No 29. death; that is, they have access to make up their right to the subject by a service, and thereby to establish a fee or property in themselves.

The death of Charles Campbell prevented the determination of this point; and the controverted matters were afterwards finished by a transaction. However, the Court will probably hereafter find a service necessary, as they have hitherto done, except in the single case of Campbell against Duncan.

Rem. Dec. v. 2. No 25. p. 39.

1747. *November 16.* ANDERSON *against* The HEIRS of SHIELLS.

No 30.
Though action for implement lies to an heir of provision, without a service, yet without a service the right does not transmit.

ANDREW SHIELLS having a son and two daughters of a first marriage, entered into a second marriage with Margaret Syme; and by his contract of marriage with her, became bound to employ 2000 merks on land, or other security, in favour of himself and heir, and longest liver in conjunct fee and liferent, and of the heirs, whatsoever, to be procreated of the marriage, which failing, in favour of the said Andrew Shiells, his own nearest heirs and assignees in fee; and to provide the half of the conquest in the same terms.

Of this marriage there was procreated one daughter, Jean; and Andrew Shiells, by his testament, appointed Thomas, his son, of the first marriage, to be his sole executor and universal legatary, under certain burdens, whereof one was payment to Jean of the special sum of 2000 merks, provided to the issue of the second marriage, but made no mention of the conquest.

Thomas dying soon thereafter, appointed his own three daughters, Janet, Elizabeth, and Margaret, his sole executors, and intromitters with his goods and gear, with the burden of the 2000 merks above-mentioned. Jean, the heir of the second marriage, survived her father and brother, and died without making up titles to the provision in her mother's contract of marriage; and Agnes, one of her two sisters *consanguinean*, having confirmed executor to her, and conveyed her right to William Anderson, he brought a process against the daughters of Thomas Shiells, as representing both their father and grandfather, to make good to him his cedent's half of the special sum and conquest provided to Jean, the only issue of the second marriage.

As to the special sum, there was no question, in respect the same was vested in Jean, the heir of the second marriage, by the testament of Andrew her father. But, as to the provision of conquest, the ORDINARY found, "That, by the death of Jean, the only daughter of the second marriage of Andrew Shiells, without issue, or her claiming implement of, or conveying the provision of conquest in favour of the heirs whatsoever of that marriage, the provision of conquest was extinguished."

And the LORDS "adhered."

THE LORDS considered, that in all cases of this kind, where a provision is made to the heir of a second marriage, who exists and dies without making up

titles, the provision becomes extinct; and that it had never been thought that the man's own heir was to make up titles as substitute heir of provision to the heir of the second marriage, but that, the provision being extinct, the man's effects, heritable and moveable, descended to his own heirs, in the same manner they would have done, had no such provision been made. THE LORDS were at the same time of opinion, and so much the interlocutor supposes, that an action lies to an heir of provision for implement, whether of a special provision or clause of conquest without service; but that, though the right be so far established in the heir of provision, without service, as to produce action for implement, yet, without service, it is not established to the effect of transmission. No 30.

Fol. Dic. v. 4. p. 184. Kilkerran, No 10. p. 463.

*** D. Falconer reports this case:

1747. *November* 26.—ANDREW SHIELLS of Pollockshiels having issue by his first marriage, a son, Thomas, and four daughters, entered into a second, in consideration whereof he became bound to secure the half of the conquest, "in favour of himself and spouse, and the longest liver of them two in liferent and conjunct fee, and of the heirs whatsoever procreate or to be procreated of the said marriage; quhilk failing, in favours of the said Andrew Shiells his own nearest heirs and assignees whatsomever."

Jean, the heir of the marriage, died without making up titles to her provision, and two of her sisters by the first marriage, their brother and the other two being dead, were confirmed executors to her; and one of them assigned her share to William Anderson, portioner of Little-Govan, who pursued the three daughters of Thomas Shiells as representing their grandfather, to make it good to him.

Pleaded in defence, That Jean having made up no titles to the provision, nor disposed thereof, it did not pass to her executors, but, in virtue of the substitution, went to the contractor's heirs whatsoever.

THE LORD ORDINARY, 3d July 1745, "found that Jean Shiells, the heir of the marriage, having deceased without assigning the said provision of conquest, or doing any other deed to disappoint the substitution in the contract, the substitutes were preferable to the nearest in kin to the said Jean; and sustained the defence, that the defenders were substitutes, and assoilzied."

Pleaded in a reclaiming bill, That the contractor not having implemented his obligation, by taking the conquest secured to himself in fee and the heirs of the marriage, Jean remained simply a creditor in the obligation, and neither was bound, nor properly could serve heir therein; but the right on her survivancy, and thereby becoming heir, was completely vested in her; 2d February 1732, Campbell against Duncan, No 39. p. 12885.; and — February 1737, Keith against Couts. *See* APPENDIX.

No 30.

2*do*, The meaning of the substitution must be understood to be similar to that of the vulgar substitutions in the Roman law, whereby the substitutes are not called, except upon the institutes' failing to take the subject; but if it has once fallen to them, the substitutes are excluded, and it goes to their representatives, either *ab intestato*, or testamentar; and dispositions of this sort are not so properly substitutions as conditional institutions: This has been held the rule in our law, 4th February 1642, Lutfitt against Johnston, *voce* SUBSTITUTE and CONDITIONAL INSTITUTE; 19th January 1699, Laws against Tod, IBIDEM; 23d January 1697, Dickson against Stephenson, IBIDEM; 27th January 1630, No 3. p. 2938.

Answered, Neither of the propositions assumed by the petitioner are true, though it is only necessary for the respondent to controvert the last: For, 1*mo*, Although the contractor did not take the conquest secured, according to his obligation, yet, to vest the right in Jean to the *jus crediti*, a service was necessary, as this right was first in himself; and here a distinction must be observed between an obligation to pay a sum to children, and one to secure a subject to a person's self and the heirs of a marriage.

2*do*, The maxim of the Roman law, that a vulgar substitution evanished on the existence of an heir, was founded on this reason, that by that law no man could name an heir to his heir, which does not obtain with us; and though some old decisions may have gone that way, possibly following the Roman law, without considering that the reason did not obtain, yet Stair, p. 480. tells us, that more frequent decisions have given a different interpretation to such clauses; and so particularly was found, 13th July 1681, Christy against Christy, *voce* SUBSTITUTE and CONDITIONAL INSTITUTE, in which case the institute had confirmed the subject.

THE LORDS, 17th November, adhered.

Pleaded in another bill, The pursuer claims, as deriving right from the substitute to Jean Shiells, for his cedent was her father Andrew's heir whatsoever in this moveable subject, being therein preferable to the defender's grandchildren by his son: Jean is institute, and to her are substituted his own heirs whatsoever, that is, those who were *designative* so at the opening the succession to them by the failure of Jean; and he prays the interlocutor may be so explained.

THE LORDS found, that by the death of Jean, the only daughter of the marriage of Andrew Shiells, without issue, or her claiming implement of, or conveying the provision of conquest in favour of the heirs whatsoever of the marriage, the provision of conquest was extinguished; and therefore adhered to their former interlocutor, so far as it assoilzied the defender.

Act. *Lockhart & Cross.* Alt. *H. Home.* Clerk, *Hall.*

D. Falconer, v. 1. No 212. p. 293.