

- No. 32. speciality either of Sir George Mackenzie's private opinion, or upon any particular clause in the nomination, but upon the general ground, that in institutions and substitutions by tailzies the nearest heir existing at the time of the devolution of the succession and service is by the presumed will of the defunct preferable, which they resolved to follow as a rule in time coming; but left the question entire, how far the remoter heir served might be obliged to denude in case of the after existence of a nearer heir of tailzie."

Dalrymple, No. 87. p. 113.

1714. February 19. SIMPSON *against* WALKER.

- No. 33. A sum being provided to a man and his wife, and the longest liver of them two in life-rent, and to the heirs to be procreated betwixt them two in fee; which failing, to the wife's heirs or assignees; and the husband and wife having deceased without children of the marriage, the sum was found to belong to the wife's heirs, and not to her executors.

Fol. Dic. v. 2. p. 401. Forbes MS.

* * This case is No. 45. p. 5475. *voce* HERITABLE AND MOVEABLE.

1714. December 14.
THE CHILDREN of BAILIE FIFE *against* KATHARINE STEVENSON and her HUSBAND.

No. 34.
A bond to the father in life-rent, and a child *nominatim* in fee, which failing, to the father, his heirs, executors, or assignees, found to be moveable.

Young of Winterfield granted a bond of 7,000 merks to Alexander Stevenson and his wife in life-rent, and to their daughter Susanna Stevenson in fee; and failing of the said Susanna by decease, to the said Alexander, his heirs, executors, or assignees, which is the precise conception of the bond.

Alexander Stevenson and his wife being dead, Bailie Fife, tutor to Susanna Stevenson, who was married to her father's sister, takes an heritable bond of corroboration in these terms: viz. "To the said Susanna, and the heirs of her body; which failing, to his own wife, and her two sisters *nominatim*, and the portion of the deceasing to accresce to the survivor.

Susanna Stevenson deceasing without issue, Margaret Stevenson, the only survivor of the three father's sisters, presuming that she had right to the bond, by the conception of the corroborative security, disposed the said sum in favours of Bailie Fife and his children of a second marriage, of no relation to the Stevensons, who do now claim right to the said sum by virtue of the said disposition to their father.

On the other hand, Katharine Stevenson being a creditor to Alexander Stevenson her brother, who was brother's son and heir to Alexander Stevenson, to whom the original bond was granted in life-rent, and also heir to Susanna the original

fiar, she obtains an adjudication against him as charged to enter heir to the said Alexander and Susanna her uncle and cousin-german; whereupon she competes, and alleges, she is preferable to the children of Bailie Fife; because the original bond was heritable, and thereby did devolve to Alexander Stevenson younger, who was heir both to Susanna and Alexander her father, and now belongs to her and her husband by virtue of the adjudication; and albeit Bailie Fife took an heritable bond of corroboration, substituting his own wife and her two sisters, and survivor of them, to Susanna, yet he the tutor could not alter the destination of the original bond, but that substitution must be rectified, and accresce to the true heir.

It was alleged for Bailie Fife's children: That the original bond was moveable, because it did neither bear a clause to infest, nor seclude executors; and therefore the tutor might very lawfully take the bond in favours of Susanna's father's sisters, who were her nearest of kin.

It was answered: That the bond was heritable, and did virtually imply an exclusion of executors; which is the opinion of my Lord Dirleton in his *Doubts and Questions on the word "Tailzie,"* p. 198. where the question is stated thus: "A bond being granted to a man and his wife, and longest liver of them two in conjunct fee, and to one of their sons named, and the heirs of his body; which failing, to the heirs to be procreated of the husband and wife; which failing, to the wife's heirs and assignees, *Quæritur*, If the bond be heritable or moveable, seeing there is no infestment nor obligation to infest? Answer, It is heritable, in respect of the tailzie foresaid; and the provision in favours of heirs with a substitution, is equivalent, as if executors were expressly excluded." And so also it was lately found in a case betwixt Walker and Simpson, No. 33. *supra*, where a portion being provided to William Walker, and Janet Walker his future spouse, and longest liver, in life-rent, and to the heirs to be procreated betwixt them in fee, which failing, to Janet's nearest heirs and assignees, the sum was found to be heritable, and to belong to the wife's heirs, and not to her executors.

It was replied: That my Lord Dirleton's opinion is confirmed by no decision; and the case of Walker and Simpson is not printed. But, *2do*, The present case differs from both; for there, there was not only a substitution and tailzie, but all the provisions in every substitution was in favours of heirs, without mentioning executors. Here the original fee is in favours of Susanna, without so much as mentioning the heirs of her body, and the only substitution is in favours of Alexander her father, his heirs and executors, which is the common destination in the substitution of a moveable bond.

It was duplied: The original fee in favours of Susanna, is to be understood in favours of her heirs; and so it was understood by Bailie Fife her tutor, who took the bond of corroboration to her and to the heirs of her body; so that if she had had children, they could not have succeeded to her by confirmation as executors, but as heirs; and the bond being heritable in the first substitution, it must necessarily so continue heritable in the second; and consequently the heirs of her father, and not his executors, were called to the succession by her death, and the

No. 34. adjection of executors made no alteration, only it might have happened that there were by-gone annual-rents before her decease, which would have been moveable, and fallen to her executors.

“ The Lords found the original bond was heritable, and could not be altered by the bond of corroboration taken by the tutor, preferring the fiar’s nearest of kin to her heirs, failing of her.”

1715. *February 3.*—Young of Winterfield granted a bond of 7000 merks to Alexander Stevenson and his wife in life-rent, and to Susanna Stevenson, their daughter, in fee; and failing of Susanna, by decease, to the said Alexander, his heirs, executors, or assignees.

Alexander Stevenson and his wife being dead, Bailie Fife, tutor to Susanna, the fiar, took an heritable bond of corroboration, in these terms: To Susanna, and the heirs of her body; which failing, to the three sisters of Alexander Stevenson, her father, *nominatim*, whereof one was the Bailie’s own wife.

Susanna dying without issue, one of the three father’s sisters, and survivor of them, assigns the bond wherein she was substituted to Bailie Fife, from whom his children have right.

Katharine Stevenson conceiving the original bond to be heritable, and that Bailie Fife, tutor to the survivor, could not lawfully take a bond of corroboration substituting the father’s sister’s and nearest of kin to Alexander, the fiar’s father, but that the right of the original bond did devolve to the said Alexander Stevenson’s heir, viz. his brother’s son, from whom the said Katharine Stevenson did adjudge the same, and thereby had right to the original bond, supposing it to have been heritable; and thereupon she craved to be preferred to the children of Bailie Fife, who had right from the said Alexander Stevenson’s sisters and nearest of kin, in whose name the Bailie had unwarrantly taken a bond of corroboration, failing of Susanna, the fiar; and the Lords, on the 14th of December last, found the original bond was heritable, and that the same could not be altered by the bond of corroboration taken by the tutor, preferring the fiar’s nearest of kin to her heirs, failing of her.

The children of Bailie Fife reclaimed, and alleged, That the original bond was moveable, being taken to Susanna, and failing her, to her father, his heirs, executors, or assignees, which is the common stile of moveable bonds, and that the said bond contained no obligation to infest, nor did seclude executors; and that the grounds upon which the former pleading and decision proceeded can easily be answered and cleared, that the same cannot be applicable to this case; *vid.* the opinion of my Lord Dirleton, in his Doubts and Questions upon the word Tailzie, where the question is stated thus: A bond being granted to a man and his wife, and the longest liver, in conjunct fee, and to one of their saids-named and the heirs of his body; which failing, to the heirs betwixt the husband and wife; which failing, to the wife’s heirs and assignees, *Queritur*, Whether that bond was heritable or moveable? *Answer*, In respect of the tailzie foresaid, and the provision in favours of heirs, it is equivalent as if executors were ex-

pressly secluded. In the former debate, another case betwixt Walker and Simpson was also cited; but none of these cases quadrate with the present in the stile of the bond, or the reason insisted on, viz. in that mentioned by Dirleton, there was a series of substitutions, and in every substitution mention of heirs, but never of executors, first nor last; whereas, in this case, the bond was taken in fee in name of a child; and failing of her, to the father, his heirs, executors, or assignees; so the money was originally the father's, designed for a provision to a child; and if that child should fail, the money was to be the father's again, his heirs, executors, or assignees; and the bond of corroboration was taken to the nearest of kin of the father *nominatim*, by the advice of the best lawyers in the kingdom for the time, who all agreed that the bond was moveable. And as to the decision betwixt Walker and Simpson, it is not found on record; and albeit bonds containing obligations to infest are often taken to heirs and executors, which is to be interpreted *singula singulis*, the principal sum to the heir, and the annual-rent to the executors; yet the common stile of moveable bonds being to heirs and executors, and there being no evidence of the intention of the original creditor to make his sum heritable, as might be presumed from the series of substitutions in the case mentioned by Dirleton, nor any decision to favour the case of the heir, the bond ought to be found moveable.

“ The Lords found, That, by the death of Susanna, the succession of the original bond should fall to Alexander Stevenson and his executors, and not to his heir.”

Fol. Dic. v. 2. p. 401. Dalrymple, No. 127. p. 177. & No. 134. p. 186.

* * Bruce's report of this case is No. 16. p. 14852. *voce* SUBSTITUTE AND CONDITIONAL INSTITUTE.

1716. June 15.

JAMES HAMILTON, and the CREDITORS of ORBISTON, *against* HAMILTON of Dalziel.

William and James Hamiltons, elder and younger of Orbiston, having made a tailzie of the estate, dated at Cramond, and the father another thereafter, dated at the Buoy of the Nore; in the first, they reserve a faculty to alter; and that tailzie is to Orbiston younger and his heirs whatsoever; in the second, (the first branch whereof is Sir David Hamilton, who repudiated the heritage), there is a clause expressly resolute of the right of any of the branches who should dispoone any part of the estate to James Hamilton, old Orbiston's brother, or his issue, who nevertheless is heir of line to Orbiston younger, by the decease, without issue, of both father and son. But, thereafter, Orbiston elder grants a disposition of his estate in favours of Hamilton of Dalziel; and in a process of reduction thereof, *ex capite lecti*, at the instance of the said James Hamilton, in conjunction with Orbiston's creditors, it was, among other things,

No. 34.

No. 35.

If the instituterepudiate the entail, the substitutes, who can have no title but by a service to him, must be cut out, and the succession opens to the heir of line, as if the entail had not been made.