

1784. *March 10.* ELIZABETH ROSE *against* JAMES ROSE.

The investitures of the barony of Kilravock had been long devised in favour of heirs-male, when, after expeding a charter in the same terms in 1771, Hugh Rose, the proprietor, in order to create certain freehold qualifications, disposed the property of those lands to his brother "Lewis Rose," (an old man who had never been married,) "and the heirs-male of his body, whom failing, to return to himself, and his heirs and assignees whatsoever;" and divided the superiority among four different disponees, "in life-rent," the fee being taken "to himself, and his heirs and assignees whatsoever." In one of those conveyances, it is to be remarked, the destination of fee having been framed "to him and his heirs-male and assignees whatsoever," the word male was deleted before the signing of the deed, and the erasure noticed in the testing clause.

Upon Mr. Rose's death, however, his son, the late Mr. Hugh Rose of Kilravock, expedite a service, in the character of his heir-male, and obtained from the Crown a charter of resignation, devising the estate to himself, "hæredibusque masculis ex ejus corpore, hæredibusque masculis ex eorum corporibus; quibus deficien. proximis ejus legitimis hæredibus masculis et assignatis quibuscunque." He afterwards conveyed a part of the superiority to a new disponee, in the room of one who in the mean time had died, "in life-rent, and to himself, and the heirs-male of his body, whom failing, to his nearest and lawful heirs-male and assignees in fee.

A reconveyance of the property by Lewis Rose was then to be effected; and a deed framed for that purpose was extended, with destination, after heirs-male of Hugh Rose's body, "to his heirs-male and assignees whatsoever." The deed, however, was never executed, that clause having been erased; and in place of the substitution in favour of heirs-male, the words, "to heirs and assignees whatsoever," were first added on the margin, and afterwards the following clause: "To and in favour of the said Hugh Rose of Kilravock, my nephew, and the heirs-male or female of his body; whom failing, to his other nearest and lawful heirs-male or female, and assignees whatsoever." Accordingly another deed, drawn up in those terms, was executed by Lewis Rose.

The late Mr. Rose of Kilravock having died without issue, James Rose, his cousin, made up titles to that estate as heir-male; and on the other hand, his sister, Elizabeth Rose, who was served heiress of line to him, claimed the lands in this last character, instituting a process of reduction of James's titles.

Pleaded for the pursuer: The respective claims relative to the superiority and to the property are to be separately considered. *1st*, The devise of the superiority by Hugh Rose the elder, in favour of "heirs whatsoever," especially when illustrated by the circumstance of the word "male" being erased from the destination must preclude the title of an heir-male. By the appellation of "heirs whatsoever," those of line are most properly and most frequently denoted, agreeably

No. 51.

"Heirs whatsoever,"
how interpreted.

No. 51. to the determination of the Court in the competition between the Duke of Hamilton and Mr. Douglas in 1762, No. 40. p. 4358. *voce* FIAR ABSOLUTE, LIMITED; and it is only when forced from its natural interpretation, by occurring in an accessory deed, very different from that in question, or by the influence of other peculiar circumstances, that it has been made to comprehend heirs-male. The service of Hugh Rose, the younger then, being in the character of heir-male, could not vest him with the right of this subject; 21st June, 1738, Edgar against Maxwell, No. 14. p. 14015. *voce* REPRESENTATION; although indeed, if his being likewise heir of line had been necessarily implied in that character, which it evidently was not, his title might perhaps have been sustained; as in the case of Bell against Carruthers, No. 16. p. 14016. *voce* REPRESENTATION; and likewise in that of Haldanes against Haldanes, No. 27. p. 14443. *voce* SERVICE OF HEIRS. If, then the last mentioned Mr. Rose made any destination of the superiority in favour of heirs-male, it is to be considered as of no avail, having proceeded *non habente potestatem*.

The above argument is applicable to the property as devised in the disposition to Lewis Rose, by the condition of return "to the heirs whatsoever" of Mr. Rose elder of Kilravock. But a strong additional plea arises from the terms of Lewis Rose's re-conveyance, so studiously amended in its destination; a deed which, like a disposition to a purchaser and a series of heirs, or a bond secluding executors, granted by a debtor, must have the same effect in regulating succession, as a formal settlement by the acquirer himself. Nor can a presumption founded on the preceding investiture throw any obscurity upon the clear import of the words, "nearest heirs-male or female," which are contained in the latter part of that devise; since in the former part the male succession is plainly relinquished by the nomination of the heirs-female of Hugh Rose's body.

Answered: 1st, With respect to the superiority, the charter obtained by Hugh Rose the elder, contained, as did the prior investitures, destination to heirs-male; and the dispositions of life-rent, on which the opposite argument is founded, and which express the devise of the fee by the appellation, "heirs whatsoever," were completed by infeftment taken upon that very charter. If, however, "heirs whatsoever" must not be here understood for "heirs male," then infeftment must have been given to a set of heirs different from that which the charter, its warrant, has pointed out. Can there be a stronger reason for fixing the application of a term, the meaning of which, it is admitted, is so flexible? Nay, the just interpretation has in effect been confessed by the pursuer, because it is evident that the object of those conveyances entitles them not to the importance of even accessory deeds. As to the construction of the phrase in general, that it ought to be agreeable to antecedent investitures, is apparent from the following decisions and authorities: Marquis of Clydesdale against Earl of Dundonald, 26th January, 1726, No. 3. p. 1262, *voce* BASE INFESTMENT; Burnet against Burnet, No. 45. p. 14939. Skene against Skene, No. 20. p. 11354. *voce* PRESUMPTION; Stair, B. 3. Tit. 5. § 12.; Bankton, vol. 2. p. 330. § 27.; Erskine, p. 551. § 20.; Mackenzie on Tailzies, p. 284.

But though heirs of line had been denoted by the above appellation, even that circumstance would not have prevented the subject from being carried by the service of Hugh Rose the younger, as heir-male; since the special facts proved before the inquest ascertain, not less clearly, his character of heir of line; according to the decision in the case of Bell against Carruthers, cited by the pursuer, No. 16. p. 14016.

2do, With regard to the property of the estate sub-feued to Lewis Rose by Hugh Rose the elder, the clause of return contained in that nominal conveyance is to be understood of heirs-male; the just construction of the words, "heirs whatsoever," which occur there likewise, having been already shewn. Lewis Rose was not left at liberty, in his re-disposition, to depart from the line thus marked out to him. Such clauses in settlements made in favour, not of natural heirs, but of persons *non alioqui successuri*, create a *jus crediti* which is not defeasible by any gratuitous deed of theirs; Duke of Douglas against Lockhart of Lee, No. 31. p. 4343. *voce* FIAR ABSOLUTE, LIMITED; Marquis of Clydesdale against Earl of Dundonald, No. 3. p. 1262. *voce* BASE INFEEFMENT; Duke of Hamilton against Duke of Douglas, No. 40. p. 4358. *voce* FIAR ABSOLUTE, LIMITED. Hence, whatever the import may be of the devise contained in that re-conveyance, its effect must be limited by the preceding destination. The appellation indeed of nearest heirs male or female," is truly synonymous with that of "heirs whatsoever," of which it is only a sort of paraphrase; and therefore the signification of both expressions alike is to be regulated by the prior investitures.

The Lord Ordinary's interlocutor was the following: "Finds, that the deeds and conveyances founded on by the pursuer are not sufficient to alter the settlements and investitures of the estate in favour of heirs-male; and therefore assoilzies the defender from this process." But upon advising a reclaiming petition and answers,

The Court "sustained the reasons of reduction of the writings libelled on, so far as concerns the property of the lands and barony of Kilravock; but repelled the reasons of reduction as to the superiority thereof."

Mutual reclaiming petitions having then been preferred, and followed with answers,

The Lords adhered to their former interlocutor, so far as related to the property, but altered it with regard to the superiority, having sustained the reasons of reduction respecting the superiority as well as the property.

Lord Ordinary, *Gardenston*.

Act. *Wight, Fergusson*.

Alt. *Maclaurin, Blair*.

Clerk, *Menzies*.

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Fol. Dic. v. 4. p. 307. Fac. Coll. No. 154. p. 239.