No 43. ' 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.

1779. *June* 28. THOM *against* LUNN.

No 44.
Juft and lawful debts include bonds of proviſion.

A PERSON, after settling provisions upon his younger children, disponed 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.*

1775. *March* 7. JAMES BOYD *against* WILLIAM GIBB.

No 45.
Import of a fubſtitution in a right of lands conceived to one indifferent, and

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.

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and to his son, and the heirs-male of his body; whom failing, to the heirs-male of the father, procreated or to be procreated.

Patrick and Margaret Rattrays died without issue. Elizabeth married Charles Gibb. She likewise died without issue. But her mother, Janet Boyd, having disponed the foresaid lands of Pitkindie and Bellairdie in favour of Elizabeth and her husband, in the contract of marriage executed between them, 14th May 1731, certain deeds were afterwards executed by Elizabeth Rattray, making over the lands of Pitkindie and Bellairdie in favour of her husband's nephew Robert Gibb, and, after his death, in favour of William Gibb, brother to the said Robert, by whom these mesne conveyances were exhibited in the present action, unnecessary to be minutely stated.

James Boyd, being heir-male of Patrick Boyd, last of Pitkindie, and after the death of Elizabeth Rattray, being likewise heir of line to the said Patrick Boyd, was advised, that, by the investitures of the estate, his right of succession could not be defeated by those deeds in virtue of which Gibb now held the same; and, accordingly, he brought a process of exhibition *ad deliberandum*, in which he established by proof his propinquity to Patrick Boyd of Pitkindie; and having granted a trust bond, in order to lead, in name of the trustee, an adjudication of the lands, upon a special charge against himself, the defender William Gibb appeared, and opposed the adjudication. THE LORD ORDINARY refused to adjudge the lands, but allowed the parties to compete as if the adjudication were passed: And upon considering the productions made by the defender, with the objections thereto, 'repelled the objections; found that the defender has produced sufficient to exclude the pursuer's claim, and therefore assoilzied him.'

Among the writings which the defender was made to produce, were the following:

Disposition, dated 14th October 1670, granted by George Hay of Kirkland, of both halves of Bellairdie and the lands of Pitkindie, in favour of Patrick Boyd, and Elizabeth Hay his spouse, in liferent, and to Patrick Boyd, their son, and to the heirs male to be procreated of his body, or to the other heirs male to be procreated of the said Patrick, elder, his body; which disposition contains the following proviso: 'That, if there shall be no heirs male procreated of the bodies of the said Patrick Boyds, elder and younger, in lawful marriage, or left behind them at the time of their decease, in that case, the right and title to the foresaid lands is to return to me and my foresaids; and this present disposition, with all rights to follow hereupon, are hereby declared null and void, and of no effect, as if the same had never been granted; with the which provision these presents are granted and accepted by the said Patrick Boyd, for him and his foresaids, and no otherwise. And further, seeing the daughters procreated or to be procreated, of the said Patrick Boyd, elder and younger, their own bodies, of lawful marriage, are hereby secluded from any right of succession in the aforesaid town and lands of Pitkindie and Bellairdie, as heirs thereto, by virtue of the and irritant clauses above written, introduced in my favours; therefore, I bind and oblige

No 45. me, my heirs, &c. to pay to the daughters, one or more, to be lawfully procreated of the said Patrick Boyd, elder and younger, deceasing without heirs male of their bodies, as said is, in case there shall be only one daughter, the sums of 2000 merks Scots; and in case there shall be two or more daughters,' &c.

A charter of even date, granted by Hay of Kirkland of the same lands, in implement of the foresaid disposition, in which the destination of the succession is in the following words: 'Praefato Patricio Boyd et Elisabethae Hay, in vitali 'reditu, pro omnibus eorum vitae diebus, et dicto Patricio Boyd, eorum filio u-'nigenito, haeredibus suis masculis de corpore suo procreandis; quibus deficien. 'haeredibus masculis dicti Patricii, sui patris, procreatis seu procreandis, haere-'ditarie et irredimabiliter.'—Upon the precept contained in this charter, infeftment followed in the lands of Bellairdie only, Dec. 13. 1671.

Another charter granted by the said George Hay, 12th September 1674, to the said Patrick Boyd of Pitkindie, and his heirs and assignees whatsoever, of both halves of the lands of Bellairdie, to be holden of the granter's superior.

Instrument of sasine, dated June 6th 1676, following upon the precept of sasine in the said charter 1674, in favour of the said Patrick Boyd.

Besides the above writings, the defender did further produce a disposition of the lands by Patrick Boyd to Hay of Kirkland, in 1659; as also, the last title in favour of the Boyds of Pitkindie, immediately anterior to the disposition to Hay of Kirkland, viz. a charter, dated August 12. 1637, granted by James Maxwell of Innerwick, as superior, confirming a charter of the lands of Pitkindie, and of the half lands of Bellairdie, granted in 1633 by Patrick Boyd of Pitkindie, with consent of Patrick Boyd elder of Pitkindie, his father, and Barbara Kinnaird wife of the said Patrick Boyd younger, to Patrick Boyd, eldest lawful son and apparent heir of the said Patrick Boyd, younger of Pitkindie, and Janet Hunter his wife, and the longest liver of them two in conjunct fee, and to the heirs male to be lawfully procreated between them; whom failing, to the heirs male and assignees whatsoever of the said Patrick.

Pleaded for the pursuer: That the foundation of the defender's pretension to the lands in question depends entirely upon the right of Janet Boyd and Elizabeth Rattray, the daughter and grand-daughter of Patrick Boyd of Pitkindie, under whose deed he claims; but it appears evident, from the terms of the disposition granted by George Hay of Kirkland in 1670, that they never could have any right.

By this deed, the lands are granted to Patrick Boyd the father, and Patrick Boyd the son, and the heirs male of their bodies; but their daughters, or heirs female, are expressly and anxiously excluded from the succession. Patrick Boyd the younger predeceased his father, unmarried; and, if Patrick the elder had any other son, he must also have predeceased his father, as Patrick was succeeded in the lands by his daughter Janet Boyd, above mentioned.

It does not, therefore, appear to be of any moment, although it were true, as the defender alleges, that Patrick Boyd elder had another son called George,

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who was baptized the day before his father's death; as the evident intention of the above recited clause of the disposition from George Hay of Kirkland appears to have been, that, if Patrick Boyd elder and younger should either have no heirs male of their own bodies born to them, or, although born, if they should not succeed to them in the lands, then, *quandocunque defecerint*, the clause of return in favour of the granter, Hay of Kirkland, was to take place.

That such was the meaning of the parties, is clear, from the daughters being expressly secluded and debarred from the succession; after which express seclusion, it is not easy to imagine upon what ground it can be maintained, that Janet Boyd, the daughter of Patrick, could possibly either have in herself, or create to the defender, any right or title to the lands.

The defender hath *argued*, That any plea arising from this disposition was *jus tertii* to the pursuer, because, by the clause of return, the right reverts to Hay of Kirkland, failing heirs male of the bodies of Patrick Boyd elder and younger.

But the pursuer does not well conceive how it can be reckoned *jus tertii* to him to show that the defender's author had no right to the lands in question, the necessary effect of which is to open the right of succession to the pursuer; to whom it cannot surely be *jus tertii* to maintain, that it is not in the power of the defender to exclude him, by producing a writing which does clearly cut down all pretence of right in the person under whom the defender himself claims.

Nor can any argument arise to the defender, from a supposed right competent to the heir of Hay of Kirkland, in virtue of the clause of return; for although such right did still subsist, and were not lost by the negative prescription, yet the defender has no title to found upon it; and, indeed, it would be *jus tertii* to him to make use of such a plea.

But farther, the clause of return was left out in the subsequent charter; by which the disposition, though of the same date, is in so far altered; and the substitution in favour of the granter and his heirs are departed from. Nor can it be denied that, notwithstanding the terms of the disposition, it was competent for Kirkland, when he came afterwards to grant the charter, to give up any right or privilege which he had reserved by the disposition. This accordingly he has done; and the right must, without doubt, stand upon the footing on which it is established by the charter.

Nor is this the only particular in which the views of succession, as they appear to be expressed in the disposition, were altered by the terms of the subsequent charter; for, by the disposition, the substitution, failing heirs male of the body of Patrick Boyd younger, was confined to the heirs male of the body of Patrick Boyd elder; but, by the charter, this substitution was extended to the heirs male general of Patrick Boyd the father; and under this character, the pursuer is by that charter called to the succession; the heirs female continuing

No 45. to be excluded by the charter, as they had in the most express and positive terms been by the previous disposition.

The defender hath disputed this extension by the charter to the heirs male general of Patrick Boyd the father; but the pursuer contends, that the interpretation which he puts upon it is the fair and just interpretation. In the former part of the clause, where the substitution is meant to be limited to the heirs male of the body of Patrick Boyd the son, it is expressly so said; the words are, 'haeredibus suis masculis de corpore suo procreandis;' but, in the subsequent part, where it is meant to be extended to the heirs male general of the father, it is expressed in these terms, 'quibus deficien. haeredibus masculis dicti Patricii Boyd, 'sui patris, procreatis, seu procreandis;' clearly not limiting to the heirs male of the body of the father, as was the case with respect to the son, but extending to the father's heirs male whatsoever, whether already existing, or to be afterwards procreated.

But, had any doubt remained upon the former writings, it will be entirely cleared up by the charter 1637, which affords the most satisfying proof, that the meaning of the substitution in the charter 1670, must be what is contended for by the pursuer; as that charter shows, that the lands in question were a *feudum antiquum* in the family of the Boyds, and stood devised to heirs male, prior to the conveyance thereof in favour of Hay of Kirkland; and which, from the circumstances of the case, was evidently granted only in trust for the behoof of the Boyds. And, as it was certainly none of the purposes of this trust to alter the ancient destination of the lands in favour of heirs male, it is impossible to believe that George Hay, when he came to re-convey the lands, could intend to make any such alteration, consequently the construction which the pursuer puts upon this deed must be a just one.

Nothing, indeed, can be more clear, than that it was not intended to create any right in favour of the heir whatsoever, to the prejudice of the succession of the heirs male; for, in the *first* place, the disposition by George Hay to Patrick Boyds, elder and younger, contains, as has been seen, an express exclusion of heirs-female; and, *2dly*, the charter 1670, granted in consequence of that disposition, stands limited to heirs male.

Answered, The general question before the Court is, whether, by the settlements of the estate, as they stood at the death of Patrick Boyd of Pitkindie, they devolved upon his daughter and grand-daughter, his undoubted heirs of line, preferably to the collateral heirs-male of him, or his father?

And that this was the case, appears clear beyond the possibility of a doubt, both from the disposition 1670, granted by Hay of Kirkland, and the charter that followed thereupon.

The foresaid settlement is clear, and liable to no sort of ambiguity. The substitution is carried no farther than the issue male of Patrick Boyd the father, which the pursuer does not pretend to be; and, therefore, failing the heirs spe-

cially called, the succession must devolve to the heirs of line. It is now an established point, that, in every tailzied succession, wherever the tailzie ends, the right of the heirs whatsomever does begin. No 45.

Farther, it appears in evidence, that Patrick Boyd had a son baptised, called George, upon 6th February 1681, and Patrick Boyd died himself the next day. The presumption is, that the son survived him; so the condition upon which the return was stipulated in favour of Kirkland, has not existed; and the estate must, of consequence, descend to the other heirs of Patrick Boyd, in the legal course of succession.

And, 2*do*, Supposing that the return was to take place upon the failure of issue male, *quandocunque*, yet still it would not avail the Representatives of Kirkland in the present case, as any claim, which otherwise would have been competent to him, is clearly cut off by prescription.

At the same time, supposing it were otherwise, the plea of *jus tertii* is most properly objected to the pursuer; and it is not *jus tertii* to the defender to make the objection. The defender does not found upon the right of Hay of Kirkland, in maintaining his right to the estate; but upon the virtual substitution of the deed in favour of the heirs whatsoever of Patrick Boyd: And, although it were to be granted that Kirkland had a preferable right, yet none are entitled to found upon that preferable right, except either Kirkland himself, or those connecting a right with him. But the pursuer connects no such right; and it is never *jus tertii* to a defender, in possession, to object to the title or right of the pursuer.

Again, the words of the charter are plain, and liable to no ambiguity; and they clearly comprehend nothing more than the heirs-male of old Patrick Boyd's body, and not his collateral heirs-male. And, indeed, if the words could admit of any dubiety, (which it does not appear they can) it would be removed by the disposition 1670, in implement of which the charter was granted.

Hay of Kirkland might, with great propriety, leave out of the charter the clause of return, being a stipulation entirely in his own favour, and which he could effectually renounce and discharge at pleasure; but Kirkland had no power, when granting a charter in implement of the disposition, in the least to vary the destination of succession established by the disposition. The charter would have so far proceeded without a warrant; and, as the foresaid charter was granted in implement of the disposition 1670, it cannot be presumed that an alteration of the disposition was thereby intended, unless the words could not admit of another construction; which is so far from being the case, that the destination in the disposition and in the charter is precisely the same.

The defender never saw or heard of any back-bond or declaration by Hay of Kirkland; but, as to the other titles which were ordered to be produced, it does appear, from the record of sasines, that an infeftment was taken on 18th October 1633, on a charter granted by Patrick Boyd then of Pitkindie, with consent of Barbara Kinnaird his wife, of the lands of Pitkindie, and one

No 45. half of Bellairdie, to Patrick Boyd his son, and the heirs-male to be lawfully procreated betwixt him and Janet Hunter his wife; whom failing, to the heirs-male and assignees whatsoever of the said Patrick Boyd. And this charter and infeftment was confirmed by a charter 11th August 1637, granted by Maxwell of Innerwick, the superior.

As to the other half of Bellairdie, the Boyds purchased it from the Earl of Kinnoul, who, on the 22d of August 1635, granted a charter thereof to Patrick Boyd younger of Pitkindie, and Barbara Kinnaird his wife, and longest liver of them two, in liferent, and to Patrick Boyd their son, and his heirs and assignees whatsoever, in fee. And upon this charter infeftment followed the 16th of May 1637.

Upon the 21st of November 1659, Patrick Boyd of Pitkindie granted a disposition to Hay of Kirkland, of the lands of Pitkindie and Bellairdie, which appears to be granted 'for certain sums of money, usual over the realm of Scotland, presently at the date hereof, really and with effect advanced, paid, and delivered to me, and certain other persons my creditors, in my name, and at my direction, by the said George Hay, for making and granting of thir presents, and the infeftments and securities after specified, whereof I hold me well content, satisfied, and completely paid, &c. Therefore he dispones these lands from me, my heirs and assignees, to and in favour of the said George Hay, and his heirs and assignees whatsoever, heritably and irredeemably, but any manner of reversion, bond, promise, or condition of reversion, redemption, or regress whatsoever.'

This deed contains a procuratory of resignation, a clause of absolute warrandice, and it bears the progress of writs to have been delivered up.

And, of the same date, a charter in implement was granted by Patrick Boyd to Kirkland, of the lands of Pitkindie, and half lands of Bellairdie, and upon which infeftment followed upon the 26th of November 1659.

And, upon the 24th of July 1662, Maxwell of Dirleton granted a charter of confirmation of the foresaid charter to Kirkland.

And, upon the 21st of November 1659, Patrick Boyd of Pitkindie granted a charter of the other half of Bellairdie to Kirkland, on the same recital and terms with the former.

And this charter was confirmed by Gray of Balledgarno, the superior.

The above is the state of the titles in the person of Kirkland, and also in the Boyds of Pitkindie, prior to the grant in favour of Kirkland; and it is submitted if they can have the least influence upon the decision of the present question. As it is not alleged that Patrick Boyd was a limited fiar, or that he was tied up in favour of his heirs-male general from altering the order of succession; so, when the subsequent investitures of the estate are clearly limited to the heirs-male procreated or to be procreated of the bodies of Patrick Boyd, elder and younger; and when Patrick Boyd, under whom the pursuer now claims the estate possessed under that investiture, and has since been possessed by his

heirs for about a century under the same investiture, without meeting with any challenge from the collateral heirs-male, it is in vain to inquire into the more ancient settlements of the estate, as the last settlement must be the rule; Patrick Boyd being under no limitation as to the alteration of the order of succession. No 45.

It is material in the present case to observe, that the Boyds of Pitkindie were totally denuded of the lands, both property and superiority, in favour of Hay of Kirkland; Hay of Kirkland was infeft to be held *a me;* and these infeftments are confirmed by Pitkindie's superior: So that nothing remained with Pitkindie, neither property nor superiority, under the former settlements of the estate. By the deed of alienation, and titles completed in consequence thereof, all connection with the ancient settlements of the estate being entirely broke off, the after acquisition, by the once proprietor of the estate, falls unquestionably to be considered as a *feudum novum*, and the ancient investitures can have no concern in the matter: And, in this view also, it would not alter the case, although Kirkland had held the estate under back-bond; of which, however, there is not the smallest evidence.

It further merits observation, that, whatever attachment the family of Pitkindie might have had to the heir-male, it appears that the idea of preferring collateral heirs-male to the heir of line, and particularly to the heirs-female of the proprietor's body, had been departed from long prior to the transactions with Hay of Kirkland. For although, by the charter and infeftment 1633, the lands of Pitkindie and one half of Bellairdie stood devised to Patrick Boyd's heirs-male; yet, upon his purchasing the other half of Bellairdie from the Earl of Kinnoul, two years thereafter, in 1635, he takes the rights thereof to himself and wife in liferent, and to his son, his heirs and assignees whatsoever, in fee. It is impossible that this new purchase, under that deed of settlement, could descend in any other channel than to the heirs of line; and therefore it is most natural to presume, that, upon his re-purchasing the whole lands from Kirkland in the year 1670, he would take the whole lands to his heirs whatsoever, preferably to his collateral heirs-male. It can never be presumed, unless he had said so in clear and express terms, that he meant to divide this small inheritance, and to give part of it to his heirs-male whatsoever, and part of it to his heirs of line.

It is merely a mistake in the pursuer to say, that, by the disposition by Kirkland to the Boyds in 1760, the heirs-female are expressly secluded. It is no doubt true, that because, by the transaction betwixt Kirkland and the Boyds, Kirkland, in a certain event, stipulates a return of the estate to himself failing the issue male of the Boyds, the daughters of the Boyds were thereby virtually debarred from taking the estate. But it does by no means from thence follow, that, by that settlement, the heirs-male whatsoever of the Boyds were preferred to their daughters; on the contrary, the daughters are so far the object of their attention, that, in that event, Kirkland is bound to pay a certain sum of money to the daughters, when, at the same time, nothing is made payable to the collateral heirs-male of the Boyds in any event; and, upon the

No 45. estate's returning to Kirkland, it was not a male fee in his person, but descendible to his heirs whatsoever, in the legal course of succession; and, therefore, upon Kirkland's discharging the clause of return, stipulated in his favour, and which was virtually done in this case, the estate would also devolve, in the legal course of succession, to the daughters of the Boyds, failing the heirs-male of their bodies.

Lastly, quoad the lands of Bellairdie, the defender's right, independently of every other consideration, is now rendered unexceptionable, by the positive prescription under the charter that was granted of these lands in 1674, and infeftments thereon in 1677.

'The COURT unanimously adhered to the Lord Ordinary's interlocutor.'

Act. *Nairne.* Alt. *M'Queen.* Clerk, *Campbell.*

Fac. Col. No 168. *p.* 66.

1775. *December* 12.

CHARLES LAWSON *against* WILLIAM and ANDREW ROBBS.

No 46.
A person bought a feu, paying L. 20, and becoming bound to relieve the seller of the debts affecting it. The warrandice was restricted to the L. 20. By a back bond the clause of warrandice was discharged. It turned out that the seller had no right, and the property was evicted. Found, that the terms of the discharge did not free the seller from warrandice *hæreditatem subesse.*

IN the year 1725, William Lindsay gardener, and Janet Robb his wife, acquired a feu of about an acre of ground at Castlebarns, near Edinburgh; and the feu-right was taken to William and Janet in conjunct liferent, and for the liferent use of William allenarly; and to Janet, and her heirs and assignees, in fee.

Janet, with consent of her husband, sub-feued one half of this acre; and, after erecting some houses upon the remaining half, they granted two heritable bonds over it to Alexander Young, and infeftment followed upon these bonds.

In the year 1738, William, and Janet his wife, both died; and, as the fee of the subject was in her person, of consequence the succession then opened to her heirs at law, who (as the subject was conquest) was her immediate elder brother, but he had predeceased her, and left a family of infant children, and no person to take care of their interest.

Their uncle, Andrew Robb, and the immediate younger brother of Janet, did, immediately upon the death of his sister, enter into the possession of this estate. Andrew did not long survive; his eldest son James, the father of the present parties, sold the succcession of his aunt Janet Robb, to James Watt.

As Andrew had never made up any proper titles as heir to his sister Janet, so neither did James make up any titles either to his sister or aunt; but, in the disposition, he is bound to make up proper titles when required.

James received from Watt only L. 20 Sterling in cash; and the remainder of the price Watt was allowed to retain in his hands, to pay the above two heritable debts; and of which, by the disposition, he became bound to relieve James and his heirs; consequently, these two debts, and also the above-mentioned sub-