

1773.

LIVINGSTON
v.
WARROCK.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *E. Thurlow, Ja. Montgomery.*

For the Respondent, *Al. Wedderburn, A. Crosbie.*

1774.

LESLIE
v.
LESLIE, &C.

The Honourable ANDREW LESLIE, . . . *Appellant;*
LADY JANE ELIZABETH LESLIE, and her
Husband, LUCAS PEPYS, Esq., . . . *Respondents.*

House of Lords, 10th May 1774.

ENTAIL—DESTINATION—HEIRS MALE—HEIR FEMALE.—In an entail the destination was “to John, Lord Leslie, and the heirs male, *or* eldest heir female, lawfully to be procreated of his body.” The respondent was the eldest heir female, and heir-at-law, and heir portioner with her sister, both being granddaughters of Lord John Leslie. The appellant was their uncle, who was the heir male of the body of Lord John Leslie, but not the heir general. Held, that by the above destination, the eldest heir female in the lineal or legal order of descent, was to be preferred to the collateral heir male of the body.

A question here arose upon the investitures of the estate of Rothes, which appeared at one time to have been in favour of heirs male. The appellant claimed to succeed under an entail 1684, and the respondent claimed to succeed as one of the heirs called under her father and mother’s contract of marriage, and also as granddaughter of the maker of the entail under the destination therein, and above quoted.

It was pleaded by the respondent, in the first place, that the entail 1684, not having been recorded in the register of entails as required by the Act 1685, the same was not good against creditors; and that she being one of the heirs called under her father and mother’s contract of marriage, was to be considered as a creditor, marriage contracts, and the provisions therein contained being in their nature onerous, and such as ought not to be affected by an unregistered entail. 2d, That, independent of her right under the marriage contract, Lady Jane was the heir called by the entail 1684, in preference to her uncle, the appellant, the destination to John, Lord Leslie, “and the heirs male, or the

“ eldest heir female lawfully to be procreated of his body,” being synonymous with heirs whatsoever of his body in the legal and lineal course of succession, with a preference only to the eldest heir female in case of the succession opening to daughters, or other heirs portioners, and, consequently, that Lady Jane and her sister, being the heirs general or heirs-at-law of their grandfather, John, Lord Leslie, Lady Jane, as the eldest, must succeed under the entail, and must take in preference to her uncle, the appellant, who is indeed the heir male of John, Lord Leslie’s body, but not the heir general.

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It was pleaded for the appellant, in the first place, as to the contract of marriage, that holding him to be the heir called under the entail 1684, in the event which has happened, his right could not possibly be defeated by any provision or settlement, which his elder brother, one of the heirs in that entail, might think proper to make upon his issue in his contract of marriage. Where an estate, supposing it to be a fee simple in the father’s person, is provided to the heirs of a marriage, these heirs must take the estate, as representing their father, and must be subject to all its anterior engagements, and even to his posterior ones, unless they be gratuitous and *in fraudem* of the provision, in which case alone, the heirs of the marriage are considered as creditors to the effect of reducing such posterior gratuitous deeds done by the father to their prejudice.

2d, As the competition must, therefore, entirely rest upon the import of the entail 1684; and as both parties claim under the words of substitution to John, Lord Leslie, the eldest son of the Countess, who made the entail, the question is, Whether these words, viz. “ the heirs male or the eldest heir female, lawfully to be procreated of his body,” do in sound sense and in the meaning of the granter, imply an entailed succession, first to the heirs male of Lord Leslie’s body, and thereafter to his heirs female? or, if they must be held as importing the lineal succession of heirs whatsoever, or heirs general descending of his body? The appellant contended, that every circumstance appearing on the face of the deed, as well as the strain of the family settlements, clearly tended to the former construction; and that this was also the natural and obvious meaning of the words. If heirs in the legal course had been intended, he had no occasion to divide them into male and female; for the word *heirs* would have comprehended both; but he calls the heirs male of Lord Leslie’s body, or the eldest heir female of his own body, mean-

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ing the one before the other; and the *quæquidem* of the charter, clearly points out this to have been the writer's intention, as it respects the substitution, by the above general description, of "heirs male, and of tailzie," &c. The word *or*, will not bring in the heirs female equally with, or preferably to, the heirs male, but only in the next place after them; and it is a mistake in the respondent to argue, that if the heirs female are not brought in according to the legal order of succession, they will be excluded altogether.

March 4, 1774. The Court of Session pronounced this interlocutor: "In the
" competition of Brieves, depending before the Macers of the
" Court of Session, &c.; the Lords, on report of Lord Stone-
" field, one of the assessors appointed by this Court in the above
" competition; and having advised the informations of both
" parties, with the writs produced, together with the mutual
" processes of declarator raised by the said parties, and conclu-
" sions of reduction at the said Mr Andrew Leslie's instance,
" they conjoin the said mutual processes, and allow them to
" be repeated in the said competition; and upon the merits of
" the cause, Find that the said Lady Jane Elizabeth Leslie is
" entitled to take and hold the estate of Rothes in question,
" and to be served heir in special therein, in preference to
" the said Mr Andrew Leslie, the heir male, assoilzie her
" from the reduction and declarator at his instance, and
" decern. And they further remit to the Macers of the
" Court to dismiss the Brieves raised by him, the said Mr
" Andrew Leslie; and to proceed in the service of the said
" Lady Jane Elizabeth Leslie, as heir in the said estate, as
" above-mentioned."

Against these interlocutors, the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the appeal be dismissed,
and that the interlocutors complained of be affirmed.

For the Appellant, *E. Thurlow, Henry Dundas.*

For the Respondents, *Ja. Montgomery, Al. Wedderburn,
Alex. Murray, W. W. Pepys.*