

No. 25. which is principally in view, Mævius's heirs be preferred before the creditor's own heirs, it can scarce be thought the creditor intended a different succession upon the unforeseen accident of Mævius's dying before him: It would be whimsical to prefer his own heirs in that particular event, when Mævius's heirs are preferred in the event principally in view; and, therefore, this construction is not to be admitted, unless the expression be such as to leave no room for doubt. From these premises it follows, that though William died before his father, the substitution is not vacated; his heirs are called to the succession in his place; and, had he left a child, that child would have been entitled to the bond, by serving heir of provision to its grandfather. And Elizabeth Cairns can have no other title to this bond, but by qualifying herself heir to her uncle William, and in that character serving heir of provision to her grandfather.

“ The Lords found, That the bond could only be carried by a service as heir of provision to James Cairns the creditor, and not by a service as heir of line; and therefore found Elizabeth Cairns's adjudication null, as proceeding upon a bond to which she had made up no proper title.”

Rem. Dec. v. 2. No. 32. p. 48.

1761. November 28.

DUKE of HAMILTON and EARL of SELKIRK *against* ARCHIBALD DOUGLAS of Douglas.

No. 23.

THE Duke of Douglas, in July, 1761, executed an entail, in which he granted procuratory for resigning his estate in favour of himself, and heirs of his body; whom failing, the heirs whatsoever of the body of the deceased Marquis of Douglas, his father; whom failing, Lord Douglas Hamilton, &c. The Duke dying in the same month, Mr. Douglas, his sister's son, took out a brieve from Chancery, to be served heir of provision in general upon the said deed. The service being retoured in common form, Mr. Douglas thereby acquired right to the procuratory in the entail 1761, and put up a signature in Exchequer for a charter of resignation, that he might complete a feudal title to the lands. He also entered into possession, by appointing factors, &c. Meantime, the Duke of Hamilton and Earl of Selkirk having raised actions of reduction and declarator, as heirs of tailzie and provision to parts of the estate, and having obtained brieves to be served heirs in special, it was questioned, whether their services could go on, as Mr. Douglas, though he had not completed his titles by infestment, was *in cursa* of completing a proper feudal title to these lands. While this question was in dependence, the Duke of Hamilton and Earl of Selkirk petitioned the Court to sequester the lands in dispute, and to appoint a factor for uplifting the rents till the issue of the competition, upon this ground, That it was unjust, where a succession is in dispute, and where there is a competition of brieves, that the one party should have so great an advantage as to be allowed possession of the

rents. Answered: Mr. Douglas, by his service as heir of provision on the deed 1761, is vested in the personal right to the lands, and has a good title of possession against the granter of that right, and against every person claiming as heir under him; and being in the lawful possession, he is entitled to continue it, till it be evicted in the regular course of law. The Lords refused the desire of the petition.

No. 26.

Fol. Dic. v. 4. p. 273. Fac. Coll.

* * This case is No. 12. p. 3966. *vide* EXHIBITION.

See another case between the same parties, Sect. 5. *infra*.

1766. November 27.

MR. PATRICK HALDANE, Advocate, against ANNE, AGNES, &c. HALDANES, Daughters of the deceased John Haldane, and their HUSBANDS.

MUNGO HALDANE of Gleneagles, in implement of a contract between him and his brother Patrick, in 1675, disposed the lands of Lanark, part of the estate of Gleneagles, "in favours of Patrick, and the heirs-male of his body, and assignees whatsoever; whilk failing, to return to the said Mungo Haldane, and the heirs-male of his body; whilk failing, to the heirs-female of the body of Patrick the eldest, succeeding without division; whilk failing, to the said Mungo Haldane his nearest and lawful heirs-male whatsoever; whilk failing, to his heirs whatsoever."

No. 27.

Effect of a general service, *tanquam legitimus et propinquior hæres*, to a father.

Patrick died in 1686, without executing the procuratory contained in the fore-said disposition; and, in 1693, John, the son of Patrick, was served and retoured heir in general, *tanquam legitimus et propinquior hæres*, to his father. But no farther step was taken to complete his titles before 1726, when, without making up titles to the procuratory by a service of heir-male and of provision, he completed his titles upon his former general service, and expedite a charter under the great seal to himself, and the heirs-male of his body, and assignees whatsoever; whom failing, to the other heirs mentioned in the disposition 1675; and, upon this charter, infestment followed in October 1726.

John had two sons, Alexander and Patrick, and six daughters; and, in 1746, he executed a disposition of the lands of Lanark, in favours of his second son Patrick, then residing in England; and, in 1757, Patrick executed a disposition of the estate in favours of his six sisters, equally among them.

Upon the death of John Haldane and his two sons, Alexander and Patrick, the last of whom died in 1765, Mr Patrick Haldane advocate, the grandson and heir-male of Mungo Haldane, the original disponer, obtained a brieve from chancery, for serving himself heir-male of provision in general to Patrick Haldane his grand-uncle. In this service, appearance was made for the six daughters of John Haldane and their husbands, who produced the disposition by John to Patrick their brother,