

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.

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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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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.

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One of his sisters, Mrs Agatha Drummond, succeeded as heiress of entail; when Mrs Mary, another of them, instituted an action against her, claiming as coheirress of line, her proportion of the lands not comprehended in the entail, and likewise, as an executrix of James, her share of his moveable effects; in support of which, she

Pleaded: The lands of Norrieston having belonged to Mr Drummond at the time when he executed the deeds of entail and of trust, their not being mentioned in either, is to be considered as owing to an intentional omission; and therefore these lands, together with those other which he acquired after that period, are still unentailed subjects. Neither could come under the general denomination of "all real and personal estate," these not being adequate terms for the conveyance of lands by the law of Scotland.

With respect to the executry of James, this comprehends the rents of the entailed subjects which became due during his life: For though they did fall under the trust deed, that settlement, in virtue of the reserved power, must be considered as so far revoked by the obligation in the contract of marriage relative to heirs.

Answered for the defender: The general description, "all other estate whatsoever, real or personal," is of itself sufficient to comprehend all the lands belonging to the granter; but more especially when his intention of including them all is so apparent. By the law of England, the terms real estate, in their strict technical signification, denote "lands and tenements." The writer of this deed seems to have borrowed the phrase thence; and, indeed, often with us the terms real and personal are used indiscriminately for those of heritable and moveable, which are the more proper technical expressions in Scotland.

The pursuer's claim to the rents of the entailed subjects during James' life, is not better founded. The trust-right was for his benefit as heir of entail, and should not be considered as revoked by the contract of marriage.

The opinion of the Court was, That the entailer's intention to settle the whole of his estate was sufficiently evident; and likewise, that the above mentioned expressions might comprehend both the lands omitted in the deeds, and also those acquired afterwards.

Some of the Judges, however, doubted, whether these general words were sufficient for a conveyance of land property to be completed by infestment. With respect to the lands of Norrieston, they farther observed, that as the entailer seemed to have been ignorant of their being omitted in the entail, so it was impossible that, in the subsequent trust-deed, he could supply that deficiency; and therefore, though his design was to contain in those deeds all his land, still *quod voluit non fecit*.

With regard to the rents of the entailed lands due during the apparenecy of James, the Court considered, that these, though otherwise vesting in him, fell

under the deed of trust, which being calculated for his benefit, was not to be presumed to have been revoked by the contract of marriage.

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THE LORDS assailed the defender.—See PRESUMPTION.

Reporter, Lord Stonefield. Act. Wight. Alt. Hay Campbell. Clerk, Orme.
Stewart. Fol. Dic. v. 3. p. 125. Fac. Col. No 53. p. 84.

1788. July 24. ROBERT HAY against MISS FRANCIS HAY.

SIR ROBERT HAY of Linplum executed a deed of settlement, by which he devised his estate to such of the younger sons of the family of Tweeddale as were then in existence, *nomination et seriatim*, and the *heirs-male of their bodies*, 'whom failing, to Alexander Hay, second son to Alexander Hay of Drummehzier, and *his lawful heirs-male*;' and, after some other substitutions, 'to the heirs-male of the body of John Marquis of Tweeddale.' From the tenor of the deed, however, it appeared highly probable, that the alteration of the expression 'heirs-male of the bodies,' as applied to the Tweeddale family, into 'lawful heirs-male,' employed with respect to that of Drummehzier, was not occasioned by any difference in the intention of the granter, but had crept in through the inaccuracy or want of skill of the writer, who was not a conveyancer by profession.

Alexander Hay died without issue; and the prior substitutes having failed, the succession was claimed by his brother, Robert Hay, as his heir. It was likewise claimed by Miss Hay, as heir-female of John Marquis of Tweeddale, the intermediate substitutes having also failed. In the competition of briefs which followed, it was

Pleaded for Miss Hay: When, in interpreting the settlement of an estate, a doubt arises with respect to any restriction or limitation of property, no latitude of construction ought to be allowed; but when the only question is, whether the granter has devised his succession to one heir or to another, the opposite principle prevails, and that construction is to be adopted which is best calculated to give effect to his will, *secundum id quod credibile est cogitatum*, l. 24. ff. De Reb. dub. Voet. ad eund. tit. § 4.; Blackstone's Commentaries, b. 2. cap. 23. No doubt the term *heirs-male* commonly denotes heirs-male in general; yet it is capable of being limited to the *heirs-male of the body*, when from circumstances such is evinced to have been the will of the devisor. A similar interpretation of the parallel expression *heirs-female* has had repeatedly the sanction of the Court; No 50. p. 2306. and No 51. p. 2308. And in the civil law, the rule is established, l. 17. § 8. ff. Ad senatusconsult. Trebell.; Mantica, De conjecturis alt. volunt. lib. 8. tit. 14. § 6. Even the statute of 1685 affords an instance of the limited interpretation of the word 'heirs,' it being there confined to de-

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The expression, *lawful heirs-male*, employed in certain parts of an entail, with the same meaning, so far as appeared, as that of *heirs-male of the bodies of the substitutes*, used in other places of the deed, was, nevertheless, strictly interpreted in conformity to the words.