

S E C T. VII.

Heirs whatsoever.—All Estate whatsoever, Personal or Real.—Lawful Heirs Male.—Heirs and Bairns of a Marriage.

1757. *January 12.*

JOHN MACLAUHLAN of St Coan's *against* JOHN CAMPBELL.

No 54.
A disposition of a subject destined it in one clause to heirs male, but in the rest of the clauses to heirs whatsoever. The Lords found, that the destination was to heirs male, as heirs whatsoever comprehended heirs male; but, the term heirs male was exclusive of all others.

IN 1660, John Macdougall of Dunnollie, granted a wadset-right of part of the lands of Ballemoir to Mr John Maclauchlan minister at Seal, his heirs male and assignees, redeemable by payment of 3200 merks; upon which sasine followed.

In 1663, Dunnollie granted a second wadset-right to Mr John Maclauchlan minister at Kilnynver, the son of the first wadsetter, which was executed in the form of a mutual contract. It recited the first wadset to heirs male; and in respect that Mr John the younger had right to the 3200 merks, as heir to his father, and that he had advanced to Dunnollie another sum of 3000 merks, therefore, in security of both sums, extending to 6200 merks, Dunnollie of new sold and disposed to the said Mr John, his heirs and assignees whatsoever, the whole six merk land of Ballemoir, &c.: but immediately after the dispositive clause followed an obligation to infeft the said Mr John, his heirs male and assignees whatsoever.—Most of the other clauses bore, in general, Mr John and his foresaids; but in the clause of redemption, Mr John obliged him, his heirs and assignees whomsoever, to grant a letter of reversion; and in case of redemption, Dunnollie became bound to pay the 6200 merks to Mr John, his heirs, executors, or assignees whatsoever.

This contract did not contain a precept of sasine; but of the same date Dunnollie granted a charter, bearing to be in implement of and conform to the contract, which was there held as repeated; but nevertheless confirming the right to Mr John, *hereditibus suis et assignatis quibuscunque*. Upon this charter Mr John was infeft. He was succeeded by his eldest son John; who made up no titles, but possessed the lands till his death in the 1710, leaving only a daughter, Margaret; and thereupon the possession was assumed by the other younger sons of old Mr John, and their sons, as heirs male, but without making up titles.

In 1752, John Campbell, the son of Margaret the daughter, obtained himself served heir of line in special to Mr John the original wadsetter; but his service was challenged in a reduction and declarator at the instance of Mr John Maclauchlan of St Coan's, the heir male of the wadsetter.

Pleaded for the pursuer, The intention of the original wadsetter, to take the right to his heirs male, and not to his heirs of line, is plain, not only from the conception of the first wadset-right, to which the second refers, but also from

the obligation to infest contained in the contract in question, which is taken expressly to heirs male: and although, in the dispositive clause, the right is given to heirs and assignees whatsoever, yet that must be understood to mean heirs male; because the term heirs male has a certain and definite meaning, quite incompatible with a destination to heirs female; but heirs and assignees whatsoever may, and often does, comprehend heirs male. Had not heirs male been intended to be preferred, they never would have been mentioned in any part of the deed. And as for the charter to heirs whatsoever, it cannot alter the case, seeing it refers to the contract, and is expressly meant to complete and confirm, not to alter it.—Besides, by the old Feudal law, rights taken to heirs whatsoever were constructed *male fees*; and to this day, in the Highlands of Scotland, where those lands lie, few estates are devised to heirs female.

Answered for the defender, It is more reasonable to presume the wadsetter's intention to have been, that the right should go to heirs of line than to heirs male. Heirs male are only mentioned in one clause, which might be by mistake; whereas heirs whatsoever occur in different clauses. The charter is expressly so conceived, and infestment followed upon that charter. It matters not what were the ancient rules of feudal succession, when military services and tenures were in use; for now it is established, that a destination to heirs whatsoever will carry an estate to a nearer heir female, in preference to a remoter heir male.

'THE LORDS sustained the reasons of reduction of the defender's service as heir of line, and decerned in the declarator at the instance of the heir male.'

Act. Rae, Lockhart. Alt. Burnett.

D. R.

Fol. Dic. v. 3. p. 125. Fac. Col. No 9. p. 16.

1782. July 17. MRS MARY DRUMMOND *against* MRS AGATHA DRUMMOND.

MR DRUMMOND of Blair-Drummond, executed, in favour of the heirs of his body and other heirs *seriatim*, an entail of his estate, comprehending all his lands, except a small parcel called Norrieston, which was not mentioned in that deed. At the same time, he likewise executed a disposition in favour of certain trustees, of his whole estate, as contained in the entail; and "of all other estate whatsoever, real or personal, or of whatever denomination, which should belong to him at the time of his decease; and that for the purpose of paying and clearing off the debts affecting the estate;" which, when this was done, they were to reconvey to the heirs of entail; but the trust-deed was declared to be, in the mean time, revocable.

He afterwards acquired certain other lands; and having married, obliged himself, in his marriage-contract, to resign the entailed estate in favour of the heirs of the marriage, and the other heirs specified in the entail. Of this marriage, he had a son James; who, dying an infant, survived him only a few months.

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No 55.

A man disposed "all estate whatsoever, personal and real," in trust for the heirs of his entail. These words found to comprehend all lands whatever belonging to him.