

rents. Answered: Mr. Douglas, by his service as heir of provision on the deed 1761, is vested in the personal right to the lands, and has a good title of possession against the granter of that right, and against every person claiming as heir under him; and being in the lawful possession, he is entitled to continue it, till it be evicted in the regular course of law. The Lords refused the desire of the petition.

No. 26.

Fol. Dic. v. 4. p. 273. Fac. Coll.

* * This case is No. 12. p. 3966. *vide* EXHIBITION.

See another case between the same parties, Sect. 5. *infra*.

1766. November 27.

MR. PATRICK HALDANE, Advocate, against ANNE, AGNES, &c. HALDANES, Daughters of the deceased John Haldane, and their HUSBANDS.

MUNGO HALDANE of Gleneagles, in implement of a contract between him and his brother Patrick, in 1675, disposed the lands of Lanark, part of the estate of Gleneagles, "in favours of Patrick, and the heirs-male of his body, and assignees whatsoever; whilk failing, to return to the said Mungo Haldane, and the heirs-male of his body; whilk failing, to the heirs-female of the body of Patrick the eldest, succeeding without division; whilk failing, to the said Mungo Haldane his nearest and lawful heirs-male whatsoever; whilk failing, to his heirs whatsoever."

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Effect of a general service, *tanquam legitimus et propinquior hæres*, to a father.

Patrick died in 1686, without executing the procuratory contained in the fore-said disposition; and, in 1693, John, the son of Patrick, was served and retoured heir in general, *tanquam legitimus et propinquior hæres*, to his father. But no farther step was taken to complete his titles before 1726, when, without making up titles to the procuratory by a service of heir-male and of provision, he completed his titles upon his former general service, and expedite a charter under the great seal to himself, and the heirs-male of his body, and assignees whatsoever; whom failing, to the other heirs mentioned in the disposition 1675; and, upon this charter, infestment followed in October 1726.

John had two sons, Alexander and Patrick, and six daughters; and, in 1746, he executed a disposition of the lands of Lanark, in favours of his second son Patrick, then residing in England; and, in 1757, Patrick executed a disposition of the estate in favours of his six sisters, equally among them.

Upon the death of John Haldane and his two sons, Alexander and Patrick, the last of whom died in 1765, Mr Patrick Haldane advocate, the grandson and heir-male of Mungo Haldane, the original disponer, obtained a brieve from chancery, for serving himself heir-male of provision in general to Patrick Haldane his grand-uncle. In this service, appearance was made for the six daughters of John Haldane and their husbands, who produced the disposition by John to Patrick their brother,

No. 27. and by Patrick to them, in bar of the service. Mr. Haldane was served, all objections being reserved to the ladies.

Mr. Haldane brought a process of reduction and declarator, for setting aside the rights founded on by the daughters of John Haldane, and particularly, the dispositions 1746 and 1757, above mentioned. The ladies brought a reduction of Mr. Haldane's service and retour; and the principal point debated in these mutual processes was, whether John Haldane, by his general service, *tanquam legitimus et propinquior hæres* to his father Patrick, did carry and vest in his person, the personal right and unexecuted procuratory in the disposition 1675? Or, Whether it was not necessary that he should have been cognosced heir-male and of provision, according to the destination of that deed?

Pleaded, for Patrick Haldane: In special services, the claim is adapted to the infestment in the predecessor, and the claimant must prove himself to be heir in that character and description, to which, by the investiture, the right is devised; but, in general services, the law is otherwise: The claim does not ascertain any particular right that is thereby to be carried; it is the character alone that is to be ascertained. It is optional to the party under what character he shall claim, whether as heir of line, heir-male, heir of conquest, heir of provision, &c.; although all these characters may unite in one and the same person, he may betake himself to any of them he pleases. If his predecessor dies possessed of two estates, the one devised to heirs-general, but loaded with debt, the other limited to heirs-male, and so settled, as not to be chargeable with debt; and the claimant happens to be both heir-male and heir of line; he may repudiate the estate devised to heirs of line, and obtain himself served *legitimus et propinquior hæres masculus*; and an heir so served will not be intitled to the estate devised to heirs-general, or subjected to an universal representation. The only means by which the lieges are certiorated of the representation of a deceased person, is by the service of his heirs, who, before the inquest, not only ascertain their propinquity, but likewise declare the character under which they claim; or, in other words, what rights and subjects they mean to vest in themselves by the service.

If the plea maintained for the ladies, the daughters of John Haldane, is well founded, the unavoidable consequence must be, that, in every case where there is coincidence of characters, as heir-male, heir of line, &c. in the same person, a service, such as occurs in this case, will not either ascertain the character under which the heir claims, or the subjects vested in him by the service, unless it could be maintained, that, where there is a coincidence of characters, as heir-male, heir of line, &c. in the same person, that person, by serving heir in any character, is understood to take up the succession of the defunct in every character; a doctrine not hitherto adopted in the law. Nor is this difficulty removed by the service, in this case, ascertaining John Haldane to be the eldest son of his father, and of consequence his heir male. The service, indeed, proves the propinquity, and that the claimant was entitled to represent his father as heir-male; but it does not ascertain that he intended to represent his father in that character. And, in support of

these pleas, these decisions were referred to; Edgar *contra* Maxwell, No. 14. p. 14015. *voce* REPRESENTATION; Menzies *contra* Dickson, No. 20. p. 5352. *voce* HEIR CUM BENEFICIO; and the case of Laurie of Redcastle's settlement, *voce* TAILZIE.

Answered for Anne, &c. Haldanes: The service of their father, John Haldane, *tanquam legitimus et propinquior hæres* to his father Patrick, established in him the right to the unexecuted procuratory of resignation in the disposition 1675. The words *legitimus et propinquior hæres*, are understood in law to apply to other heirs, as well as heirs of line, and particularly to heirs-male; and, upon this principle, was the question, Earl of Dalhousie *contra* Lord and Lady Hawley, No. 13. p. 14014. *voce* REPRESENTATION. In this present case, the inquest having found John Haldane *propinquior et legitimus hæres* to his father Patrick, must necessarily be understood to have found him heir-male to his father, as he could not be *propinquior et legitimus hæres* to him, without being his eldest son; and, if he was the eldest son, he must of necessity be his father's heir-male; and, on these principles, were determined the cases, Livingston *contra* Menzies, No. 10. p. 14004. *voce* REPRESENTATION; and Bell *contra* Carruthers, No. 16. p. 14016. *IBIDEM*.

It is a rule in law, "Quotiens in actionibus, aut in exceptionibus, ambigua oratio est, commodissimum est accipi, quo res, de qua agitur, magis valeat quam pereat; L. 12. De rebus dubiis."

A service is to be considered as an action prosecuted by the claimant before the inquest; and, agreeable to the above rule, ought to be constructed in the way most beneficial to the claimant, especially in this case, where the estate in question was the only subject intended to be taken up by the service. John Haldane, by being found nearest and lawful heir, is found to be the eldest son, that is, the heir-male of his father; and his intention to carry, by that service, the lands of Lanark, is manifest, from his executing the procuratory of resignation, contained in the disposition 1675, as having right thereto, in virtue of that service; by his expeding a charter, and taking infeftment thereon, and possessing the estate upon these titles.

In general, where different characters concur in the same heir, it is admitted he may assume one of those characters, and repudiate the rest; but, it is denied, that, when an heir takes upon him one character, he can repudiate another character, which is necessarily an inherent part of the character taken up by him. In this case, after John Haldane was served nearest and lawful heir in general to his father, he could not reject any subject divisible to heirs-male, so as to free himself from the burthens affecting that subject. Cases may occur where a service, as *propinquior et legitimus hæres* to another to whom the claimant is both heir of line and heir-male, will not carry a subject descending to heirs-male; but that will not affect this case, where John Haldane could not possibly be nearest and lawful heir to his father, without being likewise his heir-male. The decisions referred to by Mr. Haldane do not apply; for, in all of these cases, there was a possibility that the character of heir, claimed under the service, might have stood in the person of another, which, in this case, was impossible, as the character of heir-male could be in

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no other person than John Haldane, who was served *propinquior et legitimus hæres* to his father, which could not have been without his being the eldest son and heir male.

“ The Lord Auchinleck Ordinary found, that, as Patrick did not expedite a sasine on the precept contained in the disposition of 1675, John Haldane his son, upon the father’s death, made up a proper and legal title to the personal right which was in his father, by obtaining himself served and retoured heir in general to his deceased father, whereby he is cognosced *legitimus et propinquior hæres dict. Patricii Haldane ejus patris*, which ascertained upon record, not only his universal right, but also, that he was heir-male of the body of Patrick, and superseded the necessity of a service as heir-male.”

“ And to this interlocutor the Court, 27th November, 1766, adhered, upon advising a petition for Mr. Haldane, with answers for Anne, &c. Haldanes.”

For P. Haldane, *Henry Dundas et alii.*

For Anne, &c. Haldane, *David Graeme et alii.*

A. E.

Fol. Dic. v. 4. p. 274. Fac. Coll. No. 111. p. 379.

1783. December 4.

The CREDITORS OF ROBERT CUMING *against* JEAN MACONOCHIE.

No. 28.

Necessity of a general service, in order to transmit personal rights in burgage tenements.

ROBERT CUMING disposed a house in the town of Edinburgh, with an unexecuted procuratory from the person last infest, “ to James Beveridge, and Grizel Chiesly, his spouse, and longest liver of them two, in conjunct fee and liferent, for the said Grizel Chiesly her liferent-use allenary; and at and after the decease of the longest liver of them two, in favour of Jean Maconochie, the grandchild of James Beveridge, in fee.”

After the death of James Beveridge, who never was infest, Jean Maconochie, his grandchild, did not expedite a service as heir of provision to him, but obtained an infestment from the bailies as disponee, by executing in her own favour the procuratory which had been assigned by Robert Cuming.

The creditors of Robert Cuming the disponent, who had attached this subject by adjudication, followed with infestment, objected, that Mrs. Maconochie’s infestment, from the want of a service to her grandfather, was altogether inept and ineffectual. And in support of this objection,

Pleaded: Feudal rights of every denomination require in their transmission a document in writing. In those which had been vested in a person deceased, it being necessary at the same time to ascertain the death of the predecessor, and the devolution of the right to the heir, a service is indispensably requisite, as the proper and only legal voucher of transference; Stair, B. 3. Tit. 5. § 25; Erskine, B. 3. Tit. 8. § 63.

It is true, that in rights already constituted by infestment in the person of the ancestor, the superior in land, and the bailie in burgage tenements, from their sup-