1714. *June* 10.

JAMES HAMILTON, Writer in Edinburgh, second Son to the deceased Sir James Hamilton of Orbistoun, *against* JAMES HAMILTON of Dalziel.

No. 6.
Lands were disponed to one, and failing him to his eldest son and the heirs-male of his body, whom failing to the second son. The eldest survived his father, and died without serving heir to him. The estate found not to have been vested in the person of that son.

JAMES HAMILTON having claimed to be served heir of provision to Sir James Hamilton, his father, as substitute in the procuratory of resignation contained in a disposition granted by Gavin Walkingshaw of that ilk, of an apprising led in his name of the lands and estate of Orbistoun; whereby the said Gavin Walkingshaw did dispone the lands and apprising to the said Sir James Hamilton, and failing of him, by decease, to William Hamilton, his eldest son, and the heirs-male of his body, which failing, to the said James Hamilton, his second son, and the heirs-male of his body;—the inquest served him; but the retouring was stopped by Dalziel, and other creditors of William Hamilton, the eldest brother, who excepted against the same, alleging, that James could not be served heir to Sir James in that disposition, because William, the eldest son, having survived his father, was fiar, by the conception of the disposition, and his father stated only in the liferent; because, where a right is provided to one, and, failing of him by decease, to another and his heirs, the person to whose heirs the disposition provides the right is understood to be fiar, and the other only life-renter: Craig, De Feud. Lib. 2. Dieg. 3.; Stair, Instit. Lib. 3. Tit. 4. § 33. And here the right is to Sir James; and, after his decease, to William and his heirs: *ergo*, William is fiar. Where, indeed, a right is taken to a man, without mentioning heirs, the law often supplies it, and presumes heirs to have been omitted through forgetfulness; but this can never be understood where, in the same clause, with one breath, there is a conveyance to the one, without mentioning his heirs, and to the other and his heirs; which naturally shews a design to difference the two as to their right, that the one was but a naked life-renter, and the other fiar. And that that this disposition cannot be conceived in favour of Sir James and his heirs, is evident, if the case be supposed among strangers, viz. That William had not been the nearest heir to Sir James; in which case, if the clause were understood in favour of Sir James and his heirs, then the substitution could only take place in the event that Sir James had wanted other heirs; which is against all reason and practice. 2*do*, Suppose Sir James were, by the conception of the disposition, understood to be fiar, yet, after Sir James's death, the fee was vested in William's person, by his survivency, without necessity of a service; for, that substitutes need no new title to be made up to establish the fee in their persons, is clear from decisions and the opinions of our lawyers. That *nominatim* substitutes, in rights of moveables or personal bonds, need no confirmation, is clear, without all controversy; 4th February, 1680, Robertson *contra* Preston, No. 4. p. 14357. 18th January, 1625, Wat *contra* Dobie, *voce* SUBSTITUTE, 5th January, 1675, Ballantine *contra* Edgar, No. 35. p. 7807. 15th January, 1630, Thomson *contra* Merkland, No. 11. p. 5774. And the same reason is for a service being unnecessary to substitutes in heritage; and it was so decided, 23d July, 1675, L.

Lamington *contra* Muir, No. 45. p. 4252. My Lord Stair is of the same opinion, Instit. Lib. 3. Tit. 4. § 33. Tit. 5. § 6. & 51. "*As to the second question*," &c.; yea the nature of the thing shows such a service to be unnecessary and improper. For what has an inquest to cognosce in this matter? No more but that the person who was first nominated is dead; which is not the proper work of an inquest. And if a service were required in this case, by the same rule, all dispositions and donations *mortis causa*, all rights wherein a liferent is reserved, behoved to have the granter or liferenter's death cognosced by an inquest; which is absurd. 2*do*, If William was not fiar by the conception of the disposition, nor had the fee vested in him by surviving his father, the many creditors who *bona fide* contracted with him as fiar will lose all their debts and diligences. And in so just and favourable a case, every thing is to be interpreted *ut actus magis valeat quam pereat.* No. 6.

Answered for James Hamilton, 1*mo*, Sir James Hamilton being the contractor with Walkingshaw, and having performed the onerous cause of the disposition, wherein he is designed fiar of the lands disponed to him, and taking the right to himself, in as precise terms of alienation of property as could be devised, no man can doubt of his being the fiar; and, by a necessary consequence, William had not the fee. For if William had the fee immediately upon the disposition, then it would have resolved into a conjunct fee to father and son; and the clause would have run, by disponing, to Sir James and his eldest son William; but William being brought in only by way of substitution and succession, failing Sir James by decease, there was no conjunct fee designed; and, upon the father's decease, it was *hereditas jacens*, till William, the next called, should acknowledge it, and observe the methods of law, whereby this acknowledgement of the succession is gathered; for a substitute is called only as heir, substitution being institution in a farther degree; and, as a plain argument of this, William could not have enjoyed the estate without acknowledging Sir James's debts and deeds. Nor can there be any difference seen, whether Sir James had taken the right to himself, and the heirs of his body, which failing, to William, even upon the supposition that William had not been his son; because the essence of substitution does not consist in this, that the persons substituted are generally called under the designation of heirs; but in this, that one is called to a right, by way of substitution, upon the demise of another, and so takes it up by way of succession; *hereditas* being succession *in jus quod defunctus tempore mortis habuit.* What is observed out of my Lord Stair, if it should interfere with what is mentioned, cannot be acquiesced to, as being only a private opinion: but, no question, there is a mistake in it, or the interpretation of it is mistaken, there appearing some ambiguity in the application of the words *institute* and *substitute.* When bonds are taken payable to a person, and, failing of him by decease, to another, the first is certainly fiar, and may uplift and dispose of the same at pleasure. And with much greater reason must a disposition of lands make the person to whom they are disponed fiar, if there be restriction of the life-rent. 2*do*, Anciently there was no distinction of bonds and lands: The true way whereby the person substituted in either came

No. 6. to have right, was by service; but, in regard those pecuniary provisions came to be frequent in contracts of marriage in favour of children, and in bonds with special substitutions, the law hath been so far dispensed with, for the ease of creditors, as to allow those rights which are of less consequence than lands, and temporary, to be transmitted without necessity of a service; yet this is not to be drawn in consequence, to rights of greater importance, as land rights, which are framed to endure to perpetuity; and, therefore, to these no heir substitute can succeed without a service. *3tio*, Mr. Hamilton is so far from having any design to defraud his brother William's onerous creditors, that he is willing to become bound not to quarrel their debts and diligences, and to secure them upon the subject of the inventory, he being served *cum beneficio* in the most effectual way they can desire: though that is what, in strict law, he could not be obliged to do.

The Lords found, That the estate disponed by Walkingshaw was not, after the decease of Sir James Hamilton, fully vested in the person of the deceased William Hamilton without the necessity of a service; and therefore allowed James Hamilton's service to be retoured, with this provision, that, before retouring, he should give an obligation subjecting himself to the lawful debts and deeds of the said William Hamilton, as heir *cum beneficio inventarii* to him.

Fol. Dic. v. 2. *p.* 367. *Forbes, MS. p.* 57.

1715. *January* 21.

JAMES HAMILTON, Writer in Edinburgh, *against* The CREDITORS of ORBISTON, and HAMILTON of Dalziel.

No. 7.
Found as above, and seems to be the same case.

WALKINGSHAW having disponed in favours of the deceased Sir James Hamilton, which failing, by decease, to the deceased William Hamilton of Orbiston, his eldest son, an apprising of the estate of Orbiston, Sir James having deceased before William, and James Hamilton, the second son, being to serve heir to his father Sir James, there were objections made against the service by the Laird of Dalziel, and the other creditors of William, and the creditors of James Hamilton, the son of William, also deceased, as being jealous that, by such a service, all the debts contracted by William would fall to the ground, and all diligence done against him be unhinged. The question being therefore, Whether the estate disponed by Walkingshaw was, after the decease of Sir James, vested in the person of William his son, without the necessity of a service? And if William was fiar? Or if the estate was *in hereditate jacente* of Sir James?

It was alleged for Dalziel and the creditors, 1*mo*, That since William, by the substitution and his survivance, and using the disposition, became to have the right and benefit of the disposition settled in his person, it was sufficient to exclude the service; because, if the disposition belonged to William, there could be no service as heir of provision to any other but to him therein; and conse-