

1712. November 13.

The EARL of DALHOUSIE *against* The LORD and LADY HAWLEY.

## No 13.

An eldest son, who was both heir male and of line to his father, being specially served *tanquam legitimus et propinquior hæres* to him in lands, provided to the father and his heirs male, the service was understood, in terms of the last investiture.

WILLIAM, Earl of Dalhousie, *anno* 1646, made a settlement of his estate in favours of George, Lord Ramsay, his son, and the heirs-male of his body, which failing, to his own heirs-male whatsoever; by virtue whereof this George (afterwards Earl,) was infeft in the year 1647. William, Earl of Dalhousie, Earl George's eldest son, was, in the year 1674, served, retoured, and infeft *tanquam legitimus et propinquior hæres* to his father; to which Earl William, the present Earl, his cousin-german, being served heir-male in October 1711, pursued reduction and improbation against the Lady Hawley, Earl William's only child, and heir of line, of all rights and titles to the estate in her person.

*Alleged* for the defender, The pursuer's service, as heir-male to Earl William, who died infeft in the estate *tanquam legitimus et propinquior hæres* to his father, Earl George, could afford him no title thereto, nor be any ground of action to quarrel rights affecting the same; because, though the estate in the year 1646, was settled in favours of heirs-male, yet, since that settlement bore no limitation on the substituted heirs of tailzie, from altering the succession; and William, Earl George's son, was served *tanquam legitimus et propinquior hæres*, which implied that he was served heir of line; the fortune thereby devolved upon the Lady Hawley, his heir of line. Now, that Earl William's service, *tanquam legitimus et propinquior hæres*, can be no otherwise understood than as heir of blood, whom the law calls, and we term, heir of line, is clear from the different stiles of brieves and services in the Chancery; wherein *legitimus et propinquior hæres* is the distinguishing character of an heir of line. Where a fee is provided to any other heir, the retour ought to bear that the person served is *legitimus et propinquior hæres masculus tallie vel provisionis*, according to the quality of the fee, which is most necessary for preserving the distinction betwixt the several kinds of fees, and that persons may know the condition of those they contract with, or in what order or method to pursue their heirs. This could not be if the forms of chancery were arbitrary, and applicable according to the Lesbian rule; therefore, the prescribed forms of Chancery, (which are *actus legitimi*), are precisely to be observed. Any inquest, seeing Earl William's retour, serving him nearest and lawful heir, in general terms, to his father, could never have demurred to serve the Lady Hawley, his only child, nearest and lawful heir to him; upon the faith of whose infeftment no body would have scrupled to lend her money, without ever dreaming of a disappointment through the surprising appearance of an heir-male. So the civil law doth peculiarly apply the word *legitimus* in matters of succession, to a person who succeeds by disposition of law, *sine provisione hominis*; as *tutela legitima* is that which goes by law to the nearest agnat; *legitimus hæres* is he that succeeds *ab intestato*.

*Answered* for the pursuer, He is regularly served heir-male to William, Earl of Dalhousie, his cousin, Earl William being truly and effectually served heir-male to Earl George, his father; for *legitimus et propinquior hæres* is a general designation applicable to all heirs *in suo genere*, according to the last investiture; and generally all brieves, even of heirs-male and provision, bear only *legitimus et propinquior hæres*; though, sometimes, the word *masculus*, or *provisionis*, (which is not *de essentia*) be added *ex superabundanti*. Besides, albeit a general service of an heir of line requireth no more for its foundation but the propinquity of blood; yet, in a special service, there must be a voucher and document for verifying to the inquest, that the person to be served is *legitimus successor* in these lands, viz. the sasine of him last infeft. Now, how could the inquest, who had Earl George's sasine produced in their presence, and under their consideration, have returned Earl William by a special service, to have right, as naked heir of line to the estate of Dalhousie, which, by the last investiture, was conveyed to heirs-male?

No 13.

THE LORDS found, that Earl William, being eldest son, and thereby both heir-male and of line to Earl George, and served *legitimus et propinquior hæres* to him in lands, wherein Earl George was infeft to himself and his heirs-male, ought to be understood as served in the terms of Earl George's infeftment; and therefore repelled the objection, and sustained process.

*Fol. Dic. v. 2. p. 345. Forbes, p. 630.*

1738. July 21. EDGAR *against* MAXWELL of Barncleugh.

In a contract of marriage, an estate being disposed to the husband, and his heirs-male of that marriage, which failing, his heirs-male of any other marriage, which failing, his heirs-female of that marriage; and their being daughters of that marriage, but no sons, a service by the eldest son of the second marriage, as heir-male in general to his father, was found not to carry the provision in the contract of marriage, though, at the same time, he was heir-male of provision; upon which footing the heirs-female of the first marriage, who claimed the estate after his decease, were preferred to his gratuitous assignee.

No 14.

*Fol. Dic. v. 2. p. 345.*

\* \* See this case by Kilkerran, *voce* SERVICE and CONFIRMATION. See also No 10. p. 3089. *voce* CONSOLIDATION, and No 17. p. 4325. *voce* FIAR ABSOLUTE LIMITED.

1745. June 5. MERCER *against* SCOTLAND.

No 15.

A NEPHEW having, from his uncle, a disposition *omnium bonorum* that should belong to him at his death, with a provision, that he should be liable for the