1733.

IRVINES
v.
CUMMING, &c.

ALEXANDER IRVINE of Crimond, Esq. and WILLIAM IRVINE of Artamford, Esq. his brother, - } *Appellants;*

SIR ALEXANDER CUMMING, Mr. JOHN OGILVIE, JAMES GORDON, and others, the Trustees for the Creditors of Alexander Irvine of Drum, &c. - - - } *Respondents.*

4th May, 1733.

CONFUSIO.—A bond over an entailed estate being granted to the substitutes in the entail, and the succession to it having opened to the heir in possession of the estate, but he not having made up any title to the bond,—it was found that the debt is not extinguished by confusion in his person, but is still a subsisting burden on the estate.

[Fol. Dict. i. p. 196. Mor. Dict. p. 3042.]

ALEXANDER IRVINE of Drum tailzied his estate upon himself, the heirs male of his body, and certain other substitutes. The heirs were restrained from charging the estate with debt, but it was particularly provided that all the debts then or thereafter to be contracted by the maker of the entail should remain a charge on the estate. No. 23. 1683.

He afterwards executed a bond of provision for L.80,000 Scots, in favour of his *second* son, Charles, and the heirs male of his body, whom failing, to the 1687.

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heirs male of the body of such person or persons as he had by the said entail appointed to succeed to him in the said estate.

Upon the death of the entailer and of his two sons without issue, the succession as well of the entailed estate as of the said bond of provision, devolved upon Alexander Irvine, who was served heir of tailzie in the estate, but did not expede any service to the bond. He was succeeded by his son Alexander, who did not make up any title, but in 1721 granted a bond for L.10,000 sterling to Sir Alexander Cumming in trust for certain purposes. Upon this bond Sir Alexander charged the said Alexander Irvine to enter heir of provision to Charles to the said bond of L.80,000, and upon his renunciation, obtained an adjudication thereof against him, and thereafter, upon a like charge, to enter heir of tailzie in the estate of Drum, obtained an adjudication against the estate for the sum of L.80,000 Scots. Sir Alexander Cumming then brought a process of declarator before the Court of Session against Alexander Irvine, and the heirs of tailzie, to have it found and declared that the said bond for L.80,000 was a subsisting debt and burden on the entailed estate.

In defence to this action, it was objected that the right of succession to the bond, originally due to Charles, having descended to Alexander Irvine, and the right of succession to the entailed land estate having likewise descended to him by the death of his father, he, as heir of entail, became debtor for the bond, and at the same time creditor for it as heir of provision to Charles; and that therefore the

bond was merged, or extinguished *confusione*, the same person being both debtor and creditor.

It was argued for the pursuer, that Alexander Irvine never having made up any title in his person to the bond, as heir of provision to Charles, he could not have any right thereto. The bond was an estate quite distinct from the entailed land estate; and he might have taken up or waved the succession to both or either as he thought fit. In fact, he had renounced the bond in favour of the creditors, who had completed a proper title to it, and it belonged now to them and not to him; therefore, he never having been creditor in the bond, or established any right to it, the debt was not merged or extinguished by confusion, but remained a subsisting debt, and an effectual charge on the estate, established in the creditors by their adjudication.

The Lords found "that the heir male of Muit- Jan. 4, 1726.
"hill being also served heir of entail to the estate of
"Drum, his service does not state him in the right
"of the said bond of provision of L.80,000 Scots,
"so as to operate a confusion in his person, and
"that this Drum being charged to enter heir in
"special to Charles, and adjudication having there-
"on followed, does not operate a confusion of
"debtor and creditor in this Drum's person;" and therefore "found that the said bond of provision is "not extinguished, but is still a subsisting debt on "the estate of Drum."

Various judgments, in terms of these interlocutors, were subsequently pronounced.

The appeal was brought from the interlocutors of the 4th and 26th January, 1726, part of an in- Entered Jan. 26, 1732.

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terlocutor of the 21st July, 1727, and those of the 7th and 22d February, 1727.

Pleaded for the Appellants:—1. The intention of the entailer is apparent, that this bond should merge in the entailed estate, otherwise he would not have limited it, upon failure of *Charles* and the heirs male of his body, to the heirs of entail. The bond was to descend to the same person as the estate, and accordingly, the present Drum having right both to the estate and the bond, the bond became merged and extinguished *confusione*.

2. It being admitted that if the heir of entail, now in possession, had been served heir of provision to Charles, the bond would be merged and extinguished; the proceedings at law in this case have the same effect, for having by the usual process charged him to enter heir to Charles, such charge to enter heir is, *fictione juris*, of the same force and effect, as if the heir so charged was actually served heir, and the bond must therefore be considered as extinguished.

Pleaded for the Respondents:—1. The heir first named to succeed to the estate was Alexander Irvine of Muithill, and the heir named to succeed to the bond was the heir male of his body. The father had right to the estate, and the son right to the bond; so that the granter's intention is manifest, that the bond should remain a separate estate.

Accordingly the succession to the bond became open to the present Alexander Irvine during his father's lifetime, and not to the father; and although the succession to the estate did afterwards, by the death of the father, open to him, it was in his

power to wave both successions, or either of them; and therefore, until separate titles were made up to both, the bond could not be merged or extinguished in his person.

In point of fact he did wave the succession to the bond, and left it to be affected by the creditors, who have accordingly established a legal title to it.

2. The plea that the charge to enter heir was equivalent to a service as heir, is grounded on a mere fiction, and has no foundation in law. Such a charge gives the person charged no right to the bond, but is merely a form introduced in favour of creditors, by which the debt may be made a real and effectual charge on the estate of the granter of the bond.

After hearing counsel, "it is ordered and adjudged, &c. that the appeal be dismissed, and "that the several interlocutors therein complained "of be, and the same are, hereby affirmed." Judgment May 4, 1733.

For Appellants, *Dun. Forbes.*
For Respondents, *P. Yorke*, and *Ro. Dundas.*