

1739.

SIR HEW DALRYMPLE, - - - *Appellant* ;
 SIR ALEXANDER HOPE and MARY }
 BUCHAN, - - - - - } *Respondents.*

SIR HEW DAL-
RYMPLE AND
MARY BUCHAN
v.
 SIR ALEXAN-
 DER HOPE.

MARY BUCHAN, - - - - - *Appellant* ;
 SIR HEW DALRYMPLE and SIR }
 ALEXANDER HOPE, - - - - - } *Respondents.*

27th March, 1739.

TAILZIE.—Under a substitution “ to the heir female of the body” of the entailer — Found that the daughter of the entailer’s eldest son is entitled to succeed in preference to the daughter of the entailer, and to the daughter of a second son who died last seized in the estate.

[Elchies, *voce* Provision to Heirs and Children. No. 2.]

JOHN, LORD BARGENY, on the marriage of his No. 47. eldest son John, master of Bargeny, executed a settlement of his estate in favour of the said John, and the heirs male to be procreate of that marriage; whom failing, to the heirs male to be procreate of the said master’s body of any other marriage; whom failing, to William Hamilton, the second son of John, Lord Bargeny, and the heirs male to be procreate of his body; whom failing, to the heirs male to be procreate of the body of the said John, Lord Bargeny; whom failing, to the *eldest heir female of the body* of the said John, Lord Bargeny, and the descendants of her body, without division.

John, master of Bargeny, died in his father’s

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lifetime, and left issue, Joanna, the mother of Sir Hew Dalrymple.

Thereafter, John, Lord Bargeny, died, leaving issue, the said William Hamilton, and one daughter, Nicholas, the mother of Sir Alexander Hope. William made up titles to the estate, and died leaving issue, James and Grizel, mother of Mary Buchan.

James, Lord Bargeny, succeeded to the estate in 1736, and was infeft under the entail, but died without issue; and with him the issue male of John, Lord Bargeny, failed; so that the succession devolved upon “the heir female of the body of John, Lord Bargeny, and her descendants, without division;” and the question was, who was this heir female.

Sir Hew Dalrymple, and Sir Alexander Hope, each took out brieves, to have it found that he was heir of provision and entail to the said James, Lord Bargeny, and they then brought counter actions of declarator.

Jan. 16, 1736.

The court, by their first interlocutor, found “that the estate did devolve to Sir Hew Dalrymple preferable to Sir Alexander Hope, and decerned.”

In the mean time, Mary Buchan appeared in right of her mother Grizel, (the daughter of William,) took out a brieve, and brought her action of declarator; and the three actions were then conjoined. Sir Alexander Hope reclaimed against the above interlocutor, and pleaded, 1st, That the substitution being in favour of the eldest heir female of the body of Lord John the entailer, and her descendants without division, the words ‘eldest heir female’ were descriptive of the female that was

to take; and that his mother Nicolas, the only daughter of the entailer, was the female corresponding to that description, in preference to the daughters of his sons.

But, 2dly, Even though by legal construction the daughter of the eldest son be considered the heir female, still the settlement must be construed by the intention of the entailer. This intention appears from the difference in the words of the substitution to “the eldest heir female” of his body; and to “the next heir female” of his body. In the obligation to infest, after the substitution “to the eldest heir female of his body, and the “descendants of her body,” it follows, which failing, “to the next heir female to be procreate of “his body.” Under the first clause, therefore, his daughter Nicholas, who was *then in existence*, must have been intended; and not his son’s daughter, who was *to be procreate*.

Besides, in the law of Scotland, the term “heir female” is not known; and, therefore, it ought to be construed by the law of England, which, by heirs female, means only females connecting their descent by females, and, *in dubio*, the immediate daughter of the entailer ought to be preferred to the grand-daughter by a son.

Sir Hew Dalrymple answered, that the description of “heir female” of Lord John was applicable only to his mother Joanna, the daughter of the entailer’s eldest son. She alone, on the extinction of heirs male, was his heir of line, or at law, under which character, neither the entailer’s daughter nor the daughter of his son could claim.

On the other hand, Mary Buchan maintained that, by the course of succession founded on the

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forms of feudal tenures, when lands are disposed to the heir male of the body of the entailer; whom failing, to his heirs female,—the female who is to take, on failure of the males, is that female who is heir female, or heir at law of the male last seized, and not the female who is heir female, or heir at law, of the entailer.

The court (18th January, 1738,) found, “that by the conception of the entail, Sir Hew Dalrymple was called to the succession of the estate of Bargeny preferable to Mary Buchan;” and also found “that, by the conception of the entail, the succession to the estate of Bargeny devolved on Sir Alexander Hope, eldest son of the only daughter of John, Lord Bargeny; and that, therefore, he ought to be served heir of entail preferable to Sir Hew Dalrymple and Mary Buchan, and decerned.”

Mary Buchan reclaimed against this interlocutor, and, upon advising her petition, with answers, their Lordships adhered, (6th July) and thereafter (11th July) they found “that Mary Buchan ought not to be served heir of entail preferable to Sir Alexander Hope.

Entered
 Jan. 18, and
 Feb. 9, 1739.

An appeal was brought by Sir Hew Dalrymple from the interlocutor of the 18th Jan. 1738. An appeal was likewise brought by Mary Buchan from the same interlocutor, and from those of the 6th and 11th July.

Pleaded for Sir Hew Dalrymple :—This deed of entail must receive the legal construction, according to which the appellant’s mother was undoubtedly the *heir* of her grandfather, Lord Bargeny, and consequently the only person who could take by the description of “eldest heir female” of Lord Bargeny; for his daughter was not his heir,

nor can she be so, while there remains any issue of his eldest, or of his second son.

It is a mistake to say, that the term “heir female” is unknown in the law of Scotland. It never was before doubted, that where an estate is settled upon a man, and the heirs male of his body, whom failing, the heirs female of his body,—the term “heirs female” denotes the persons, who failing heirs male of his body, are his heirs of line, or heirs at law. Many instances were produced in the Court of Session from record, to show that the term “heir female” is usual in settlements, and in retours by juries; and other instances were given, where grand-daughters by an eldest son are in possession of the estates of their grandfathers in preference to his eldest daughter, by virtue of a substitution (failing heirs male) to the *eldest heir female of the body of the grandfather*, without division. In these cases, although the right of succession had been disputed upon other grounds, the legal construction of the term “heir female” never was contradicted by the daughter.

As to the supposed intention of the entailer, deduced from the terms of the obligation to infeft, this can be of no weight, for this difference in the words of substitution occurs only in the obligation to infeft, and not in the procuratory of resignation. In the procuratory, after the substitution to the eldest heir female of Lord Bargeny’s body, and the descendants of her body, it is said whom failing to the next heir female of his body, without the words “to be procreate.” If the words “to be procreate” had been thought of importance, they would have been inserted in the procuratory. But at any rate, if Lord Bargeny, by the term “heir fe-

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male," had intended, not his female descendant, who, on failure of issue male, would also be his heir, but his daughter Nicolas, who was then living, he would have called her to the succession by name, in the same way that he called his younger son William, and thus have distinguished her from the person who properly would be the heir female.

With regard to the appellant Mary Buchan, it is clear that she can have no claim. By the entail, upon failure of heirs male, it is not the heir female of the last possessor who is called, but the heir female of the entailer; and while there is issue by the eldest son, the issue of the second son never can be heir to the grandfather.

Pleaded for Mary Buchan:—Two errors have been committed by the Court of Session. *1st*, The daughter of the father ought not to have been preferred to the daughters of the sons; and *2d*, the daughter of the second son, who was last seized, and had completed his title by charter and infestment, ought to have been preferred to the daughter of the eldest son. For,

1st, By the course of feudal tenures which prevails in Scotland, though the first heir succeeding upon the entailer's decease must, in order to complete his title, be served heir to the entailer himself, who died last infest in the estate; yet no subsequent heir, upon the death of a preceding heir who was infest, can, by the forms of the law of Scotland, be again served heir to the entailer, but must of necessity be served heir to that person who was last infest in the lands.

2d, By the same law feus are masculine, and when the extinction of the male line happens in the person of an heir male, who had completed his ti-

tle by charter and infeftment, the succession under a substitution “to the heirs female,” or “heirs general,” is understood to rest in the person of the heir female, or heir at law of such male, who thus died last infeft, and not in the heir at law, or heir female of the entailer, or of any of the intermediate heirs male.

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Pleaded for Sir Alexander Hope :—The term “heir female of a man’s body,” in its proper and legal signification, must, in the first degree, denote his daughter. A grand-daughter who succeeds, as standing in the place of a son, can no more answer the description of heir female than a grandson, who represents a daughter, does that of heir male. Where, in a marriage contract, the estate is conveyed to the heir male, it is a common provision to settle portions upon the heirs female of the marriage, meaning thereby the daughters.

After hearing counsel, “it is ordered and ad-
 “judged, &c. that the appeal of the said Mary
 “Buchan be, and is dismissed this House, without
 “prejudice to any right that may hereafter accrue
 “to the said Mary Buchan, or the descendants of
 “her body, on failure of the heirs of tailzie men-
 “tioned or described in the settlement of the 19th
 “June, 1688. And it is hereby ordered and ad-
 “judged, That that part of the interlocutor afore-
 “mentioned, of the said Lords of Session, of the
 “18th Jan. 1737-38, whereby they found, ‘That
 ‘by the conception of the tailzie, the succession to
 ‘the estate of Bargeny devolves on Sir Alexander
 ‘Hope, eldest son of the only daughter of John
 ‘Lord Bargeny, and that therefore he ought to be
 ‘served heir of tailzie, preferable to Sir Hew Dal-
 ‘rymple and Miss Mary Buchan,’ be, and the same

Judgment,
 March 27,
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“ is hereby reversed : And it is further ordered
 “ and adjudged, That so much of the interlocutor
 “ of the same Lords, of the 6th of July last, where-
 “ by they adhered to their said former interlocutor,
 “ be, and the same is hereby also reversed ; and it
 “ is hereby declared, That the said appellant, Sir
 “ Hew Dalrymple, is entitled to the estate in ques-
 “ tion, upon the failure of heirs male of the body
 “ of John Lord Bargeny ; and it is further ordered
 “ and adjudged, that the interlocutor of the said
 “ Lords of Session, of the 16th July, 1736, where-
 “ by they found, ‘ That the estate of Bargeny
 ‘ doth descend to Sir Hew Dalrymple, of Castle-
 ‘ ton, eldest son to the daughter and only child of
 ‘ John, master of Bargeny, and that he ought to
 ‘ be served heir of tailzie and provision to James
 ‘ Lord Bargeny, preferable to Sir Alexander Hope,
 ‘ of Kerse, eldest son to the only daughter of John
 ‘ Lord Bargeny,’ be, and the same is hereby af-
 “ firmed.”

For Sir Hew Dalrymple, *Wm. Noel, Ro. Craigie.*

For Mary Buchan, *Fr. Chute, Al. Lockhart.*

For Sir Alexander Hope, *Ch. Areskine, W. Murray, J. Graham.*