posed knowledge of their vassal or fellow burgess, have been permitted, by precept of *clare constat*, or by cognition by hasp and staple, to make up for the want of a service, and to give infeftment directly to the heir. But this power, which is the creature of usage alone, and a deviation from the general rules of feudal conveyance, has never been extended to personal rights. An investiture in these must be altogether incomplete without a service, which connects the warrant for infeftment in favour of the predecessor with the infeftment in favour of the heir. Indeed, an extension of the powers of the bailies would not aid Mrs. Maconochie, by whom, from a misconception of the nature of her rights, titles have been made up, not in the character of heir of provision, but as a disponee or singular successor. No. 28.

Answered: The form of a general service, for the purpose of establishing personal or incomplete real rights in the heir, is only necessary in the case of a land-estate. In burgage tenements, where the charter and sasine are contained in one writing, it is seldom or never used; the bailies, upon their knowledge of the fact, giving infeftment at once to the heir. In this case, Mrs. Maconochie's title, upon the decease of her grandfather, was equally clear, as it would have been if his right had been clothed with infeftment.

The Court in general, were of opinion, that the power of the bailies to give infeftments to heirs without a regular service, was confined to rights in which the ancestor had died infeft. It was however unnecessary to decide on that ground; because the infeftment to Mrs. Maconochie had proceeded on an erroneous idea, that she was fiar by the terms of the disposition from Robert Cuming.

The Lords "sustained the objection to Jean Maconochie's right, and found, That the creditors of Robert Cuming have a preferable right to the subject, by their adjudication and infeftment."

Lord Ordinary, *Alva*. For the Creditors of Cuming, *Mat. Ross*.
For Mrs. Maconochie, *Ilay Campbell*. Clerk, *Orme*.

Fol. Dic. v. 4. p. 272. Fac. Coll. No. 134. p. 210.

1802. *November* 16.

SIR ANDREW CATHCART'S TRUSTEE *against* EARL of CASSILLIS.

No. 29.
An estate, specially destined by family settlements, having been resigned of new, and a charter taken *hæredibus et assignatis quibuscunque*; a general ser-

SIR JOHN KENNEDY of Cullean, Baronet, stood seised in an estate under investitures to heirs-male. At his death, in 1742, he left three sons, John, afterwards Sir John, Thomas, and David, both of whom were successively Earls of Cassillis; and three daughters, the eldest of whom was the mother of Sir Andrew Cathcart of Carleton, Baronet.

His son, John, completed a proper feudal title to such parts of the estate as were held of the Crown and Prince of Scotland; but he made up no feudal title to that part of it which was then holden of the family of Cassillis.

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vice, as nearest and lawful heir of line, and heir-male, was found a sufficient title to carry the unexecuted precept in the charter.—The same service found sufficient also to connect with lands not in the charter, but contained in the antecedent settlements, as equivalent to a service as heir of provision, the service showing that the party serving has both characters in him.

In 1743, he granted a procuratory for resigning the estate as follows: "In favour of myself, and the heirs-male of my body in fee; whom failing, the heirs-female of my body, the eldest succeeding without division; whom failing, Mr. Thomas Kennedy, my immediate younger brother-german, and the heirs-male of his body; whom failing, Mr. David Kennedy, my youngest brother-german, and the heirs-male of his body; whom failing, the heirs-male procreated of the marriage between Sir John Cathcart of Carleton, and the deceased Dame Elizabeth Kennedy, his spouse, my eldest sister-german;" whom failing, to his two other sisters in succession, and their heirs-male.

This was a simple destination, not secured by any prohibitory clause.

Sir John having died in 1747, was succeed by his brother Thomas, who thereupon expeded a general service, (2d July, 1747) as nearest and lawful heir of line, and heir-male to his brother Sir John, and also as heir of provision, in terms of the contract of marriage between his father and mother; and of the same date, he also expeded a general service as heir to his father, under the same character.

Sir Thomas executed a disposition, (2d January, 1748) by which he settled the estate of Cullean, comprehending the several lands and baronies therein enumerated, and all other lands and heritages of whatever kind, which he should afterwards acquire or succeed to, "in favour of myself and the heirs-male of my body; whom failing, to David Kennedy, my only brother-german, and the heirs-male of his body; whom failing, to Mr. David Kennedy, advocate, my uncle, and the heirs-male of his body; whom failing, to Mr. John Kennedy of Kilhenzie, advocate, and the heirs-male of his body; whom all failing, my own nearest heirs whomsoever, the eldest heir-female and her descendants, so oft as the succession devolves upon females or their descendants, excluding still all others from being heirs-portioners, and succeeding always without division throughout the whole course of succession."

At this time, Sir Thomas had not established in his person any feudal right to any part of the estate of Cullean; but he proceeded, at different times afterwards, to complete his title to the several parcels of it.

He completed his title to the barony of Greenan, and other parts of the estate of Cullean, holding of the King or Prince, in which his brother had been infeft, by obtaining a crown charter, (23d February, 1757) proceeding on his brother's procuratory of resignation, and his own disposition of 2d January, 1748. In this charter were included some lands purchased by himself, and the destination contained in it was the same with that of the disposition 2d January, 1748, already mentioned. Infeftment also followed upon it.

With respect to the lands holding of the Earl of Cassillis, which composed the greatest part of the estate of Cullean, Sir Thomas made up his title, by obtaining (14th February, 1757) a precept of *clare constat* from John, Earl of Cassillis, as superior, for infefting him as heir of his father, the person last infeft in these lands. Upon this precept, infeftment was immediately taken.

Sir Thomas made various purchases of lands, the dispositions to which were taken to himself, his heirs and assignees.

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In 1759, Sir Thomas Kennedy succeeded as heir-male to the honours and estate of Cassillis, which last was settled by entail upon the same heirs.

Earl Thomas (January 1774), granted procuratory for resigning the estate of Cullean, for new infeftment to himself, his heirs and assignees whatsoever.

Upon this procuratory, a crown-charter was expeded (23d February 1774), granting the lands therein contained to Earl Thomas himself, *et hæredibus suis et assignatis quibuscunque.*

A short time before the date of this charter, Earl Thomas had granted a feu-right of the lands to be holden of himself in favour of his brother David, his heirs and assignees whatsoever; and the latter after being infeft (15th June 1774), granted a reconveyance of the lands so feued in favour of the Earl, his heirs and assignees whatsoever, upon which the Earl was infeft (18th October).

After having granted the above feu-right, Earl Thomas conveyed the charter 1774 to certain persons in liferent, who were infeft, and thus became vested with a liferent right of superiority, for the purpose of making them voters in the county. But with respect to the fee, which was taken to the Earl, his heirs and assignees whatsoever, the precept remained unexecuted during his life.

Earl Thomas having died in 1775, the succession opened to his brother David, now become Earl of Cassillis, who thereupon expeded a general service as heir to his brother, in the following terms, (17th April 1776): "Qui jurati dicunt, magno sacramento interveniente, quod quondam Thomas, Comes de Cassillis, unicus frater germanus Davidis, nunc Comitis de Cassillis latoris præsentium, obiit ad fidem et pacem S. D. N. Regis, absque hæredibus ex suo corpore legitime procreat.; et quod dict. David, Comes de Cassillis, est legitimus et propinquior hæres masculus et lineæ dicti quondam Thomæ, Comitis de Cassillis, sui fratris germani, et quod est legitimæ ætatis."

The precept in the crown-charter 1774, remaining still unexecuted as to the fee which had been taken to Earl Thomas, his heirs and assignees, and the right to it being understood to be carried by this general service, Earl David took infeftment (21st October, 1776) upon the precept. Being thus vested with the superiority of the estate of Cullean, holding immediately of the Crown, he granted a charter in his own favour, confirming the base infeftment which had been taken by Earl Thomas, upon the reconveyance of the lands feued out to him, and at the same time granted a precept of *clare constat* for infefting himself in these lands.

Upon this precept Earl David was infeft (28th October, 1776,) and the property was consolidated with the superiority (18th November), by granting a procuratory of resignation *ad remanentiam*, upon which resignation followed.

Earl David was never married; and having full power over the estate of Cullean, he, in 1783, executed a deed of entail, comprehending both the estates of Cassillis and Cullean, which he settled exactly in terms of the subsisting entail of the Cassillis estate, *i. e.* upon the heirs-male of the family.

He also executed another deed of entail (2d February, 1790,) whereby, failing heirs of his own body, the estates of Cassillis and Cullean were destined *nominatim*

No. 29. " to Captain Archibald Kennedy of the royal navy; whom failing, to Archibald Kennedy, his eldest son and heirs-male of his body; whom failing, to John Kennedy, second son of the said Archibald Kennedy, and the heirs-male of his body; whom failing, to Robert Kennedy, third son of the said Archibald Kennedy; whom failing, to any other heirs-male, procreated, or to be procreated, of the body of the said Archibald Kennedy; whom failing, to the other nearest heirs-male whatsoever of the deceased John, Earl of Cassillis, in their order.

Earl David died in 1792. The right of succession to the estates of Cassillis and Cullean, under these two deeds of entail, opened to Captain Archibald Kennedy, who in consequence became Earl of Cassillis.

With respect to the estate of Cassillis, his title was unchallenged; but his right to the estate of Cullean was called in question, in an action of reduction at the instance of Andrew Blane, writer to the signet, trustee for Sir Andrew Cathcart of Carleton, Bart. Blane having adjudged upon a trust bond, and founding upon Sir Andrew's rights as one of the heirs portioners of line of Earl Thomas and Earl David, being descended of their eldest sister, and likewise as being heir of provision to Earl Thomas, in virtue of the procuratory executed by him in 1748, (the prior substitutes having all failed,) insisted for reduction of the whole titles made up by Earl David, so far as respected the estate of Cullean, as being inept and erroneous, and of the deeds of entail which he had executed, as flowing *a non habente*, and consequently null and void.

In the *first* place, As to the lands contained in the procuratory and charter 1744, he contended, that this charter, which was evidently intended for political purposes, could not be considered as a new settlement of succession, or as any alteration of the former anxious destination of the estate, contained in the disposition 1748, by which Sir Andrew Cathcart was entitled to succeed. In support of this objection, he

Pleaded: The term " heir whatsoever," is of a flexible nature; and though it may sometimes, and in ordinary cases, signify heirs of line, yet the proper meaning of it is, *heirs of any sort;* so that it is held to denote heirs general, heirs male, heirs of provision, heirs of conquest, or, in short, any of the various kinds of heirs known in law, according to circumstances; Stair, B. 3. Tit. 5. § 12.; Mackenzie on Tailzies, p. 284.; Erskine, B. 3. Tit. 8. § 47. A family settlement once made is not easily presumed to be altered; and the destination to a particular series of heirs will not be altered or revoked by an after-deed to heirs whatsoever, unless the intention is distinctly expressed; but the term will be interpreted to mean the heir of the former investiture; Marquis of Clydesdale against Earl of Dundonald, No. 3. p. 1262. *voce* BASE INFEFTMENT; Skene against Skene, No. 20. p. 11354. *voce* PRESUMPTION; Weir against Steel, No. 25. p. 11359. IBID. Burnet against Burnet, 28th June, 1765, *voce* SUCCESSION; Robson against Robson, 18th February, 1794, IBID. The term " heirs and assignees," therefore, in the charter 1774, must be explained, by the standing deed of settlement 1748, to mean the heirs of provision in that settlement; and Earl David ought to have

connected himself with the charter, as well as with the settlement, by a service as heir of provision. No. 29.

Answered: The proper and technical signification of "heirs whatsoever," is "heirs of line;" and when an heir of line in the ordinary case, founds on a charter or disposition granted to heirs whatsoever, he is under no necessity of instructing that it is a deed in his favour. It is no doubt true, that circumstances may construe its meaning differently; as, where a person holding a subject descendible to a particular series of heirs, acquires right to any accessory security, or collateral title affecting it, the benefit is held to accrue to the heirs of the destination. But the usual and established meaning of the expression is heirs of line; and when a person holding an estate in fee-simple, although under a destination to a particular series of heirs, but which may be altered at pleasure, grants procuratory for resigning for new infeftment to heirs whatsoever, and expedes a charter in these terms, the ordinary effect is to alter the former destination, and to make the estate descend to heirs of line.

The charter 1774, it is true, was passed for political purposes; but if it had been intended to make no alteration upon the settlements of the estate, the conveyance would have been taken to the heirs of the investiture 1748. Under both, too, Earl David was heir, which distinguished this case from all those authorities where a competition arose between an heir of line and an heir of investiture; Douglas *contra* Duke of Hamilton, No. 40. p. 4358. *voce* FIAR ABSOLUTE, LIMITED; Rose *contra* Rose, 10th March, 1784, *voce* SUCCESSION. Besides, the question here is merely, Whether Earl David had a sufficient title in his person to enable him to make a deed settling his own succession? and, it is thought, that by a service as nearest heir of line, and heir-male, he clearly did what was sufficient, in point of legal form, to vest in him the general title of "heir and assignee whatsoever," under the charter 1774, whether this had effect *eo ipso* of altering the destination in the deed 1748 or not.

The Lords (15th January, 1800) found, "That David, Earl of Cassillis, by his general service, *tanquam legitimus et propinquior hæres masculus et lineæ* to his brother Earl Thomas, carried right to the unexecuted precept in the charter 1774, and did thereby vest in him a sufficient personal right to the lands therein contained: Found, That as Earl David was heir to his brother, as well by the special destination contained in the settlement executed by Earl Thomas in 1748, and the charter following thereon, as by all the other titles and investitures in the person of Earl Thomas, it was unnecessary to determine the question, Whether the special destination was altered or not by the charter 1774, the general service being, in all events, sufficient in point of form to connect him with the lands contained in the charter, or in any similar titles;" and in so far adhered to the Lord Ordinary's interlocutor, which had found, that Earl David by his service carried a sufficient right to the lands in the charter 1774. The Court, upon advising another reclaiming petition and answers, (13th January, 1801,) "adhered."

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2. As to the lands contained in the settlement 1748, and not in the charter 1774, it was objected, That the general service of Earl David, as heir of line and heir-male, could never connect him with the special destination, or supply the place of a service as heir of provision.

In support of this objection, it was

Pleaded: There is no *ipso jure* transmission of rights by mere survivance. The distinction between an heir served and an heir-apparent is fixed and certain. Real rights standing in the person of the ancestor by infeftment, cannot be vested in the heir but by a special service, or a precept of *clare constat* followed by infeftment; and personal rights to lands can only be vested in the heir by a general service. As there are different kinds of heirs, there are as many different kinds of service; and a general service as heir of line is distinct from a general service as heir of provision. One may have the apparency of both characters in him, yet may serve heir in the one character without serving heir in the other, and will vest in himself the succession descendible to him in that character in which he is served, without vesting the succession, or incurring the burden in the other character, in which he is not served; Stair, B. 3. Tit. 4. § 33. and Tit. 5. § 35; Bankton, B. 3. Tit. 5. § 14, 59. B. 4. Tit. 45. § 165; Ersk. B. 3. Tit. 8. § 74.

Heirs of line, heirs of conquest, and heirs male, are creatures of the law, about whom there can be no uncertainty; but an heir of provision depends entirely upon the will of the maker of the destination, and there may be as many such heirs as he pleases. These cannot have this character to any extent, nor otherwise, than under the particular deed of destination, and in respect to the subject disponed; but the other, who are heirs-general, on establishing their representation, take all subjects devised to that species of heirs, and may serve even though no subject exists to be carried by the service.

The service of an heir is the joint sentence of the inquest and judge before whom it proceeds; Stair, B. 3. Tit. 5. § 33, 34, 35, 41. The party serving cannot be served in any other character than that which he claims; as the inquest can take cognisance of nothing but that which is submitted to them, and he cannot be made an heir against his will. The evidence of this intention is the claim, which, in this case, desired his right to the character of heir of line and heir-male in general to be cognosced, but not that of heir of provision.

A service, then, is the legal form, or *actus legitimus*, by which an heir-apparent solemnly claims and vests in himself judicially the succession devolving to him in the character in which he is served; Dirleton, v. *d. Feudo Pecuniæ, Quæst.* 10.

The first requisite of a service, therefore, is the *animus adeundi*. A service as heir in any particular character, without any intention of so serving, is absurd. The particular character may indeed be advantageous; but it may also prove the very reverse, as he becomes liable to all the burdens falling upon the character of heir in which he serves. Earl David did not intend to be served heir of tailzie and provision under the deed 1748; he never made up any claim, nor was ever cognosced to that character; but having served as heir-male and of line, this, it is

said, must be held to be also a service as heir of tailzie and provision, provided it appear with certainty from the service, compared with the deed of provision, that the person served has also the other character of heir-apparent of provision. Such a doctrine might be attended with very dangerous consequences; and it would just result in this, that any man being heir to a predecessor in different characters, could not take up the succession in one character, without vesting himself with the representation of every other character, whether he chose or not. Earl David was certainly at liberty to serve heir-male or heir of line to his brother, without vesting in himself the succession, as heir of provision under the deed 1748; yet, if what he has done is equivalent to this, the succession under this deed might have been a small estate only, and that burdened beyond its value; or he might have been bound to convey a separate estate of his own to another, on succeeding to the entailed estate, or to perform something which he might have been most unwilling to do; yet all this he must have done against his will, without the most remote idea of serving heir of provision. No. 29.

A service also implies a proof, and solemn cognition by an inquest, that the person claiming is heir in the character in which he claims to be served. There is not the least vestige of evidence in the service and retour of Earl David, either of the claim or proof on his part, or of finding on the part of the inquest that he was heir of provision; no deed of provision being at all produced, or so much as mentioned. But this service, it is said, ascertains upon record the fact, that Earl David was heir of provision under the deed 1748, as well as heir-male and of line, and that this is sufficient to vest in him the possession as heir of provision. This, besides laying out of consideration the necessity of an *animus adeundi*, keeps out of view the important distinction between an heir and an heir-apparent; the title to take up a succession, and the actually taking it up; the title to claim and obtain one's self vested with the state and rights of an heir of a certain character, and the actually claiming and being vested with the state of an heir serving in that character. The ascertaining upon record, that a man has a right to succeed, will not vest in him the succession as an heir served. If a man serve heir of line to his grandfather, the service at the same time proves that he is heir of line to his father, still it does not vest the succession as heir of line to his father.

Again, it is impossible to discover from the service, that Earl David was heir of provision under the deed 1748; for the record shows no evidence of this. But even this service, when joined with the deed of 1748, does not ascertain with absolute certainty that Earl David was heir-apparent of provision, or entitled to be served heir of provision in terms of that deed. For, if Earl Thomas had left a son who survived him, and was served heir of tailzie and provision to him, in terms of the deed 1748, but died without making up any title as heir of line, or heir-male general to him, Earl David might have been served heir of line and heir-male to his brother, though he could not have been served heir of provision to him, but to his nephew.

A service, again, brings debts and burdens on the heir, as well as confers rights. But it is argued, that the effects of a service depend not upon the service itself,

No. 29. but upon the use that is made of it; that a service may be made a service as heir of provision, if it be used as such, but that it will not be such a service unless used in this manner, nor vest any representation active or passive as heir of provision. This overturns all the notions hitherto established as to services and legal succession, holding that a service is not by itself a passive title.

Every progress of writs to lands, again, must consist of a connected chain of writings, each bearing on the face of it its connection with the former. But this service could not have been a sufficient warrant to a notary to give infeftment on the precept, or make resignation on the procuratory of the deed 1748; he must have gone beyond the general service, which was his warrant before doing this, and determined points which he had no right to determine.

The principle, that a service in one character, cannot carry rights descending to heirs of another description, though the same person should be heir-apparent in both, is a fundamental and essential doctrine in our system of real rights; Edgar *contra* Maxwell, No. 14. p. 14015. *voce* REPRESENTATION; Cairns *contra* Creditors of Garioch, No. 25. p. 14438; Menzies of Coulterallers *contra* Dickson, No. 20. p. 5352. *voce* HEIR CUM BENEFICIO; Forbes *contra* Maitland, No. 20. 14431; Hay *contra* Lord Charles Hay, No. 12. p. 14369. *voce* SERVICE AND CONFIRMATION; Livingston *contra* Lord Napier, 9th March, 1757; TAILZIE, Gordon *contra* M'Culloch, 23d February, 1791, IBIDEM; Laurie *contra* Spalding, 24th July, 1764, IBIDEM; Spalding *contra* Laurie, 20th February, 1784, Sect. 5. *h. t.* Rose *contra* Rose, 10th March, 1784, *voce* SUCCESSION; Reid *contra* Woods, 18th November, 1788, Sect. 5. *h. t.*; Fairservice *contra* White, 17th June, 1789, Sect. 6. *h. t.*

Answered: When a vassal dies, a new investiture no doubt is absolutely necessary to transfer the right to his heir, as our law has rejected the maxim, *Mortuus sasit vivum*, which has been adopted in the feudal law of most countries. In order to obtain this new investiture, it is required that the person demanding it should establish his right to succeed by the verdict of a jury, proceeding on a brief of inquest. All that is necessary, then, to make a good service, is, that the verdict of the jury, or the retour, shall afford complete evidence that the raiser of the brief is really the heir entitled to succeed and to demand an investiture.

Earl Thomas's settlement is a destination, in the first place, in favour of himself, and the heirs-male of his body; whom failing, not in favour of any set of heirs generally, but specially and *nominatim* in favour of David Kennedy, his only brother-german. Now, the facts established by the retour, are, *first*, That Earl Thomas died without issue; and, *secondly*, It is not only found in general that David was heir-male and heir of line to Thomas his brother; but it is specially declared, that the claimant is David, the only brother-german of Thomas. This retour establishes every one point which Earl David was bound to establish, in serving heir of provision under the deed 1748.

The original end and proper object of a service does not seem to have been to ascertain the *animus* of the heir, whether with a view to the estate itself, or to the

burdens under which it lay; for the superior had a substantial interest in the process, as the feu reverted to him, if the claimant could not prove himself to be the heir of the investiture. Hence the origin of the precepts of *clare constat*, which are perfectly equivalent in their nature, effects, and consequences, to a service; and they would never have been tolerated, if it had been necessary, before an heir could establish his right, that he should perform a certain *actus legitimus*, in order to prove his *animus adeundi hæreditatem;* for the precept of *clare* proves no such *animus* on the part of the vassal, and no one thing else but the knowledge of the superior of the only thing required in a service, that the claimant is the individual person to whom the fee stands provided. The service even now cannot be considered as an *aditio hæreditatis*, or even as proving an *animus adeundi;* for the service merely proves, that the claimant is a particular person. He may then stop short, and the retour will carry nothing; if he does not complete his title, he will die in a state of apparency. No. 29.

A service does nothing else than prove the heir to possess a certain character; and that therefore he is entitled to every right belonging to that character. Having legally ascertained himself to be a particular person, every right devised in favour of that person immediately attaches to him, whether he had any *animus* with regard to it or not. If Earl David had, in technical language, served himself heir of provision to his brother, and in evidence of it produced the deed 1748 to the jury, this would give him right, not only to the subjects conveyed by that right, but to all other subjects standing devised to him, in deeds which neither he nor the jury ever saw or heard of; Ersk. B. 3. Tit. 8. § 74. Again, where a man serves himself heir of line to his father, this is only another mode of saying that he is his heir-male, and he will take all subjects devised in this last character. He who serves as heir of line, or heir-male to his immediate younger brother, would take every *feudum novum* acquired by his brother. It is not, in these cases, that the one service is equivalent to the other; but that, though the technical words have not been used, the service in fact proves the claimant to be the very person described in the deed of settlement.

A special always includes a general service *ejusdem generis;* but, so far as it indicates any *animus* in the claimant, beyond the ascertainment of his character, it is an *animus* restricted and limited to taking up that single subject only to which the claim specially applies; yet, as the special service has proved him to be a particular character, he thereby acquires every personal right destined to that character, just as much as if he had expeded a general service, referring to each individual deed of settlement.

Services were not introduced with any reference to debts incurred by the ancestor. By the feudal law, an heir served does not represent his ancestor universally; and the universal representation of an heir has been introduced among us, by ingrafting upon the feudal system the maxim, "Hæres est eadem persona cum defuncto." Whenever he performs the *actus legitimus*, proving, in point of fact, that he is heir of his ancestor, the maxim instantly applies. He becomes

No. 29. liable, however, not by the service, nor by the *animus* implied in the service, but merely by shewing himself to be the heir. It is impossible, from the service, to know the extent of the representation to which the heir subjects himself. There may be different provisions in his favour, created by different deeds; the service does not apply to one more than another; the burdens depend not upon the style of the service, but upon the use made of it: By taking up this or that particular subject, which is so provided to the person served, he will be liable to all the burdens affecting these subjects; and there is no ground in law by which an heir of provision can be made liable further. But here, the service is not only by inference a service as heir of provision, but it is expressly as heir of line and heir-male, which, by consequence, already fixes an universal representation of the defunct upon the claimant.

It is to be attended to, that, by the deed 1748, Earl David is called *nominatim* to the succession, and as the granter's only brother-german; which is extremely different from calling him under a general character only. In the latter case, a service is always necessary to shew, that the person who claims the character does indeed possess it; but a person called by name needs no service to prove his identity. A service may be necessary to prove, that others called before him have failed; but that is all that can be required; Stair, B. 3. Tit. 5. § 6.; Bank. B. 3. Tit. 5. § 22. It was sufficient, then, to show, that Earl Thomas, the institute, and his heirs-male, the prior substitutes, had failed. This was all which was strictly requisite; but he has done more, and proved that he is the only person to whom the destination in the deed 1748 applies. When the right to succeed appears in the retour *per se*, and *in gremio*, the uniform practice has been, to hold it a good service, though certain technical words of style have not been used. On the other hand, in every case where this did not appear, it was found insufficient, and set aside; Livingston against Menzies, No. 10. p. 14004. *voce* REPRESENTATION; Earl of Dalhousie against Lord Hawley, No. 13. p. 14014. IBIDEM; Haldane against Haldane, No. 27. p. 14443.; Bell against Carruthers, No. 16. p. 14016. *voce* REPRESENTATION; Orr against Orr, November, 1798, (not reported).

The Court was a good deal divided in opinion; and a hearing of counsel having been appointed, the following interlocutor was pronounced:

"(26th May, 1801), Find, That the general service of David Earl of Cassilis, *tanquam legitimus et propinquior hæres masculus et lineæ* of his brother Earl Thomas, was not a service as heir of provision under the settlement 1748, and consequently is not sufficient to carry the subjects in question, which are not contained in the charter 1774; and sustain the reasons of reduction as to these subjects; and remit to the Lord Ordinary to proceed accordingly."

But, upon advising a relaiming petition with answers, (16th November, 1802,) the Court altered this interlocutor, and sustained the service as sufficient.

Lord Ordinary, *Justice-Clerk Macqueen.* For Pursuer, *Hay, M. Ross, Robertson, J. Clerk, Baird.* Agent, *And. Blane, W. S.* For the Defender, *Lord Advocate Hope, Solicitor-General Blair, Rolland, H. Erskine, Cathcart, Campbell, junior.* Agent, *Jo. Hunter, W. S.* Clerk, *Home.*

F. *Fac. Coll. No. 58. p. 123.*