

No 42.

*Answered,* According to this interpretation, no greater prestation is undertaken by the express stipulation in the letter, than is incumbent on every seller by law; for though it is generally affirmed, § 3. *Inst. de emptione venditione*, that the risk is the buyer's; yet when the accident happens in the course of what was incumbent on the seller, in order to delivery, or by the nature of the thing sold, in that case the bargain is dissolved; as is explained by *Cujacius, tractatu octavo ad Africanum*, and proved from l. 13, 14, et 15. ff. *de periculo et commodo*; and therefore the seller having undertaken the risk, and not delivered sufficient victual, must be liable in damages.

THE LORDS found, That the seller was not liable in any damages.

Act. H. Home.

Alt. Haldane.

Clerk, Justice.

D. Falconer, v. 2; No. 50. p. 49.

1756. March 2.

EMILIA and MARGARET FARQUHARSONS *against* JAMES FARQUHARSON.

No 43.

The words of a deed, disposing 'all lands which should pertain to the granter at the time of his death, to his brother's heirs and assignees whatsoever,' were not found to comprehend a subject to which the granter afterwards succeeded, that from circumstances appeared not to have been within the granter's intention.

THE lands of Inverey and Tullich, holding of subjects superiors, belonged to John Farquharson. He had issue, by his first marriage, two sons, Patrick and Charles; by his second, James the defender.

The ancient destination of the lands aforesaid was to heirs-male; but the lands were evicted from John, and purchased by his son Patrick.

Patrick obtained charters of resignation from his superiors, and took the succession of the said lands, devised 'to the heirs-male of his body; whom failing, to his heirs-male whatsoever; whom failing, to his heirs and assignees whatsoever.'

Patrick was married twice; by his first marriage he had issue, daughters only. In the 1714, by marriage-contract with his second wife, he provided the said lands 'to the heir-male of that marriage; whom failing, to his heirs-male whatsoever; whom failing, to his heirs and assignees whatsoever.' This contract contains a procuratory of resignation in the terms above mentioned.

Of this marriage he had issue, two sons, Joseph and Benjamin, and two daughters, the pursuers.

In the 1737 Patrick died, and was succeeded by his son Joseph, who died also in the same year, without completing his titles. He was succeeded by his brother Benjamin, who, in 1738, made up titles to the lands of Inverey and Tullich; and dying soon after, was succeeded by his uncle Charles, brother-german of Patrick.

This Charles, in the 1721, executed a deed of the following tenor: 'For certain reasonable causes, he sells, assigns, and disposes to, and in favour of Patrick his brother, *his heirs and assignees whatsoever*, all lands, heritages, tenements, annualrents, debts, sums of money, heritable and moveable, and all goods

‘ whatsoever which shall happen to pertain to him at the time of his decease, whenever the same shall happen.’ This disposition is granted with the burden of all debts contracted, or to be contracted ; reserves a power to alter even on death-bed ; and contains a clause dispensing with delivery.

In 1739, Charles executed a procuratory for resigning the estate of Auchlossan, his own purchase, in favour of himself and the heirs-male of his body ; whom failing, to *his other heirs-male*.

Afterwards, in the same year, Charles was served heir-male in general to his nephew Benjamin, the person last infeft, and also obtained precepts of *clare* for infeftment in Inverey and Tullich, as heir to him.

Upon the death of Charles, in the 1747, James, his brother consanguinean and heir-male, took possession of the estates of Inverey and Tullich, in virtue of the investitures to heirs-male.

Emilia and Margaret, the daughters of Patrick, insisted in an action against James, for having it declared that they, in virtue of the disposition in the 1721, had right to the lands of Inverey and Tullich, as *heirs whatsoever* of Charles, and that James should make up titles and denude himself in their favour.

*Pleaded* for the defender, The pursuers cannot take by the deed 1721 ; for that, *imo*, It being conceived in favour of Patrick first, and then of his children, can bestow no more on them than on him : Now, it could not mean to bestow on him the lands of Inverey and Tullich, which were already his property. Charles had in view the event of Patrick’s succeeding to him, not the event of his succeeding to the estates of Patrick ; as Charles had no expectation of this last event, he cannot have had any intention of providing for it ; consequently the words *heirs whatsoever*, are words without intention, and as such ineffectual in law. But, independent of this, *2do*, Although the expression *heirs whatsoever*, does, in the abstract, imply *heirs of line* ; yet, when it is used in any particular deed, it must be explained according to the intention of the disponent, and the nature of the subject disposed. As in the 1721, the investitures of Inverey and Tullich were to the *heirs-male* of Patrick ; the words *heirs whatsoever* of Patrick, must be understood of *heirs-male* ; which character belongs to the defender. By that expression Charles could not have intended *heirs of line* ; for that, in the 1739, he devised Auchlossan to heirs-male : Now he never could have devised his conquest to heirs-male, and Inverey and Tullich, his paternal inheritance, to heirs of line.

*Answered* for the pursuers, He who grants a general disposition of whatever subjects shall belong to him at his death, has no special lands or moveables in view. Such disposition conveys not particular subjects, but the chance of succeeding to *all* subjects whereof the disponent shall die possessed ; the extent of what is conveyed will be ascertained from the condition of the disponent’s estate at his death. Thus, in the present case, Charles, when he executed the deed 1721, had no view to Inverey and Tullich ; yet, as those estates devolved to him, they came under the description of ‘ all lands belonging to him at the

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'time of his death,' and fall to the pursuers as *heirs whatsoever* of Patrick, called by the deed 1721. As Charles survived Patrick, he saw that event which is said to have been unforeseen; yet did he not revoke the deed 1721, neither can the Court. The settlement of Auchlossan in the 1739, can have no further effect than as to the estate thereby settled.

*2do*, To the arguments from the supposed ambiguity of the expression *heirs-male whatsoever*, it is *answered*, That the expression is variously interpreted in purchases of rights, but not in settlements. When a purchaser is unwilling to communicate to the seller the nature of his family settlements, he takes his purchase to *heirs whatsoever*. This expression will, in law, be limited or extended according to the settlements; but in the settlements themselves it has a determined technical meaning, and must imply *heirs of line*.

'THE LORDS found no action competent to the pursuers, in virtue of the deed 1721 against the defender, to oblige him to denude of the estates of Inverey and Tullich.'

Act. *Miller, Brown et Lockhart.* Alt. *Wedderburn, Garden et Ferguson.* Clerk, *Kirkpatrick.*  
*Fac. Col. No 193. p. 285.*

This cause was appealed.—THE HOUSE OF LORDS ORDERED and ADJUDGED, That the interlocutor complained of be affirmed.

No 44.

Just and lawful debts include bonds of provision.

1779. June 28.

THOM against LUNN.

A PERSON, after settling provisions upon his younger children, disposed his whole estate to his eldest son, in his contract of marriage, under the burden 'of his hail onerous, just, and lawful debts, presently owing by him.'

In an action for payment of the provisions, it was *objected*, That, being revocable at pleasure, and payable at the granter's death, they were not comprehended under the clause in the disposition.

'THE LORDS found the defender liable for the sums contained in the bonds of provision.' See PROVISIONS TO HEIRS AND CHILDREN.

Act. *Nairn.*Alt. *Macqueen.*G. *Ferguson.**Fac. Col. No 96. p. 350.*

No 45.

Import of a substitution in a right of lands conceived to one in liferent, and

1775. March 7.

JAMES BOYD against WILLIAM GIBB.

PATRICK BOYD of Pitkindie died in 1681, infeft and seised in the lands of Pitkindie and Ballairdie; he left issue, one daughter, Janet, who was married to George Rattray; and of this marriage there were three children, Patrick, Elizabeth, and Margaret.