

Case 49. Katherine Stevenson, and Mr. James Gillon,
 Dalrympie, Advocate, her Husband, - - - *Appellants*;
 24 Dec. 1714. Gilbert, Mary, and Eupham Fife, Children
 3 Feb. 1715. of Gilbert Fife deceased, late one of the
 Bruce, Baillies of Edinburgh, - - - *Respondents*.
 3 & 19 Feb. 1715.

20th Feb. 1718-19.

Heritable and moveable.—A bond taken to a man and his wife in life-rent, and to their daughter in fee, and failing her by decease to the husband, his heirs, executors, or assignees; found to be moveable, that being but one substitution.

Tutor and Pupil—A tutor having taken a heritable bond, in corroboration of a personal one payable to the pupil and her issue, whom failing to three aunts, her nearest in kin *nominatim*; it is found that he acted warrantably.

Succession.—The three aunts having neither confirmed nor served themselves heirs, but one of them, who survived, being according to the tenor of the said heritable bond entitled thereto, assigned the same: in a question between the assignees and the heir, who was *then* also nearest in kin of the deceased pupil, the assignation is supported.

ALEXANDER STEVENSON, merchant in Edinburgh, deceased, on the 17th of December 1668, lent to Walter Young of Winterfield, the sum of 7000 merks Scots, and took from him a bond for that sum, payable to the said “Alexander Stevenson” and Katherine Wilkie his wife, and longest liver of them two, “in life-rent, and to Susanna Stevenson, their lawful daughter, “in fee; and failing her by decease, to the said Alexander Stevenson, his heirs, executors, or assignees.” Alexander Stevenson died intestate in February 1669, leaving his daughter and only child Susanna, an infant about 14 months old. His widow and three sisters, Christian, Susannah (married to Gilbert Fife, one of the bailies of Edinburgh), and Margaret, also survived him; and he left a nephew and niece, Alexander Stevenson and the appellant Katherine, children of a deceased brother.

Gilbert Fife, being appointed tutor to the said Susannah the infant, on the 6th of January 1671, took an heritable bond of corroboration from Walter Young the debtor, obliging him to pay the said sum to Katherine Wilkie the mother in life-rent, and to the said Susannah Stevenson her daughter, and to the heirs lawfully to be procreated of her body; whom failing, to Christian, Susanna, and Margaret Stevenson, her aunts, sisters to the said Alexander Stevenson deceased, equally amongst them, and to the said Gilbert Fife, husband to the said Susanna, for his interest, and to the heirs lawfully procreated or to be procreated of the said three sisters their bodies; and failing of any of them by decease without heirs of her body, and not making lawful disposition of their shares, then the portion of the deceasing sister or sisters to accresce to the surviving. Upon this heritable bond infestment was taken.

Susanna

Sufanna the infant died about the age of four years, and her aunts Christian and Sufanna having also died without issue, and without making any disposition of their shares, Margaret the survivor, in January 1704, conveyed all her right and interest in and to the said bonds to George Denniston, in trust for the respondents, who were children of Gilbert Fife by a second wife, but no relations of the Stevensons. Denniston afterwards conveyed the same to the respondents. Margaret, the surviving aunt, took up the succession by virtue of the personal substitution to her in the second bond, and never made up any title by confirmation or service.

The creditors of Walter Young having brought an action of ranking and sale of his estate of Winterfield, the respondents appeared and claimed the said debt by virtue of the titles before mentioned. But in this they were opposed by the appellants, Katherine and her husband, claiming right through her brother Alexander Stevenson, the nephew and heir of the said Alexander Stevenson deceased. Alexander Stevenson jun. being indebted to his sister Katherine in the sum of 8500 merks Scots as her marriage-portion, the appellants charged him to enter heir to his uncle, and the daughter Sufanna, in the said original bond, and thereupon brought an adjudication, in which they obtained decree in December 1710.

A competition thereupon ensued between the appellants and respondents with regard to the right to the sums due by Walter Young. On the part of the appellants it was contended, that the original bond contained a gradual substitution of heirs, and was therefore heritable as to the succession; and that the tutor of Sufanna could not innovate the first bond in prejudice of the heir. The Court at first by an interlocutor, on the 17th of December 1714, "Found that the original bond conceived in favour
" of Sufanna Stevenson was heritable, and found that the inno-
" vation of the security by Sufanna's tutor in prejudice of the
" succession of the heirs could take no effect, and therefore pre-
" ferred the appellants for the sums due by the original bond, as
" coming in the right of Sufanna's heirs."

The respondents reclaimed against this interlocutor, and after answers for the appellants, the Court, on the 3d of February 1714-15, "Having fully considered the case with the original bond
" granted by Walter Young to Alexander Stevenson, in which
" bond there is but one substitution to Sufanna Stevenson, heir of
" the sums therein, viz. to the said Alexander Stevenson, his
" heirs, executors, or assignees; found, that upon the death of
" Sufanna, the succession by the original bond would have de-
" volved upon the executors of Alexander Stevenson, who were
" his own sisters, from whom the respondents derive right." The appellants reclaimed, and as no title by service or confirmation had been made up by the sisters, the appellant Katherine offered to make up a title in her person by confirming herself executor: the respondents made answer, and the Court, on the 19th day of
February

February 1714-15, “Adhered to their former interlocutor, but
 “remitted to the Lord Ordinary to hear parties’ procurators,
 “upon this point, viz. If the succession by the original bond
 “would have devolved upon the executors of Alexander Steven-
 “son, if the appellants confirming, or as executors *designative*,
 “serving heirs of provision before extract could be preferred to
 “the respondents, they not having shewn any right by confirma-
 “tion or service.”

Parties were accordingly heard before the Lord Ordinary, who made report thereof, and the Court, on the 7th of July 1715,
 “Found that the tutor could not in his administration alter the
 “succession designed by the original bond; but that he acted
 “warrantably by taking the foresaid corroborative right, substi-
 “tuting those persons *nominatim* who were nearest of kin to
 “Alexander Stevenson, and might have confirmed themselves
 “executors to Susanna Stevenson the pupil.” And to this in-
 terlocutor the Court adhered on the 19th of the same month of
 July.

Entered,
 2 Dec. 1717. The appeal was brought from “several interlocutors of the
 “Lords of Session of the 3d and 19th days of February 1714-15,
 “and of the 17th and 19th days of July 1715.”

Heads of the Appellant’s Argument.

By the laws and custom of Scotland, every bond that has in it a gradual substitution of heirs, is considered to be heritable, seeing it necessarily requires a service of the heir as a title to it: and this is expressly laid down by the learned Lord Dirleton upon the word *Tailzie*, where, he says, that a bond like the present “is heritable in respect of the tailzie foresaid; there
 “being no tailzie of moveables or moveable sums. And the
 “provision in favour of heirs with the substitution foresaid, is
 “equivalent as if executors were expressly excluded.” And this point was lately determined by the Court of Session, 19th February 1714, in the case of Walker and Simpson. The original bond in this case, therefore, should be looked upon as heritable, *quoad* the succession, seeing it contained several degrees of substitution: and although there had been but one degree of substitution, yet that very substitution or entail made the bond heritable as to the succession, and so to belong to the heir, and not to the executor.

But though the bond were moveable, and not heritable, and so part of the personal estate, and as such to descend to the executors of Alexander Stevenson, the original creditor; yet the same must now belong to Alexander Stevenson jun. the heir at law, and his sister Katherine the appellant, they being at present the next of kin to Alexander Stevenson deceased, (who died intestate,) the original creditor, and his daughter Susanna: and, consequently, all their estate, effects, goods, and chattels, both heritable and moveable, by the law of Scotland belonged to the appellant Katherine and her brother, none of the three sisters of the
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the deceased Alexander, aunts to the appellants, having made up a title in their lifetime, by getting themselves confirmed executors dative as nearest in kin to the deceased.

It would be a thing of dangerous consequence to countenance such a practice in tutors, that during the infancy of their pupils, they might take upon them to alter the settlement made by the ancestors of the pupil contrary to their intentions: and without this the respondents have no title.

It is still more unfavourable in the present case, where the tutor has made such alterations in favour of himself and his children, to the prejudice of the right heirs; he having by his indirect practices endeavoured to defraud the true heirs of the sum of money in dispute, and to vest it in his own children, the respondents, who are entire strangers in blood to Alexander Stevenson, the original creditor, and Susanna his daughter.

Heads of the Respondents' Argument.

The original bond was certainly moveable, and to be held as personal estate: for to make a bond heritable, executors must either be excluded from the succession, or there must be a series of gradual substitution; especially if joined with this, that the successors who have the right of blood are cut off, and the succession is settled upon one who could not succeed otherwise than by virtue of the express provision in the substitution. But none of these occur in the present case, for failing of Susanna the fiar, the bond is conceived expressly to Alexander the father, his heirs, executors, or assignees, and Susannah having died an infant, the bond must be reckoned as much moveable as if the father had taken the bond simply to himself, his heirs, executors, or assignees, which without all question would have gone to executors. It is not the addition of the words *which failing*, that makes a bond heritable; for these words, though not adjected, are implied in all bonds: as when a bond is taken to A. B., his heirs, executors, or assignees; that differs in nothing from a bond taken to A. B., *which failing*, to his heirs, executors, or assignees.

The plain intention of the said Alexander Stevenson who lent the money was, that having only one daughter Susanna, the bond was taken as a provision for her, and designed to belong to her, her husband, and children, in case she lived to have any; but failing of that event, the bond was to return to the same state as if her name had never been mentioned, viz. to Alexander Stevenson, his heirs, executors, or assignees, on the plain terms of an ordinary moveable bond. 2dly, Since the bond was conceived to Susanna, without mentioning her heirs, or executors, and yet was designed for her as a portion; it could not be imagined, that the father's design was to exclude the children of Susanna, and prefer his own other heirs or executors to them: In case Susanna had had children it would have gone to them as executors, because she being fiar and no mention made of heirs, or executors in the bond, the case would have been the same thing, as if the bond had been granted to her simply, which by
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the nature of the thing (money being a moveable subject,) would have belonged to her executors; and, therefore, since by the plain presumed intention of Alexander Stevenfon the bond was moveable in the person of Sufanna, he not having made mention of her heirs, but taken it simply to her, and so left it to descend to her executors, conform to the common disposition of law, it could never be claimed by any person as her heir. 3dly, Supposing that Sufanna herself was only to have right, and not her heirs, nor executors, yet the respondents' case would be equally strong if not stronger, because where a right is taken simply to a person's self and not to their heirs, but to other substitutes, that person's right resolves entirely into a life-rent; and then the case would have been the same as if the bond had been taken to Sufanna in life-rent, and to Alexander Stevenfon, his heirs, executors, or assignees, in fee, in which case it was plainly moveable. 4thly, Supposing the bond had been heritable in the person of Sufanna, yet so soon as the succession devolved upon the last substitute, viz. to Alexander Stevenfon the father, his heirs, executors, or assignees, then the bond became a simple moveable bond, as if it had been conceived at first to Alexander, his heirs, executors, or assignees.

The first bond being by its conception moveable, the tutor acted very warrantably by taking the second corroborative bond, and substituting therein the same persons *nominatim* who were nearest of kin to Alexander the father, and might have confirmed themselves executors to Sufanna the pupil.

There was no occasion for the aunts confirming themselves executors, because the tutor saved them that trouble and expence by taking the bond to them *nominatim*, which if the tutor had not done, they infallibly would have made up their own title by confirming themselves executors immediately upon Sufanna's death: and though a tutor could not by any deed of his alter the course of his pupil's succession, yet he could so far meliorate the condition of his pupil, and his pupil's successors, as to save them the trouble of a service or confirmation by taking the right to these persons *nominatim*, who would have succeeded by virtue of the general word executors in the first bond. So that thus the substitution taken *nominatim* to Alexander's executors, (on whom the right devolved) establish the title sufficiently in the persons of these executors: and the respondent's derive their right from them.

Judgment,
20 Feb.
1718-19.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the said several interlocutors complained of be affirmed.*

For Appellants, *Rob. Raymond.* *Will. Hamilton.*
For Respondents, *David Dalrymple.* *Tho. Lutwyche.*