1797. *May* 16.

ANNE, MARGARET and SARAH PATONS, Heirs at Law of the late Captain Lockhart Nasmyth, *against* JOHN HAMILTON, and Others, his Trustees and Legatees.

No 36.
A person after executing a trust-deed, by which he left his property to persons not *alioqui successuris*, having married, and by his contract of marriage provided his fortune to the children of the marriage; whom failing, to his nearest heirs and assignees whatsoever; and having afterwards died without issue, it was found that the trust-deed was not revoked by the contract, and that the persons favoured by the former had right to his succession, in preference to his heirs at law.

CAPTAIN LOCKHART NASMYTH, in 1791, executed a settlement, by which he conveyed his whole estate in trust to John Hamilton, and others, with directions to pay his debts, the provisions in favour of his wife Mrs Margaret Hamilton, and a variety of legacies and annuities; and to make over the residue to John Nasmyth, his natural son, and the heirs of his body; whom failing, to certain other persons therein mentioned.

Among other bequests, he left annuities of L. 10 yearly each to Elizabeth, Anne, and Margaret Cullens, and to Magdalen Moncrieff; the payment of which was to begin at the first term after his wife's death. He likewise bequeathed various articles of plate and household-furniture to the Miss Cullens and Miss Moncrieff, particularly, a dozen of silver spoons to the latter; all which his trustees were appointed to deliver to them one month after his death.

He also left L. 100 to Miss Moncrieff, and L. 25 each to Anne and Margaret Patons, who were his second cousins, and two of his heirs at law.

The deed contained a declaration, 'that so far as these presents shall happen 'to remain uncancelled, or not altered by me, and as my said heritable and 'moveable estate and effects, or any part thereof, shall not be otherwise dis-'posed of by me, so far shall these presents be good and effectual, although 'found in my custody undelivered at the time of my death.'

Soon after the date of this deed, Mrs Nasmyth died, leaving no children.

In May 1792, the Captain married Miss Magdalen Moncrieff.

Their contract of marriage contained the following clause: 'And for provi-'sions to the child or children to be procreated of this marriage, the said John 'Lockhart Nasmyth binds and obliges him to have in readiness, of his own 'proper means and estate, including the tocher after mentioned, the sum of 'L. 4000 Sterling; and to bestow and lend out the same upon land, or other 'good and sufficient security; and to take the rights and securities thereof from 'time to time in favour of himself, and the said Magdalen Moncrieff, in con-'junct fee and liferent, (for security to her of her provisions above mentioned 'allenarly,) and to the child or children to be procreated of this marriage in 'fee; whom failing, to the said John Lockhart Nasmyth, his nearest heirs and 'assignees whomsoever.' This clause was qualified with a declaration, that if there should be only two children of the marriage, the provision was to be restricted to L. 2000, and to L. 1500, if only one child.

By the contract, it was also provided, that Miss Moncrieff should have the liferent of Captain Nasmyth's whole silver plate.

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Captain Nasmyth died a few weeks after the marriage, without issue, and without lending out the L. 4000, in terms of the contract. His fortune at his death did not exceed this sum.

The trustees having entered on the management, were called in an action of declarator by Anne, Margaret, and Sarah Nasmyths, three of his heirs of line and next of kin, who contended, that the trust-deed had been virtually revoked by the contract of marriage, and of consequence that they had right to the Captain's succession, both by law and by the last destination in the contract, to 'his nearest heirs and assignees whomsoever:' And

Pleaded; 1st, Captain Nasmyth, by his marriage with Miss Moncrieff, had the prospect of a family, which naturally put an end to his former views with regard to his succession. Accordingly, no reference is made in the contract to the former settlement. Indeed, as the Captain's fortune did not exceed L. 4000, both were in truth general settlements of his affairs; and as, by the one, he gave the same subject to a different set of persons from those to whom he gave it by the other, the contract of marriage necessarily implied a revocation of the trust-deed; 14th December 1779, Gibson against Weir, (not reported.) And were the two deeds to be joined so as to make one settlement, the case would be inextricable. By the trust-deed, Captain Nasmyth appointed certain annuities to be paid after his wife's death; but as Captain Nasmyth survived her, had he meant these annuities to take place at all, he would have specified some other term of payment, either in a relative deed, or in the contract. He also, by the trust-deed, leaves his plate and some household furniture to the Miss Cullens and Miss Moncrieff, to be delivered one month after his death; whereas, the last mentioned Lady, now Mrs Nasmyth, is by the contract to have the liferent of the whole of it.

2dly, Even supposing the trust-deed not to be revoked by the contract, Captain Nasmyth's heirs of line are entitled to the L. 4000 destined by that deed, 'to his nearest heirs and assignees whomsoever,' failing children of the marriage; for, although in accessory deeds, a destination to "heirs and assignees" is understood to mean the heirs to whom the principal subject is destined, yet in deeds unconnected with any other, and particularly where a man's whole fortune is settled by them, which frequently happens in marriage-contracts, the term "heirs whatsoever," is universally understood to mean heirs at law; Calderwood against Pringle, No 5. p. 3036.; 9th December 1762, Duke of Hamilton against Douglas, &c. No 40. p. 4358. Suppose there had been only one child of the marriage, he would, by the contract, have been entitled to no more than L. 1500; of consequence, according to the construction of the defenders, the remainder of Captain Nasmyth's fortune would have gone to them under the trust-deed. But as this could not be his intention, it shews, that by the destination to his nearest heirs and assignees in the contract, he must have meant his heirs at law.

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Answered; After a person has made a deliberate settlement of his affairs, an alteration of it is not to be presumed from any deed which will bear a different construction. By the contract, Captain Nasmyth's sole view was to provide for his widow and the children of the marriage. His heirs at law were very distantly related to him. By the trust-deed, he gave two of them very small legacies, while the third was wholly excluded from his succesion. In these circumstances, it cannot be supposed that he meant, failing children of the marriage, to give them his whole fortune in preference to all his other friends and connections.

It is of no consequence, that in some trifling particulars, the trust-deed is inconsistent with the contract. Captain Nasmyth reserved power to revoke or alter the trust-deed, either partially or entirely, and, therefore, it must subsist, unless in so far as it is inconsistent with the contract.

2dly, 'Heirs whatsoever' is a pliable term, which is always interpreted according to the presumed intention of the person who uses it, 16th November 1698, Hay against Crawford, *voce* Succession; 8th January 1740, Duke of Hamilton against Earl of Selkirk, No 10. p. 5615. And when it occurs in the close of a destination, it is held to mean the heirs of line, only where the party using it has not otherwise explained his intention. But when the same subject has been previously left by him to different persons, by a deed not expressly revoked, that term is held to denote those who have been specially called to the succession.

The trust-deed makes no provision for the event of Captain Nasmyth's leaving children, so that if the case put by the pursuers had occurred, the condition *si sine liberis* would have taken place, and his son would have taken the whole succession.

Replied; The condition *si sine liberis* rests on a presumption that the children have been altogether forgotten, and therefore could not have had place here, because special provisions were made for them in the contract of marriage.

The Lord Ordinary found, "That the trust-disposition executed by Captain Nasmyth in 1791, was a total settlement of his estate, heritable and moveable, which he therein declares to be good and effectual, though not delivered, in so far as it should happen to remain uncancelled or not altered, or in so far as his said estate and effects, or any part thereof, should not be otherwise disposed of by him: Found, That the object of the subsequent marriage-contract was merely to make provision for his wife, in case she should survive him, and for his children in case he should leave any; but that said marriage-contract was not intended as a general settlement, or as a total revocation of the former settlement he had made, so as, failing children of that marriage, to make way for his heirs at law, to the exclusion of the whole persons favoured by the foresaid disposition: Found, that the succession to Captain Nasmyth's estate and effects falls to be regulated by the foresaid trust-disposition, except in the particulars where-

in it is virtually revoked or altered by the foresaid marriage contract: Therefore, and on the whole circumstances of the case, assoilzied the defenders from the conclusion of the pursuer's declarator." No 36.

On advising a reclaiming petition, the Court, influenced by the decision in the case, in Duke of Hamilton against Douglas, No 40. p. 4358., by a considerable majority, " Altered the interlocutor reclaimed against; found, that under the destination, ' nearest heirs and assignees whatsoever,' contained in the deceased John Lockhart Nasmyth's contract of marriage with his last wife, the petitioners are entitled to take the L. 4000 Sterling therein provided."

A second reclaiming petition was presented for the Miss Cullens, and appointed to be answered.

When the cause was again advised, one Judge remained of opinion, that the terms ' heirs whatsoever,' occurring in a contract of marriage, could bear no other interpretation than that of heirs at law; and that whatever might, in fact, be Captain Nasmyth's intention, it would be dangerous, in point of precedent, to give effect to it, in opposition to the legal import of his settlement.

The rest of the Court, however, were now of opinion, that the decision in the case of Douglas did not affect the present question, and that the interlocutor of the Lord Ordinary was right, the provision in the contract of marriage not being of the nature of a total settlement, nor inconsistent with the former deed.

The Lords accordingly " altered the interlocutor reclaimed against, and, agreeably to the interlocutor of the Lord Ordinary, assoilzied the defenders." See No 38.

Lord Ordinary, *Polkemmet.* Act. *Rolland, R. Craigie.*
Alt. *J. W. Murray, W. M. Morison.* Clerk, *Sinclair.*

R. D. *Fac. Col. No 23. p. 25.*

1797. *December* 13.

Walter Logan *against* Mrs Margaret Mitchell, and Others.

No 37.
An entail found not to be revoked by a trust-deed, executed a few days after it, by which the granter disponed the whole heritable and moveable subjects, heir-

On the 14th February 1793, John Maxwell executed a strict entail of the barony of Fingalton, in favour of Mrs Margaret Mitchell, and others.

On the 25th of the same month he executed a deed, disponing to trustees, ' the whole heritable and moveable subjects, heirship-moveables included, of ' whatever denomination,' which should belong to him at his death; ' and par- ' ticularly, without prejudice of the foresaid generality,' the subjects therein mentioned, which consisted chiefly of houses, and feu-duties. The trustees were directed, after paying his debts and annuities, to dispone the residue to the same persons who, by the entail, were to succeed to Fingalton. The trust-deed, however, neither mentioned these lands nor the entail, and the free residue was not to be entailed.