

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.

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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

merks at her attaining the age of twenty-one years complete, with annual rent from the term next after William Bell's decease; declaring, that in case Jean Bell depart this life before she be twenty-one years complete, or before her lawful marriage, or die thereafter not having children, or leave children who shall not attain the age of one year, that in these cases her portion shall pertain and belong to the said John Carruthers and Mary Bell, and their heirs of tailzie above mentioned."

John Bell of Whitstonhill intermarried with the said Jean Bell, and had issue a daughter who survived her mother, attained to six years of age, and was served and retoured heir of provision to her mother. After her death, her father expedite a general service as heir of line to her, and commenced process against Francis Carruthers of Dormont, as representing his father John, for payment of the 4000 merks. The defence was, That the sum in question being settled upon Jean Bell, without any mention of heirs, it must be carried by a service as heir of line, and not by a service as heir of provision; and therefore, that the service of Jean's daughter, as heir of provision to her mother, being void, the portion remains still *in hæreditate jacente* of the mother, to be taken up by the defender as heir of line. On this head it was observed for the defender, that as a service *qua* heir in general cannot carry personal rights descendible to heirs of provision, though the heir of line be by the provision called to the succession; so a service as heir of provision cannot carry subjects descendible to heirs of line. To prove which, the decision Edgar *contra* Maxwell of Barncleugh was appealed to, 21st July 1738, No 14. p. 14015.

The pursuer, to make his answer to this objection the better understood, set furth the words of the service. " Qui jurati dicunt, quod demortua Jeana Bell filia legitima secunda quond. Gulielmi Bell in Winterhophead, mater Jeanæ unicæ filiæ procreat. inter illam et Joannem Bell latoris præsentium, obiit ad fidem et pacem S. D. N. et quod dicta Jeana Bell est legitima et propinquior hæres provisionis dictæ suæ matris, secundum tenorem contractus matrimonialis init. et perfect. inter Joannem Carruthers, unicum filium et hæredem Joannis Carruthers de Dormont, cum consensu sui patris, ex una parte, et Mariam Bell filiam natu maximam dicti quondam Gulielmi Bell de Winterhophead, et illum pro illa in se onus suscipien. ex altera parte, de data decimo die Augusti. 1708: Per quem quidem contractum matrimonialem dictus Joannes Carruthers junior, et respectivi hæredes talliæ inibi mentionat. onerantur cum solutione quatuor mille mercarum monetæ Scotiæ, dictæ demortuæ Jeanæ Bell, et puerulis ex ipsius corpore legitime procreat. matri superviventibus, et ad unum annum pervenientibus; quibus (deficien. aliis hæredibus in dict. contractu specificatis; ut in dicto contractu matrimoniali, diversas alias clausulas in se continen. latius pro- portat; et quod dicta Jeana Bell est legitimæ ætatis. In cujus rei test, &c." To clear the point in issue, a distinction was stated betwixt a general service, in which one specific subject only is claimed, and a general service, in which no subject is mentioned. With regard to the latter, it is necessary that the gene-

No 16. ral service specify the precise title under which the party claims, because a service has a passive effect as well as an active ; and if it should be found that the service carries more than is claimed, the consequence might be, that the claimant should be liable to the predecessor's debts, beyond what he proposes to be. For example, supposing a person who is both heir of line and heir-male, claims as heir-male only, if the Court shall find he has right by this service to subjects descendible to the heir of line, the necessary consequence must be, to subject him to his predecessor's debts as heir of line ; which would be unjust, since it would be subjecting a man as heir of line to his predecessor's debts, who never intended to be so subjected ; and a more precise declaration he cannot give of his intention, than to claim only as heir-male, when he hath both titles in his person. This is a doctrine established by many decisions ; and particularly that mentioned by the defender, where it was found, that a service as heir-male in general carries not a provision in a contract of marriage to the heirs-male of the marriage, though both characters concur in the person served.

It is a very different case, where one specific subject only is claimed in a general service. There it is of no importance under what character the claimant be described, provided only he be entitled to take that subject by a service. There can be no danger in finding him entitled to it ; because, in claiming that specific subject, the heir served must lay his account to be subjected to all the burdens consequent upon that claim. However wrong described Jean Bell may be in the service, it is evident she intended to assume the proper character which entitled her to claim the 4000 merks ; and she or her tutors must have laid their account that she should be *passive* liable to all debts which could affect her in quality of heir to that subject ; therefore it can have no bad consequences, like what follow in the former case, to find her entitled to this subject ; because such judgment will not subject her to any debts but what she submitted to. The present objection then amounts to no more but this, that here is a *falsa demonstratio*, a mistake in the description of the heir ; to which the obvious answer is, that a *falsa demonstratio* is nothing, *si constat de persona*. The claimant's intention is clear to serve heir to this subject ; and it is of no importance how she be described, provided it appear from the service that she is entitled to the subject. To lay any weight upon an erroneous designation in such a case, is to make justice, the substance, yield to form, the shadow.

It was added, that a general service is but a late invention. Within these two centuries, an heir needed no active title to such subjects as are now carried by a general service ; it was sufficient that he claimed them, or brought a process ; any act asserting his right was sufficient to vest. And while our law stood so, the heir run no hazard of being subjected farther to the debts of his predecessor, than in the character which he assumed. The general service was introduced by analogy of the Roman law, as an *aditio hereditatis* ; and therefore, if in the general service it be clear what subject is claimed, the service

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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.

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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