

- No. 46. * * This case having been appealed, the House of Lords, 26th March, 1770, ORDERED and ADJUDGED, That the interlocutors complained of be reversed ; and it is declared, that John Chatto is preferable, and entitled to be served heir of provision to the deceased Mr. William Walker, under the settlement made by him of his estate of Stonypath in 1752. And it is further ordered, That the objection to the service of the said John Chatto be repelled, and the mutual declarators be conjoined, and the said John Chatto assoilzied from the process of declarator at the instance of the said William Baillie ; and that the Court of Session do find, in terms of the declarator at the instance of Agnes Tennant, mother of the said John Chatto, against the said William Baillie. And it is further ordered, That the said Court of Session do give all necessary and proper directions for carrying this judgment into execution.

1766. June 24.

SIR JOHN SINCLAIR *against* The COUNTESS and EARL FIFE.

No. 47.
Nearest heir-
male of line
whatsoever.

Alexander, Earl of Caithness, by a strict entail, devised his own estate, and also the estate of Murkle, in which he had succeeded to his brother Lord Murkle, to himself and the heirs-male of his body ; whom failing, to his brother Francis, and the heir-male of his body ; whom failing, to the second and younger sons, successively, to be procreated of the body of Lady Dorothea his daughter ; whom failing, “ to George Sinclair of Woodhall, Esq. one of the senators of the College of Justice, and the heirs-male of his body ; whom failing, to the said George Sinclair, his nearest lawful heir-male of line whatsoever ; whom failing, to his own nearest heirs and assignees whatsoever.”

The title and honours of Caithness were descendible to heirs-male, and failing his own and his brother's male issue, devolved upon remote heirs not called in the entail, and whom the Earl did not mean to favour. This led him to insert a clause, That, excepting the heirs of his own body, his brother Francis, and the heirs-male of his body, the whole heirs succeeding to the estate should bear the name and arms of Sinclair of Murkle only, and should forfeit their right upon succeeding to any title of peerage.

Lord Woodhall was the third son of the family of Stevenston. Sir Robert, the eldest, had died, leaving male-issue. John Lockhart of Castlehill, the second, was also dead, and had left only daughters. Patrick Sinclair, the fourth, was a bachelor.

After the execution of the deed, Francis Sinclair, Lord Woodhall, and Patrick Sinclair, all died without issue. The Earl also died, leaving issue a daughter, Dorothea, Countess of Fife, who was as yet childless.

Sir John Sinclair, eldest son of Sir Robert Sinclair of Stevenston, apprehending himself to be called under the description of nearest heir-male of line whatsoever to Lord Woodhall, purchased brieves for serving nearest and lawful heir of tailzie and provision in general to the Earl of Caithness.

Lady Fife likewise took out briefes for serving heir of tailzie and provision to the Earl, under the last substitution in the tailzie; and a competition ensued.

Pleaded for the Countess: The expression "heir-male of line whatsoever," has no meaning in the law of Scotland. Heir-male denotes one species of heir, heir of line denotes a different species of heir; and the two joined together amount to a contradiction in terms, as much as if the same person had been called under the double description of heir-male and heir-female; so that the clause must be held *pro non scripto*.

But, if the expression has any meaning, it cannot denote either the heir-male, or the heir of line, but a person in whom both characters are united. It is as impossible to conceive an heir-male of line, who is not heir of line, as an heir-male of line, who is not heir-male. Had the expression been Lord Woodhall's "heir-male, being his heir of line," there could not have been a doubt in the case, and the expression actually used, is, in effect, the same, though more concise. The intention may have been to call such of Lord Woodhall's heirs-male, as should be also his heirs of line; and, failing them, to give place to the Earl's daughter. Sir John Sinclair is nearest heir-male to Lord Woodhall, but he is not heir of line; that character is in the daughters of John Lockhart of Castlehill, who are equally entitled to claim under the settlement to heirs-male of line, being only heirs of line, as Sir John Sinclair is, being only heir-male. Both of them have one of the characters in the description, and neither has the complete character.

Answered: Heir of line, and heir-male, when set in opposition to one another, are, no doubt, descriptive of different persons. But there is another sense in which the denomination of heir of line is understood in the law; and the whole argument of the Countess proceeds on overlooking that distinction.

In the succession of brothers, there is a double representation in the same degree. The succession divides: The conquest goes to the immediate elder brother, who is heir of conquest; the heritage goes to the immediate younger brother, who is heir of line, or heir-male of line.

In this case, the *persona praelecta* was Lord Woodhall; failing his issue, the succession was to devolve upon his collateral heirs-male. Had the deed been expressed in these terms, there might have been a doubt whether the estate was conquest in the person of Lord Woodhall, or heritage; and, of consequence, whether it should devolve upon his heir of conquest, or his heir of line. The Earl chose to devolve it upon Patrick Sinclair, the younger brother of Lord Woodhall, the heir of line, preferably to Sir John Sinclair, the son of the eldest brother, the heir of conquest. In that view, failing issue male of Lord Woodhall, he very properly substituted his heir-male of line whatsoever, thereby calling the heir of line in preference to the heir of conquest.

Had Patrick Sinclair survived the Earl, he would have taken the estate as nearest heir-male of line of Lord Woodhall; and excluded Sir John Sinclair the heir of conquest, who, by the death of Patrick, having become heir-male of line, is clearly entitled to the succession.

No. 47. “ The Lords preferred Sir John Sinclair, and found that he is entitled to be served heir of provision, under the settlement of the deceased Alexander, Earl of Caithness, and repelled the objections to his service.”

For John Sinclair, *Lockhart, Macqueen, H. Dundas.*

Alt. *Burnet, Rae, Ja. Ferguson.* Clerk, *Ross.*

G. F.

Fol. Dic. v. 4. p. 308. Fac. Coll. No. 37. p. 260.

* * This case having been appealed, the House of Lords, 6th April, 1767, ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutors complained of be affirmed.

1768. July 1.

MRS. FLORENCE M'LEOD *against* MR. JOHN NICHOLSON, and the CHILDREN of the deceased DONALD NICHOLSON.

No. 48.

A right assigned by a wife in her marriage-contract, transmits to the husband's heirs, though heirs are not mentioned.

Donald Nicholson, in 1757, married Mrs. Florence M'Leod, relict of Archibald M'Queen, out of whose subjects she was entitled to a jointure or life-rent-annuity of 150 merks yearly.

After Mrs. M'Leod's marriage with Mr. Nicholson, a post-nuptial contract was entered into, proceeding on the narrative of their being already married; that no contract had been extended; that Mrs. M'Leod was not sufficiently secured in a jointure, nor the children to be procreated of the marriage provided, or a tocher given to Mr. Nicholson, according as was communioned upon between the parties, before and after marriage;—therefore the said Donald Nicholson binds and obliges himself, his heirs, &c. “ to secure the said Florence M'Leod his spouse, after his decease, in life-rent, during all the days of her lifetime, in all and whole the interest of 2000 merks Scots.” If no children of the marriage, the wife is to have the interest of 3000 merks; and she was farther provided to 700 merks, in compensation of her terce of moveables, the half of the household-furniture, and all the sheep and goats that should pertain to them at the time of the husband's decease.

And, on the other part, the said Florence M'Leod “ assigns and disposes to, and in favour of the said Donald Nicholson, the interest of 3000 merks money, provided to her in life-rent, by the deceased Archibald M'Queen of Tott, by their contract of marriage, bearing date the day of years, with the contract itself, and all that has followed or may follow thereupon; surrogating and substituting the said Donald Nicholson in her full right and place of the same, which assignation she binds and obliges herself to warrant from any fact or deed done by her, or foresaids, prejudicial hereunto.”

Donald Nicholson died in October 1761, leaving Mrs. Florence M'Leod his widow, and a family of children under age. John Nicholson, brother to Donald, as pro-tutor for the children, took upon him the management of their affairs;