

1786. December 8. ELIZABETH ROSE *against* JAMES ROSE.

#### HEIR AND EXECUTOR.

An heir-male entitled to relief, from the heir of line, of heritable debts secured on the succession of both indiscriminately.

[*Fac. Coll. IX. 379; Dict. 5229.*]

MONBODDO. The Roman law is out of the question. The cases quoted relate to questions, not amongst *heirs*, but between the *hæres* and the *legatarius*, and in each of them there was a *quæstio voluntatis*. Here there was no *animus*, for Kilravock did not mean to regulate his succession, but to give security for borrowed money. I consider an heritable bond as a sale under reversion, with assignation to mails and duties. It is just like a wadset. The additional security given will not relieve the lands with respect to the heir-male, and lay the burden on the heir-general.

JUSTICE-CLERK. This is a question as to succession, which ought to have been decided long ago, but, as is acknowledged, has never received a decision. Here there is a fee of a particular estate, descendible to heirs-male,—an heir of tailie, in the sense of the law, and in virtue of the act of the former proprietor. The other estate is one which goes to heirs-general, under that description, for want of will in the proprietor. The heir of line has a right to the *universum jus*, unless when any parcels are otherwise settled or disposed. There can be no parallel between *heirs of provision* and *heirs-general*, for they are not *ejusdem generis*. In consequence of this, the law of Scotland has introduced a right of relief. Without *that*, a provision by the will of the testator would be elusory. The creditor might go against the heir of provision; and, if he had no relief, the settlements made by the proprietor would give way to the intestate succession. In the days of Craig, &c., when the principles of the civil law were well understood, and the feudal principles also, it was held that, when a special burden was established upon a special fee, from the presumed will of the testator, the relief was still competent against the heir of line. This has been so far altered, that, if a security has been created on a male fee, that will imply a discharge of relief, or, as we now express it, will create a perpetual *lien* on the male fee. But the case here is different. A gentleman, having lands descendible partly to heirs-male and partly to heirs-general, grants catholic infeftments. I admit that lands *transeunt cum suo onere*; but will it follow that this should be without relief? And can we suppose that the proprietor, by granting such infeftment, intended thereby to overturn the disposition in favour of a particular heir? An act of the creditor may adjudge the male fee and not that falling to the heir-general, but this will not take away the relief, for the adjudication is the act of the creditor, not of proprietor. It is no matter that the relief will exhaust the right of the *heir-general*, for the want of relief will exhaust the right of the *heir-male*. Had Kilravock, *prospera*

*fortuna* or by succession, obtained another estate, descendible to *heirs-general*, the *heir-general* would have had an unburdened succession and the *heir-male* would have had nothing.

BRAXFIELD. Had it not been for blundering political operations, this case would not have occurred now more than formerly. It was well observed, that in this country men do not generally *divide* their successions, though they may burden; and, when there are two estates, the one entailed and the other not entailed, the person in possession takes care to burden the entail as much as he can. An heir of provision and an heir-male are not upon the same ground: An heir of provision is not bound *ultra valorem*. Craig has blundered, and Hope and Spottiswood have followed him blindly. It was never the law of Scotland that a creditor could be put off with damages *loco facti imprestabilis*. Let us try to find out a principle on which our determination may rest. When security is given on an estate descendible to *heirs-male*, there is no relief: *that* is expressly said by Lord Stair. It has been asserted that the general rule is, the heir of line must relieve, and that Lord Stair speaks of an exception: but *that* is a mistake,—he is laying down a rule, and not mentioning an exception. What reason is there for making the rule different, when the creditor has got security on the estate descendible to *heir of line* as well as on that descendible to *heirs-male*? What reason, then, is there for making the rule different because the creditor has got security over both estates? In questions not decided, the great thing is to discover a principle. The lands are the principal debtor: [This is rather a figure of rhetoric than a principle:] and therefore there is no relief. It is on the pledge that the creditor relies: so, if the security be taken on two subjects, a rateable relief must take place. It is said that there is no form for making such rateable distribution; but a like thing happens in the case of catholic creditors and secondary creditors. The catholic creditor must take from what portion of the estate he pleases, but he must assign to the secondary creditors.

SWINTON. I am still of the opinion of the interlocutor. By the Roman law *suus hæres* was, in the life of the proprietor, *hæres partiarus*, and only became heir on the death of the proprietor. *Hæres talliatus* is like a legatary; and hence Sir Thomas Hope says that he is *tanquam extraneus*. [He quoted several texts from the civil law greatly in favour of the *legatarius*.]

ESK GROVE. No assistance can be had from the Roman law where there was only one sort of heir. In Scotland our old lawyers adhered to the maxim, that *hæres est eadem persona cum defuncto*, in order to find some person universally liable. The texts from the civil law go a great deal farther than it is admitted the law of Scotland goes. Our later lawyers saw what I may call the absurdity of this generality, and they went upon the *express* will of the defunct. This showed that they were at a loss; for the presumption is “that the heir of line is the most favoured.” The authority of Lord Stair, appealed to on both sides, is composed of various cases. When a debtor, possessed of an estate, gives a real security to a creditor, this has the effect of burdening the heir whose succession is so burdened. This may be from presumed intention, for every man is presumed to know the law, though we at present are disputing a little about it. Should a trifling security given over an estate descendible to

heirs of line have the effect of transposing a large security from the heirs-male to the heirs of line?

PRESIDENT. I shall not be ashamed of *blundering*, with Craig, Spottiswood, and Hope, (alluding to a rough phrase of Lord Braxfield's.) I lay aside all questions as to creditors, for they proceed on different principles. *My* opinion is founded on the civil law, though Lord Monboddo has abandoned his old mistress. When a *hæres* took, *successit in universum jus*: a *legatarius* is much the same as an *heir of provision*. The *legatarius* was in effect the heir. The same is the case as to the feudal law. When an heir makes up titles, he is universal representative. We have *heirs-male* and of provision, so called because a title must be made up; but still they are *legatarii*. The heir of line is not the favourite of the law. It is the heir of provision whom the testator has preferred. When the defunct inclines to lay the burden on any particular heir, he may do it: if he does not, the heir of line must be liable.

HENDERLAND. By the law of Scotland no heir is more *eadem persona cum defuncto* than another. The principle laid down by Lord Braxfield seems the just one. [He quoted Voet, *Familiaæ Exercundæ* and *De Acquirenda Hæreditate*. Voet speaks of countries in which the Roman law takes place.]

On the 8th December 1786, "The Lords \_\_\_\_\_."

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1786. December 15. MRS BARBARA LOWTHER *against* MURDOCH M'LAINÉ.

#### ALIMENT—HUSBAND AND WIFE.

Aliment to a Wife, not entitled to legal or conventional provisions, found due by the Husband's Heirs.

[*Fac. Coll. IX. 456*; *Dict. 435.*]

JUSTICE-CLERK. It is admitted by the pursuer, that, if the marriage dissolves within year and day without there being a child born alive, the terce is not due; and that even a formal settlement by the husband will, in such a case, be good for nothing, unless the parties, having the law before their eyes, dispense with it. It would be strange, then, were the widow to be entitled to an aliment, which is the same thing as a terce. If the wife has such a right, so also must the husband. This case must have often occurred, and yet no such claim was ever made. Marriage is *juris divini* and *juris gentium* as to its constitution; but the effects of marriage will vary according to the practice of different nations.