

No. 13.  
heirs-portioners, as well as heritage.

who had two sisters, one elder and one younger; and the lands being conquest, did ascend to the eldest sister, and to William Carse as descended of her.

Mr. Robert Russel, descended of the youngest sister, claimed an equal share, as heir-portioner, and alleged that there was neither the opinion of lawyers, nor any precedent of conquests ascending to an elder sister. It was long doubtful amongst the ancient lawyers, in what manner conquest was transmitted: And that matter was determined by the 88th and 97th chapters *Quoniam Attachiamenta*, by which it is provided, "That if there be three brethren, and the mid-brother deceasing without heirs of his body, the eldest and first begotten shall succeed to the land and tenement, and not the after born or youngest brother," because lands conquest should ascend by degrees, and the heritage descend by degrees: And the 97th chapter is to the same effect. But there is no notice taken of elder or younger sisters; and the reason is, because the law of primogeniture carried the whole succession to the eldest son, or nearest heir-male, except in the case of conquest; but daughters or heirs-female succeeded equally *in capita*; therefore there was no occasion of a speciality in conquest in the succession of females: And lawyers who write upon the subject of conquest, do only state the case of a middle brother-german deceasing but not of females; yet Craig, Lib. 2. Dieg. 15. *in fine*, has these words, "Si plures sint sorores, & una vel feudum vel annuum reditum acquisiverit, & sine liberis mortua fuerit, omnes sorores ad ejus successionem per capita admittentur."

"The Lords found the succession did descend upon the heirs of both sisters as heirs-portioners."

*Fol. Dic. v. 4. p. 398. Rem. Dec. v. 1. No. 3. p. 5.*

\* \* A similar decision was pronounced, January, 1727, Adam against Thomson,  
See APPENDIX.

1734. June 12. EARLS of LOWDON and GLASGOW against LORD KERS.

No. 14.

The Lords found an adjudication *contra hereditatem jacentem*, preferable to an assignation of mails and duties granted by the defunct proprietor, where the competition was about the rents that fell due betwixt the proprietor's death and the date of the adjudication. See APPENDIX.

1757. November 29. ISAAC GRANT against PETER GRANT.

No. 15.  
Heritage of fourth brother goes to immediate elder.

William Grant of Larg had four sons, John, James, Peter, and George. George, the youngest, died without issue, leaving an heritable subject.

William, the son of Peter the third son, then deceased, obtained brieves for serving himself heir of line and conquest to George.

Isaac, the son of John the eldest son, then deceased, opposed this service, so far as it was intended to serye William heir of line to George; and for that purpose offered a bill of advocation, maintaining, That he, as the son of the eldest brother, was heir of line to the youngest brother, in preference to the immediate elder brother of the youngest.

No. 15.

“ The Lords refused the bill.”

For Isaac, *Garden.*

*Fol. Dic. v. 4. p. 304. Fac. Coll. No. 137. p. 252.*

1770. *December 7.*

JOHN CUNINGHAME, eldest Son of the deceased John Cuninghame of Carmelbank, and TUTORS, *against* ARCHIBALD CUNINGHAME of Caddel.

No. 16.

Helen, Jean, and Margaret Cuninghame, the daughters of John Cuninghame of Caddel, deceased, were by a bond, on which infestment had followed, provided in 2000 merks each as their portions. Helen the eldest dying without issue, her succession became the subject of competition between Archibald Cuninghame the eldest brother, and John Cuninghame the eldest son of John Cuninghame of Carmelbank, the immediate elder brother of Helen. Hence the question was, Whether Helen was to be succeeded by the son of her immediate elder brother as heir of conquest, or by her eldest brother as heir-general and of line.

In the succession to a sister, the son of the immediate elder brother as heir of conquest, preferred to the sister's eldest brother, the heir-general, and of line.

The Lord Ordinary having decided in favour of John the immediate elder brother's son as heir of conquest, Archibald Cuninghame the eldest brother, in a reclaiming petition, pleaded :

There were several specialties in the law of Scotland which differed from the laws of most other nations : The division of succession into heritage and conquest was one of these peculiar rules, founded, however, upon no principle that could be discovered, other than the arbitrary will of the law itself ; and it would be of dangerous consequence to extend such rules, from a seeming analogy to other cases not authorised either by statute or immemorial usage. Though a particular mode therefore was established as to the collateral succession of brothers to one another, there was no good reason why the same special rule should be extended to the succession of brothers to sisters ; and of course the preference should, as in all other ordinary cases, be given to the eldest brother upon the established right of primogeniture. The rule as to succession in conquest was merely arbitrary ; so that judges were not authorised, when the question came for the first time before them, to extend that rule to a case not provided for by any enactment ; and as the Legislature, by the Quon. Attach. Cap. 88. and Stat. Rob. III. C. 3. had laid down the rule only in the case of brothers succeeding to one another, it was to be inferred that all other cases were excluded.

Answered for the pursuers :

The distinction of heritage and conquest in the collateral succession of brothers to one another had been long established in the law of Scotland ; Quon. Attach.