

1715. *January 25.*ROBERT ALLAN, Merchant in Edinburgh, *against* The EARL OF LAUDERDALE.

## No 16.

An heir male being pursued for payment of his predecessor's debt, the Lords sustained process, tho' the heir of line was not called, unless the heir-male would allege that the heir of line had a visible estate.

ROBERT ALLAN having right by progress, to a debt due by the deceased Duke of Lauderdale, pursues the present Earl as heir-male and of tailzie by progress to the said Duke, for payment.

It was *excepted* for the Earl, That he being only pursued as heir-male and of provision, the Duke of Lauderdale heir of line, ought to be first discussed.

*Answered* for the pursuer; That the benefit only took place, where the heir of entail could condescend upon the heritage that fell to the heir of line, and which might be reached by diligence.

*Replied* for the Earl; That he could not so condescend, yet the heir of line ought to be discussed; because it is the privilege of an heir-male, or of tailzie, that he is but liable *secundario* or *in subsidium*, and cannot be attacked for the predecessor's debt, except in the event that the creditor cannot recover payment from the heir of line, who is the universal successor. Now, although there were nothing to which the heir of line could succeed, yet, if he represent by service, (which oftentimes happens when there is no estate) or by behaviour, or if he suffer a decret to go against him when lawfully charged, without renouncing; in all these cases he is liable to the creditors, and must pay their debts, though he should not have a sixpence by the defunct; therefore, the heir of line ought still to be discussed, though no estate were condescended on, to which the heir of line could succeed.

*Duplied* for the pursuer; That if the order of discussing were required, even when no heritage is condescended on, to which the anterior heir might succeed, then creditors should be put to unnecessary delay, trouble and expense, if in the event there is nothing to be affected, to which the heir of line could succeed; and the privilege law gives to the heir-male, is still upon the supposition, that there is a subject which may be affected, the very import of the word *discussing* implying it; for to discuss, is not only to procure a *personal*, but to affect a subject according to the nature of it; and where there is none such to be condescended on, it is impossible this discussing can take place. And of this opinion is the Lord Stair, § 21. Tit. HEIRS, where he positively asserts the exception of the order of discussing will not be sustained, unless the defender condescend on an heritage, to which the anterior heir might succeed.

*Triplied* for the defender; That there is this other reason for discussing the heir of line, that he being the universal successor, and the heir of provision, with respect to him, *quodammodo* a creditor, the heir of line is presumed in law to have the instructions of the payment of the debt, if any be; and likewise to know the objections or defences that may be competent against the debt, which the heir of provision is not presumed to know, where there is an heir of line either entered or that may enter; and the heir of line, in such cases, is always held to represent, until he renounce.

*Quadrupled* for the pursuer ; That that is not the reason of discussing ; the true reason lying in the prerogative of the heir-male, tailzies being understood to be made for the preservation of families, and they are accounted as creditors, with regard to the heir of line : And as, when the heir of line had renounced all, and that there was a total and universal tailzie, he is not presumed to have the keeping of the writs, so this is always supplied by a diligence of exhibition, the heir-male think fit to seek it ; and the benefit of discussing competent to a cautioner is not founded upon this, That the principal is presumed to be master of the instructions of payment, and to know best the defences against the debt ; but is founded upon the nature of a cautioner's stipulation, *qui pro alio fide-jubet* ; and so is only subsidiarily liable, and he may renounce the benefit.

THE LORDS sustained the condescence of an estate to which the heir of line may succeed.

Act. Sir Wal. Pringle.

Alt. Ro. Dundas.

Clerk, Mackenzie.

Fol. Dic. v. 1. p. 246. Bruce, No 40. p. 50.

1773. January 13.

WILLIAM INNES of Sandside, and Others, Creditors on the Estate of Stircock,  
against ALEXANDER SINCLAIR of Barrock.

IN the ranking of the Creditors of Stircock, Sinclair of Barrock founding upon a bond of provision granted by Francis Sinclair of Stircock to Katharine Sinclair, his sister, for 2000 merks, with the decree of adjudication, and other diligence following thereon, conveyed in his favour, the other Creditors proposed objections to this interest ; in particular, that the action of constitution upon which the adjudication proceeded, having been brought both against the heir-male and the heirs of line, was improperly carried on against the heir-male only, without any discussion of the heir of line ; and that the procedure in it was erroneous and inept.

The Lord Coalston Ordinary 'sustained the objection to the decree of constitution, as relevant to restrict the adjudication to a security for the principal sum, annualrents, and necessary expenses accumulated at the date of the decree of adjudication.'

*Pleaded* by Barrock in a reclaiming petition ; The decree of constitution upon which the adjudication afterwards followed, is well founded ; and there is nothing solid in the objection moved against it.

George Sinclair was brother-german and heir-male and successor of Francis Sinclair, the granter of the bond, and lawfully charged to enter heir to him ; and, as he did not renounce, this was a sufficient passive title for founding a decree against him. The only defence that was insisted upon by him, was, that the heir of line ought to be first discussed ; and, to remove that defence, it was

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A decree of constitution taken against the heir-male singly, in an action for the predecessor's debt, wherein the heirs of line had been also called, and offered to renounce, but did not, found liable to challenge for want of discussion, and as being in other respects irregular ; and the objection sustained as relevant to restrict the adjudication led thereon to a security.