim as heir of provision, whereas it belonged to her as heir of line.

THE LORDS found the service of young Jean Bell to her mother effectual to carry the provision granted to her said mother.

Reporter, *Striched.* Act. H. Home Alt. R. Craigie. Clerk, Gibson.  
*D. Falconer, v. 2. No 71. p. 77.*

\* \* \* Lord Kames reports this case:

WILLIAM BELL of Winterhophead, having two daughters, and no prospect of more issue, settled his estate, in his eldest daughter Mary's contract of marriage with John Carruthers of Dormont, upon the heirs-male of the marriage. And in the same contract he made a settlement upon his other daughter Jean, in the following words: "Likeas, it is hereby expressly provided and declared, that this present disposition, procuratory of resignation, precept of sasine, and infeftment to follow hereupon, are made and granted by the said William Bell, and accepted of by the said John Carruthers, under the burden and payment to Jean Bell, second lawful daughter to William Bell, of the sum of 4000