

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.

No. 16. Cap. 88, 97. Stat. Rob. III. C. 3. The succession of brothers to a sister was a case so exactly similar, that the analogy of the law could not fail to apply the same rule, unless it could be shewn either that there was some substantial reason why it should not, or that such extension was expressly prohibited. Were this rule not adopted in the present case, the succession, according to the petitioner's argument, would favour the right of primogeniture; which being itself a special privilege, was therefore to be strictly interpreted, and not carried farther than the very letter of the law authorised. The rule of succession, maintained in the present instance, in favour of the heir of conquest, though it might not perhaps hitherto have been brought into question and decided on, was expressly supported by the following authorities; Craig, L. 2. Dieg. 15. Stair, B. 3. Tit. 4. § 33. Bankton, B. 3. Tit. 4. § 21.

At advising, the decision, 7th July, 1675, Lord Halkerton, reported both by Stair and Dirleton, No. 3. p. 5605. *voce* HERITAGE AND CONQUEST, was mentioned from the Bench as in point; and the Lords adhered to the Lord Ordinary's judgment.

Lord Ordinary, *Pitfour*.
Clerk, *Tait*.

For John Cuninghame, *A. Belsches*
For Archibald Cuninghame, *Lockhart*.

R. H.

Fac. Coll. No. 56. p. 164.

No. 17.

1787. November 15. HAY BALFOUR *against* SCOTT.

In the succession to the estate of Scotstarvest, the Lords found, That heirs, whether *alioquin successuri* or not, and whether *ab intestato* or by special destination, must collate before they are entitled to claim any share of the moveable succession.

Fol. Dic. v. 4. p. 304.

* * This case is No. 18. p. 2379. *voce* COLLATION.

No. 18.

1787. November 28. MACAW *against* MACAW.

The Lords found, that the privilege of collation is only competent to the heir when he is likewise one of the nearest of kin, and entitled in that capacity, if there had been no heritage, to a share of the executry.

Fol. Dic. v. 4. p. 304.

* * This case is No. 19. p. 2383. *voce* COLLATION.