

REPRESENTATION.

14019

must be effectual as an *aditio hæreditatis*. The subject claimed, whether as at present by a service, or as formerly without a service, must regulate the whole. There will be no active title but to the subject claimed; and there will be no passive title but what results from claiming that subject.

No 16.

THE LORDS unanimously repelled the objection against the service. They were of opinion, that the decision, Edgar *contra* Maxwell, is not applicable to the present case, where the subject is mentioned in the service, which clearly points out the intention, and makes the appellation of heir of provision to be merely a *falsa demonstratio*.

Rem. Dec. v. 2. No 109. p. 203.

* * * Kilkerran also reports this case :

THERE is this difference between a general service, in which no subject is mentioned, and a general service, in which one specific subject only is claimed, that where the service is general, without reference to a particular subject, it will carry no subject to which the person has only right by some special provision. And accordingly, a service as heir-male general will not carry a provision to the heir-male of a marriage, *supra* 21st July 1738, Edgar *contra* Johnston, No 14. p. 14015. And the reason is plain, that *non constat* by such general service, that he is the person entitled to the provision. And the case is the same of a general service as heir of line, that it will not carry a provision to heirs-male, even though the person who serves be both heir of line and heir-male, because still *non constat* from the face of the service, that the person served heir of line is also heir-male.

But it is otherwise, where, in a general service, a person claims a particular subject, and truly is the person who has right to it, of which there cannot be a better example than the case in hand. A subject is provided to a daughter, without mention of her heirs: Upon her death, her heir of line is entitled to take it up. Her only child serves to her not as heir of line, but as heir of provision. The service will be good, because the child could not be heir in the subject by provision without being heir of line; and it would be very strange, if a service in the very subject itself by a person admitted to have right to it, should not be effectual to carry the subject.

And accordingly, the objection to the service in this case, that it was as heir of provision, and not as heir of line, was repelled.

Kilkerran, (SERVICE AND CONFIRMATION.) No 8. p. 513.

1766. July 16.

BAIRD, and other Creditors of PRIMROSE, *against* NEIL, EARL of ROSEBERRY.

No 17.

IN the question between these parties, of date 22d June 1765, recorded *voce* TAILZIE, after the entail had been found ineffectual against creditors, as not

No 24. being recorded, it came to be disputed, Whether the Earl was liable *in solidum* for the whole debts, or only *in valorem* of the estate?

Pleaded for the Creditors; The Earl had it in his power to have served *cum beneficio*; but, in place of doing so, he chose to serve heir of tailzie and provision; and, therefore, now that the entail is set aside, he must be liable for the whole debts.

Answered; An heir of provision is not an heir in the proper sense of the word, he does not succeed *in universum jus*, but to the special subject provided, and, therefore, can only be liable *in valorem*.

2do, When the succession opened to the defender, the tailzie was supposed to be effectual. For that reason, he did not think it necessary to serve *cum beneficio*. But, now that the tailzie has been unexpectedly set aside, he must be considered in the same light, as if he had availed himself of that privilege, which he would have exercised, had he known that the estate was to be held in fee-simple.

“ THE LORDS found the Earl liable only *in valorem*.”

Act. Lockhart, Sir David Dalrymple.

Alt. Burnet.

G. F.

Fol. Dic. v. 4. p. 234. Fac. Col. No 40. p. 267.

* * * This case was appealed.

The House of Lords, (3d April 1767,) ORDERED and ADJUDGED, That the appeal be dismissed this House, and the interlocutor therein complained of be hereby affirmed.

See SERVICE and CONFIRMATION.

See APPENDIX.