

hering to Lord Strichen's interlocutors of December 18, 1765, and February 15, 1766.

On the 1st August 1766, the Lords refused a reclaiming petition, and adhered. *Act. J. Montgomery. Alt. R. Blair, A. Lockhart.*

OPINIONS.

PITFOUR. The cautionary obligation extends to all intromissions, without distinguishing prior from posterior.

COALSTON. Cautionary obligations are not to be extended.

AUCHINLECK. The narrative of the bond mentions the date of Pitcairne's commission. This unnecessary, if the bond related solely to what he was afterwards to receive.

KAIMES. The general rule, that cautionary obligations are not to be extended, may be departed from according to circumstances; but, here, there are no such circumstances. Here, caution was taken for the first time: What title had the magistrates to exact caution for bygones? *Actus non operantur ultra intentionem*: And there are no circumstances here to extend that intention to bygones, unless it be said that the *res gesta* was, that Pitcairne was to be turned out unless he found caution for bygones, and that upon this account Gardiner became cautioner.

GARDENSTON. It is most rational to suppose that caution was only meant to be exacted for the future: if otherwise, Why was there no mention of arrears? A cautionary obligation is a *literarum obligatio*, not to be extended beyond its tenor. This he illustrated from various Acts of Sederunt respecting cautioners in suspensions. *Trades of the Canongate against Angus. Sir John Douglas.*

BARJARG. The balance could only appear by posterior accounting, so that it is necessary to extend the caution to arrears. Pitcairne, by keeping a balance in his hand, intromitted anew.

JUSTICE-CLERK. Why should Gardiner become caution in L.400 for time to come, and not for time past?

ALEMORE. The words of the obligation comprehend both principal and cautioner alike.

Diss. Coalston, Kaimes, Elliock, Gardenston, Hailes.

1766. *August 2.* DOROTHEA, COUNTESS FIFE, and her Husband EARL FIFE, for his interest, *against* SIR JOHN SINCLAIR of Stevenson, Baronet.

SUCCESSION.

Nearest Heir-Male of Line Whatsoever.

[*Faculty Collection, IV. 260; Dictionary, 14,944.*]

A competition arose between those parties concerning the succession to the

estate of Caithness, under a disposition from Alexander, the last earl. For understanding the case it is necessary to state the great lines of the genealogies of both the families :

Family of Caithness.

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|---------------------------------------------------------------|---------------------------------------------------------|--------------------------------------------------------|
| 1. Earl Alexander, the testator, died in 1765, leaving issue, | 2. John, Lord Murckle, died in 1755, <i>sans</i> issue. | 3. Francis of Milton, died in 1762, <i>sans</i> issue. |
|---------------------------------------------------------------|---------------------------------------------------------|--------------------------------------------------------|
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- Lady Dorothea.—Earl Fife married in 1759.

Family of Stevenson.

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|----------------|------------------------------------------------------|-----------------------------------------------------------|-------------------------------------------|
| 1. Sir Robert. | 2. John Lockhart, died 1760, <i>sans</i> male issue. | 3. George Lord Woodhall, died in 1764, <i>sans</i> issue. | 4. Patrick, died 1763, <i>sans</i> issue. |
|----------------|------------------------------------------------------|-----------------------------------------------------------|-------------------------------------------|
- |
- Sir John.

The estate of Caithness was chiefly the acquisition of Alexander Earl of Caithness. His brother, John Sinclair of Murkle, left him his whole estate real and personal. The deed contains this clause: "I do earnestly recommend to the said noble Earl to bestow a suitable share of my fortune and estate on Lady Dorothea Sinclair, his daughter, my niece, for whom I have the greatest affection and regard, and that at such time and in such manner shall be most proper." By letter which Lord Murkle wrote on the first of May 1755, a short time before his death, he thus addressed his brother: "I again make my humble request, that you may settle your estate on her, as well as mine." It appears that Lord Caithness, immediately after his brother's death, had an intention of making some settlement in favour of Lady Dorothea; but the execution of this intention was first delayed, and then laid aside altogether.

In 1759, Lady Dorothea was married to Lord M'Duff now Earl of Fife: the marriage was with consent of Lord Caithness: he provided his daughter in no greater fortune than £2000 sterling. Lord Caithness had cultivated a long friendship with George Sinclair of Woodhall, one of the senators of the College of Justice. He was the third brother of the family of Stevenson; and his relation to Lord Caithness, if any, was very remote. On the 19th May and 17th August 1761, Lord Caithness executed deeds of settlement, whereby he granted procuratory for resigning his lands, "in favour, and for new infestment of the same to be granted to himself and the heirs-male of his body; which failing, to his brother, Mr Francis Sinclair, and the heirs-male of his body; which failing, to the second, third, and other younger sons successively, to be procreated of the marriage between Lady Dorothea Sinclair his daughter, and James Lord M'Duff, and the heirs-male of their bodies; which failing, to the heirs-male to be procreated of the body of the said Lady Dorothea Sin-

clair of any subsequent marriage; which failing, to George Sinclair of Woodhall, Esq. one of the senators of the College of Justice, and the heirs-male of his body; which failing, to the said George Sinclair his nearest lawful heir-male of line whatsoever; which failing, to his own nearest heirs and assignees whatsoever." The whole heirs are taken bound, under an irritancy, to bear the name, arms, and designation of Sinclair of Murkle, simply, and no other: but from this obligation are exempted the heirs-male of the body of Lord Caithness, Mr Francis Sinclair, and his male issue. All peers are excluded after the failure of the male issue of Mr Francis Sinclair, with whom it is plain that Lord Caithness understood that the title of Caithness would fail in his own branch. By these deeds, a strict entail was established, whereof it is unnecessary to recite the clauses. It appears that Lord Caithness meant to vest his personal estate in the purchase of lands to be taken to the same series of heirs; but his purpose was never carried into execution, whereby the succession to the personal estate, supposed to amount to L.20,000 sterling, devolved to his daughter Lady Dorothea, *ab intestato*. When Lord Caithness died, there remained no brothers of the family of Stevenson of the same generation with Lord Woodhall. Sir John Sinclair of Stevenson, the eldest son of Sir Robert, the eldest of the brothers, purchased brieves to be served heir of tailie and provision in general to Lord Caithness, upon the deed 17th August 1761. His claim was founded on this, that he was the person designed as heir-male of line whatsoever to Lord Woodhall, and consequently called to the succession, while Lady Dorothea, Countess Fife, had no second son. On the other hand, Countess Fife, apprehending that heir-male of line whatsoever was an unintelligible character, took out brieves for serving herself, in virtue of the next substitution, heir whatsoever of Lord Caithness. The general topic pleaded for her was, that the words "heir-male of line whatsoever" have no meaning in the law of Scotland; that they imply a contradiction; that, if they have a meaning, it is one which does not apply to Sir John Sinclair.

The Lords Barjarg and Coalston, assessors to the macers, took the debate to report.

ARGUMENT FOR SIR JOHN SINCLAIR:—

That there is no such character known in law as heir-male of line whatsoever, is asserted by Lady Fife; but this assertion is erroneous. That Lord Caithness had thereby some person or persons in view, is obvious, for that he calls such heir preferably to his own heirs whatsoever: and, that being the case, the description, however inaccurate, will, *si constet de persona*, have its full effect. Heir-male, and heir-of-line, when opposed to each other, are descriptive of different persons, though heir-male may be also heir-of-line, and heir-of-line heir-male. But, in order to discover what Lord Caithness meant by this description of heir-male of line whatsoever, the situation of the family of Stevenson in 1761 must be attended to. That Lord Woodhall was the *prædilecta persona* is plain: he had two elder brothers, and one younger. The eldest brother was dead, leaving issue Sir John; the next, Mr Lockhart, was also dead, leaving issue daughters only; Peter, the youngest, was alive and a bachelor. In the succession of brothers dying without issue, the law of Scotland allows a double representation in the same degree: the one of heritage, which descends

to the immediate younger brother, the heir of line; the other of conquest, which ascends to the immediate elder brother, the heir of conquest. Thus are they contradistinguished, although, in fact, they are both heirs of line, as taking in the course of legal succession. Hence there is no impropriety in describing the immediate younger brother under the character of heir-male of line, who takes by descent, in opposition to the immediate elder brother who takes by ascent. Thus, then, Sir John Sinclair was Lord Woodhall's heir-male of conquest, as being the eldest son of his only elder brother who had male issue; whereas Peter Sinclair, his immediate younger brother, was his heir-male of line. By using the description "heir-male of line," Lord Caithness determined that Peter should be preferred to Sir John Sinclair. The terms "heir," and "heir whatsoever," are capable of a construction more or less limited from circumstances. That the distinction here pointed out, of heir of line and conquest, is authorised by lawyers, appears from Lord Stair, title, *Succession*, § 33; and Lord Bankton, *B. 3, tit. 4, § 21*.

ARGUMENT FOR LADY FIFE :

The words "heir-male of line whatsoever," have no meaning in the law of Scotland: they imply a contradiction as much as if one were to call the same person under the denomination of heir-male and heir-female. They are words of style unknown to practitioners, and must be held *pro non scriptis*. If, however, they must be understood as having a meaning, Lady Fife will shew that they do not apply to Sir John Sinclair, the heir-male of Lord Woodhall, but that they must apply to a species of heir who is not heir-male simply, nor heir of line simply, but both. Here the word whatsoever, can imply no more than what it generally implies, namely, the collateral heir of Lord Woodhall, in contradistinction to the heir of his body already called. The question then is, What collateral heir of Lord Woodhall is called under the description of his heir-male of line? The testator, using this phrase, could not mean to express either heir-male or heir of line simply. By the law of Scotland, heir-male is a general character: an heir-male, who is likewise heir of line, and one who is not, are its two species: Or, succession may be viewed in another light. An heir of line is a genus whereof there are two species: one an heir-male, *i. e.* a male and connected by males; the other, an heir-female or connected by females. In whatever light the expression of the deed is viewed, the character of heir-male and heir of line cannot be separated. Sir John Sinclair is the heir-male of Lord Woodhall; but the daughters of Mr Lockhart are his heirs of line. If "heir of line" were to be left out, and "heir-male" only retained, why not *vice versa*? And then the daughters of Mr Lockhart might claim in the character of heirs of line to Lord Woodhall, rather than Sir John Sinclair as his heir-male. Had the substitution been to Lord Woodhall's heir-male, being of line, the person having both these characters, and not singly one of them, would have been understood: heirs-male of line imports the same thing, though more briefly expressed. Nor is it unreasonable to suppose that Lord Caithness required the coincidence of both characters in this substitution; for he thereby narrowed the succession among strangers to his family, and made way the sooner for his own heirs whatsoever. Had he meant to call Sir John Sinclair to the prejudice of his own daughter, he might have called him *nominatim*, or under the description of Lord Woodhall's heir-male whatsoever. As

he has not called him under either of those descriptions, it is to be presumed that he did not mean to call him at all. Papinian, *ex Conjectura Pietatis*, supplied a whole branch of a substitution; but such conjecture cannot be admitted in order to disinherit a daughter. It is said, that, under this description, the testator meant to call Peter Sinclair, Lord Woodhall's younger brother, his heir-male of line, but not of conquest. Of this, however, there is no evidence: Besides, the estate, once vested in Lord Woodhall, would have devolved to his heir of line, not of conquest; so that the description of heir-male would have had the same effect. That the terms heir, and heir whatsoever, are sometimes ambiguous, arises only from this, that there are prior settlements to the tenor of which the testator may be supposed to refer; but nothing of this kind here occurs. Be this as it will, the term heir-male is never ambiguous. Lady Fife does not plead that the expression ought to be read heir-male and of line, but that, in its consequence, it comes to be understood of one who is both heir-male and of line. In the same manner, an heir-male, called by a tailie, will be either heir-male of tailie, or heir-male and of tailie.

N.B. In this cause there was an ample production of letters made, in order to show what was the purpose of Lord Caithness in executing this disposition. Lady Fife founded on some letters, to prove that Lord Woodhall prevented Lord Caithness from executing a settlement in her favour. Sir John Sinclair founded on other letters, to show that the deed in controversy was altogether owing to Lord Caithness himself; and that Lord Woodhall procured it to be conceived in a form less prejudicial to Lady Fife's issue than her father himself had intended; that Lord Woodhall, had he seconded Lord Caithness's plan of purchasing land, might have disappointed Lady Fife of the moveable succession, amounting to £.20,000 sterling. The decision of the cause did not however turn upon those particulars: they served only to show violent resentments, much caprice, and some duplicity of conduct in the noble Lord.

On the 2d August 1766, upon report of Lord Barjarg, one of the assessors, "the Lords repelled the objections made by Lady Fife, and ordained the service of Sir John Sinclair to proceed."

For Lady Fife, J. Ferguson, J. Burnet. *Att.* H. Dundas, A. Lockhart, R. Barjarg.

OPINIONS.

COALSTON. I think that the settlement in question is irrational, as made in favour of a stranger, to the prejudice of a deserving heir. I think also that it is partly unjust, as made contrary to Lord Murkle's recommendation. It appears that Lord Caithness, immediately after Lord Murkle's death, considered himself as bound by that recommendation. These questions, however, are not now before us: I am clear that Sir John Sinclair is at present entitled to be preferred.

AUCHINLECK. The question is upon the import of the deed, not of the letters. Upon the supposal that Lord Caithness was of a disposing mind, the settlement itself must be the rule. Lord Caithness meant to call *some* heirs of Lord Woodhall after the heirs of his body. The question is, Who those heirs

are? The style is odd, and has a hermaphroditical appearance. Heir-male of line is lineal heir-male; *hæres masculus lineæ et hæres linealis masculus* are the same. The specialty of settling the estate upon the heir of line and heir of conquest, is nothing to the purpose. This never entered into Lord Caithness's imagination.

KAIMES. I lay aside every collateral circumstance: a clause, by being dubious, is not to be held inexplicable. I do not commend the writer, because he went out of the known style. Heirs-male of line implies those who are natural heirs, not those who are created by deed.

PITFOUR. Somebody other than the issue male of Lord Woodhall is here meant. I take the clause in the sense which Sir John Sinclair's counsel have put upon it. Lord Woodhall had ambiguous heirs-male. This clause means the heir of line,—Peter, in preference to Sir John, the heir of conquest. I should have thought there was an ambiguity, were it not for the collateral evidence. The argument for Lady Fife is a pleadable critical argument. I have, however, a doubt whether Lord Caithness could make this deed in consistence with the tacit fideicommiss from Lord Murkle's letter. The civil law makes the expressions *se scire, credere, or existimare*, if addressed to heir, obligatory as a fideicommiss. See also Lord Caithness's letters after Lord Murkle's death, wherein he seems to have had this notion.

ALEMORE. Suppose this last argument good, still Sir John must be served, in order that he may denude. Lady Fife cannot be served upon the letters quoted. Three judges have each of them explained the phrase—heirs-male of line, in a different sense. This should teach conveyancers to be cautious, and not to use new terms. As Peter Sinclair is dead, Sir John Sinclair is both heir of line and of conquest to Lord Woodhall. I do not like a fideicommiss in letters or by momentary resolutions. Lord Murkle certainly left his brother at full power: Besides, how can there be a fideicommiss on deathbed?

PRESIDENT. The question as to fideicommiss is at present improper. I have not the smallest notion of the letters being evidence in this cause. The cause of *Tenant* was quite different: there the deeds were all considered together as making one settlement. An ambiguity of expression will not cut down the deed. I think heir-male of line is lineal heir-male. Had Peter Sinclair had a younger brother, he would have come in. Shall Sir John Sinclair lose the estate because he is both heir-male of line and of conquest? The Roman fideicommiss is not received into our law: Besides, the codicil of the 8th May is later than the letters from Lord Murkle.

Affirmed on appeal.