by leaving out the word (five) and instead thereof inserting the word (four). And it is further ordered and adjudged, that *that* part of the said interlocutor by which the pursuer is found liable to the defender in the expense of process be, and the same is hereby reversed. And it is farther ordered that the cause be remitted back to the Court of Session in Scotland to proceed accordingly.

For the Appellant, *C. Hope, T. Erskine, V. Gibbs, J. Montgomery.*

For the Respondent, *S. Percival, Wm. Adam, Charles Hay.*

Unreported in the Court of Session.

(Mor. p. 15298.)

WILLIAM GRIEVE, - . - *Appellant;*

LIEUTENANT COLONEL FRANCIS CUNYNGHAME of Dunduff, and JAMES GRAY, Writer, Edinburgh, his Commissioner, - } *Respondents.*

House of Lords, 19th June 1804.

LEASE—CONSTRUCTION OF WORD "HEIRS."—A lease was granted for thirty-eight years to the tenant *and his heirs*, secluding *assignees* and sub-tenants; and if the tenant was alive at the expiry thereof, for his lifetime, or for the lifetime "of the *heir* or *heirs* "of the said William Grieve." In consequence of the tenant's eldest son having chosen a different mode of life, the tenant, before his death, left a nomination of heirs in favour of his second son, disponing the lease to him. The landlord, after the tenant's death, objected to this, stating that the word "heirs" in the lease, meant only the heir at law, and not heirs by destination. In the Court of Session, the tenant was decerned to remove. In the House of Lords the case was remitted, with considerable doubt expressed as to the judgment below.

The respondent's predecessor in the estate of Dunduff set to the father of the appellant, "William Grieve, *and his* "*heirs*, secluding assignees and subtenants without the "heritors consent, and that for the whole time and space of "thirty-eight years, and the lifetime of the said William "Grieve, if then alive, or of the *heir* or *heirs* of the said "William Grieve who shall, at the end of the said thirty-

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" eight years, have succeeded to, and shall then be in the " possession of the said lands."

The thirty-eight years mentioned in the lease, expired at Whitsunday 1797. The tenant, the appellant's father, died in the beginning of the year 1796—leaving a deed of nomination of the appellant, *his second son*, as his heir to succeed to the lease, and disponing and assigning it to him.

The reason which dictated this course was, that his eldest son, his proper heir at law, had a distaste to, and incapacity for farming pursuits, and had betaken himself to a different business. In early life he became a weaver, set up business for himself, was unfortunate, insolvent, and unsettled in his life: while the appellant always remained with his father, was bred up by him to the cultivation of the farm, and had, for many years previous to his father's death, undertaken the chief management.

On his father's death accordingly, the appellant continued the possession of the farm. He paid the half year's rent due at Whitsunday 1796, as representative of his deceased father, and the following half year's rent due at Martinmas, as tenant, and as having succeeded to the tack as such. For both he received a discharge from the respondent, who had succeeded as a remote substitute to the estate.

He also obtained a discharge for rent, dated 5th Dec. 1797, for the rents due at Whitsunday 1797, which receipt also discharges the rent due at Martinmas 1797, being for a whole half year after the specific term of thirty-eight years had expired. He further proceeded to make extensive improvements, by subdividing and enclosing the whole farm with hedges and ditches, &c., and continued to possess until 9th March 1799, when the respondent brought the present process of removing, on the ground, that the appellant was not the heir at law of the late William Grieve, and so not entitled to retain possession;—that assignees were secluded —and that, as his elder brother was in a different profession, he could have no right, and never had any possession at the end of the thirty-eight years, and, consequently, the lease was void and null. In defence, the appellant maintained that the term " heir " was here used in a general and comprehensive sense—that it was used in the plural number as well as the singular, and so must be held to include *that* descendant of the original lessee who should be nominated his successor in heritage and in possession at the expiration of the specific term; and although there was a clause secluding assignees without the landlord's consent, yet there

was no clause forfeiting or irritating the tenant's right, in case it should be assigned, or the farm subset.

The Lord Ordinary, of this date, repelled the defences, and decerned; and, on representation, he adhered, "re- Mar. 5, 1800.
"serving to Adam Grieve, the eldest son and heir of line June 2, ——
"to his father, to claim the possession of the farm in ques-
"tion, if he is so advised, and to the proprietor his defences,
"as accords."

On two several reclaiming petitions the Court adhered.* May 16, 1802. Mar. 8, 1803.

* Opinions of the Judges :—

Lord President Campbell said,—"I think the interlocutor gives too narrow a construction to the word "heir." Besides, the tack was not forfeited. If it does not belong to the second son, it must belong to the eldest, who, upon his father's death, had the legal right of succession, and the possession of his brother must be considered as his possession, even upon the principles of the interlocutor. The eldest son ought to be made a party. It is a mistake to suppose that the eldest son has lost his right, in a question with the landlord, by not being in the natural possession. Civil possession is sufficient; and if the respondent's argument be well found the civil possession would be no where else but in the eldest son. See cases of Freehold Qualifications, Melville of Greigstone, &c.

"In the case of trustees, clauses against selling or contracting debt, do not necessarily imply a prohibition to alter the succession, or *vice versa*. Neither does a clause against assigning in a lease, imply a prohibition to alter and regulate the succession by *mortis causa* deeds. See Stewart *v.* Hoome, 8th July 1789, Mor. 15535. It is the meaning of the parties, that while the tenant himself lives, the landlord has so much confidence in him that he must possess himself, and not admit any other person in the character of an assignee, legal or conventional, into the farm—in so much, that it was disputed in the case of Hepburn *v.* Burn, 14th February 1759, Mor. 10409, Whether even the eldest son could, during his father's life, be assigned to the lease *percep-tione?* But when the original tenant dies, there must be an end to his own possession and management; and if he has the lease not as a mere liferenter, but descendible to his heirs, somebody must be entitled to succeed to it, even the king, on default of other heirs. Why then should not the tenant make choice of his heir? In general, it would be much against the landlord that he should be tied up in this respect, for then, perhaps, heirs portioners would divide the subject among them, or a very unfit person might be the first heir. If the landlord can say this person, whom the deceased tenant has made his heir, is a bankrupt, or a bad man, he may perhaps be heard for his interest, but I doubt if he can set up a challenge against the tenant's appointment of his own succession. The form of the deed can be of no consequence in such a case as this. See the late case of Men-

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Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The lease, in this case, was granted "to the said William Grieve and his heirs." In

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zies of Culdares, House of Lords, 13th November 1801, and Court of Session, 13th January 1803, where the doubt entertained in the House of Lords was, whether the *appointment of heirs* was not more to be attended to than the *dispositive clause*. See also Lord Galloway *v.* M'Hutcheon, same date. The petitioner therefore narrows his argument too much, when he supposes that the tenant ought to choose his heir out of his own family, or among his own descendants. There is no such limitation in the tack, either expressed or implied. The case of Deuchar *v.* Lord Minto, 20th November 1798, Mor. 15295, I think, was wrong decided. See notes upon it, 20th Nov. 1798."

LORD MEADOWBANK.—"The second son is in this case the heir. In the Roman law, a Testament made by a fictitious *emptio venditio* was good."

LORD HERMAND.—"I am of the contrary opinion. If this were the case he (tenant) might bring in a *stranger as heir of provision*. There is a speciality here. There is not only a lease for a specified term, but a liferent to the lessee after that term, and to his heir. The tenant cannot change the liferent right."

LORD ARMADALE.—"If one stranger may be named as an heir, he may name another, and so on indefinitely. I do not think that belongs to the description of rights under the lease. What if the parties make a mutual entail to themselves and their heirs, whom failing, to the heir of C. Can this mean any thing but the heir at law of C? I think not."

LORD JUSTICE CLERK.—"I am of the same opinion. If simply granted to heirs, without specifying seclusion of assignees, I would consider the power of the tenant as more extensive."

Advising, 8th March 1803.

LORD PRESIDENT CAMPBELL said, (*Vide* Former Notes.)—"I think the writer of this petition has not carried his argument so far as he should have done, owing to his desire of getting out of the decision of Deuchar. But that decision was wrong. The appointment of an heir by a *mortis causa* deed, in whatever form, is very different from a sale or alienation *inter vivos*, though the form of the deed may be the same, or nearly so, in both cases. A conveyance by disposition or assignation, is the proper form of regulating succession as well as of transferring the property *inter vivos* to a purchaser. The one is revocable, the other not. The one implies *warrandice*, the other not. Upon the one, the granter may be inhibited, on the other not; the grant in the one represents me, and is

the law of Scotland "heirs" is a comprehensive term, and includes heirs of every description, whether heirs at law, or heirs of destination; and it means heirs of destination preferably to heirs at law, so that those last shall take the succession only in case there are no heirs of the former description. When a person binds himself and his "heirs,"

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liable for my debts, at least *in valorem*, in the other not. A judge ought to be able to discriminate between these things. But this accidental circumstance cannot vary the substance of the transaction any more than it can turn property into superiority or wadset, or *vice versa*. In tailzies, the altering the order of succession is one thing and selling another, yet the name of the deed is the same. The second son here is truly one of the heirs at law. What if the eldest son collates with him, the one throwing in the tack and the other the stocking? Can it be maintained that this too is prohibited? If we consider this to be a tailzied fee, the eldest son should be understood to be entitled to the share of moveables, without collating, this has never been understood. In the case of a middle brother being tacksman, may he not choose any of his brothers to be his heir, or may not a father prefer his eldest daughter? See Ersk. b. iii tit. 9, § 3. It is laid down that a man cannot disinherit an heir effectually without naming another heir, but here another heir is named. See Bankton, b. iii. tit. 4, § 23. Dict. voce "Succession." Neither can the first heir, by simply renouncing, let in the next heir during his life. (Ibid.) Yet in the case of Barganny the first heir repudiated, so as to let the next heir in. Heirs by destination take in preference to legal heirs; and the king cannot take as *ultimus hæres* until all the other heirs are spent, still less can the landlord or superior. The idea of the landlord's naming the tenant's heir is absurd. The tenant might as well name the landlord's heir, to whom the rent shall be payable. Where a right is heritable, and not limited by tailzie, the *testamentum factum* is entire, though, no doubt, heritage requires a different *form of deed* from moveable property. The common rules of succession are even more entire than in the case of a bond to heirs secluding executors. It is said that the tenant may abuse the power of naming his heir, and may evade the exclusion of assignees. But is this a reason why he should be deprived of the fair exercise of his right? Fraud or collusion must always be one exception, but the exception must not be turned into the general rule. The late case of Lord Galloway illustrates this. What if it be a tack of teinds with a long duration,—must the tacksman let it go to his heirs of line, and not to the heir succeeding to his estate? Secluding assignees is truly a *right of pre-emption*; and putting it into the landlord's power to interfere in a competition of heirs, is enabling him to extort a higher rent from the one or the other."

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the obligation attaches to the heir whom he calls to the succession by will, as well as to his heir at law. In like manner, when he stipulates a right in favour of himself and his heirs, he stipulates for him whom he shall name his heir, as well as for him who, failing such nomination, would take the succession by disposition of the law. The more comprehensive term "heirs" is sometimes limited by the use "of *heirs of the body*," "*heirs male*," "heirs of a particular marriage," and so forth; but here the terms used are general, and comprehend all kinds of heirs. The exclusion of assignees does not limit, in this case, the term thus used, because that clause had solely in view to prevent the lease or farm being put into the market, or carried to a subtenant, and even if it were otherwise, the exclusion being only made unless with the consent of the landlord—the latter must be held to have consented, by his taking rent from him as tenant, and allowing him to continue possession for two years. Apart from express clause, law declares that in leases of long duration, and also in *liferent leases*, the tenant has a power to assign, and that it is only by an express clause, excluding assignees and subsetting, that the tenant can be prevented from so doing. The lease, in this case, does not absolutely and totally deprive the tenant of this right. There is implied a power to assign with the landlord's consent. The respondent has homologated and approved of the appellant's title of possession, and so his consent is presumed. It is true, that by a peculiarity in the law of Scotland, an heir must be appointed by a deed *inter vivos*; and so far the conveyance resembles that which the granter would fall to execute, were it his intention to transfer the right from himself to another in his own lifetime. But this goes only to the *form* of the deed, not to the substance of it; for, in all questions of succession, the *will* of the party is the governing rule, except only in cases of entail, where, for obvious reasons not connected with the present subject, *will* avails nothing, and form and expression every thing. But here there is a contract of lease—a *bona fide* contract, and the terms of the contract cannot be infringed; and where the word heir occurs in such, it is not to be construed with the same strictness as in a deed of entail.

Pleaded for the Respondents.—The grant of the lease to William Grieve and his heir, or heirs, is a destination which, by the law of Scotland, limits the succession to the lease to the heir at law of the tenant. The appellant is not heir at

law of the tenant, but his assignee in the lease; and, as assignees were expressly excluded without the consent of the landlord, he has no right to remain in the farm. Such is the interpretation put on such terms of destination in other species of real property. In contracts of marriage, the property settled on the heirs of the marriage does not alter the legal rule of succession; and, accordingly, the heir at law is the party held to be pointed out by such destination, and not a stranger, or heir nominate. In this case, the appellant's only right is the assignation of a tack in favour of an individual whom the law regards as a stranger, and therefore it is null and void by the express terms of the contract.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said—

"My Lords,

(His Lordship began by reading the facts, as stated in the cases, viz. the lease of 1759,—the assignation by William Grieve,—his death, and the state of his family at that time, stating that the appellant, the second son of the original lessee, had continued in the possession after the expiration of the term of 38 years, and that the respondent's father had received rent from him. He detailed the circumstances of the present action, with the proceedings of the Court of Session,—the several interlocutors, and the appeal now before their Lordships, and then said).

"The question was, Whether, in a lease which was granted to a man and his heirs, secluding assignees and subtenants, it was competent to the tenant to constitute his heir, or if the heir must not be in strict sense his heir of line? If the heir of line is the only heir, the second son cannot hold the lease.

"This is a question of very great importance to landlords and tenants.

"In Lord Minto's case, decided in 1798, the term heirs was found to mean heirs of line; and although the appellant has attempted to distinguish that case from the present, yet I can perceive no solid ground of distinction between that case, as it is reported, and the present one. There may, however, have been a difference between that case and the present one, of which I am not aware, as it is only very shortly noticed in the report. But, supposing *that* case should be held as having decided the general principle that "heirs" mean "heirs of line" only, it is said, that previous to that decision there was no idea that a man, having a lease conceived in these terms, could not nominate his heir. And if that be true, there must have been a number of similar leases then existing, and still subsisting. Upon the

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parties, therefore, in which Minto's decision was pronounced, that decision must have been a surprise.

"From 1798 to the present case, it does not appear that Minto's case has ever been followed as a precedent in the Court of Session, although it may have been followed in practice; and this is an important consideration, if that decision was a surprise upon the parties to leases.

"But it was justly observed, that Minto's case cannot bind this House, neither can it be held as binding the Court of Session.

"From the pleadings in the Court below, which are very ably drawn on both sides, it appears that the consideration of the case was limited to the clause which lets the farm to William Grieve and his heirs, &c., and *that* which describes the commencement and endurance of the tenant's interest, and that no attention was paid to the other parts of the tack. It is proper, however, that the whole of the tack should be considered.

"It has been said on the part of the respondent, that the term 'heirs' being followed by the words 'secluding assignees and subtenants,' can only mean heirs of line, and that the words '*have succeeded to*,' can only be applied to heirs of line, who alone can be said to *succeed*, as no other can acquire the possession but as *disponees*, to whom the term 'succeed' is not applicable.

"But it appears to me, that an assignee, and an heir nominated, are very different characters; and that by assignee, in this case, is meant that person who is an assignee, not being an heir nominated.

"With respect to the words 'who shall have succeeded,' &c., and to which considerable meaning was attached by a noble Lord (Lord Rosslyn), I think that the heir nominated may as well be said to succeed as the heir of line. Supposing that these words were to occur in a deed conveying a fee, it seems impossible to maintain that the term 'succeed,' would not apply to a disponee as well as to the heir of line.

"It has been contended for by the appellant, that by 'heirs' is implied every one of the tenant's family. But although this may have been the intention of parties, which I think probable, yet it cannot receive that interpretation in a judicial sense, and its construction must be confined either to the heir of line or to the heir nominated.

"The point for consideration in this case is, what is the meaning of the parties, as to be discovered from the whole of the lease taking it altogether?

"The prestations by the tenant are laid on him, 'his heirs, executors, successors,' &c., who would be liable to make good these prestations, while, according to the limited sense contended for by the respondent, the heir of line would receive all the benefit of the lease.

"From the particular circumstances of this case, it does not follow that it may not be differently decided from Lord Minto's case, without interfering with the general principle thereby decided.

"The appellant having possessed the farm previous to the termination of the thirty-eight years, he must have done so, either as disponee, subtenant, or heir. During such possession, rent was accepted by the lessor, which in this country would have confirmed the possession, unless it had been received under protest, the lessor expressly declaring, that it was not to be considered as a confirmation of the possession. And it appears, that on the same day on which this case was decided, the Court gave effect to this principle in another case. In that case indeed the tenant was many years in possession; but the principle must be as effectual, where there is only one payment, as when there are many. Yet no attention seems to have been paid by the judges to this circumstance, and the opinions do not inform us why it was not attended to. Rennie *v.* Darroch, 8th Mar. 1803. (Mor. Dic. p. 15301.)

"When we are told that this case follows as a consequence of Lord Minto's case, there is the greater reason for having the point well settled, if that decision is to be considered as a surprise.

"The noble Lord who preceded me in my official situation, thinks it rightly decided; but I have infinite doubts in my mind as to its propriety; and, when I consider the different and contradictory opinions of the judges below, and the great importance of this case, arising from the number of similar cases, I would propose to remit the cause for farther consideration, directing the Court to review their judgment generally—regard being had to the meaning of the word 'heirs,' as used in all parts of the tack, also to the interest the elder brother may have in the same. Lord Rosslyn.

"From anything I know of the form of proceeding in the Court of Session, it may perhaps be competent to Colonel Cunynghame, after having succeeded in ejecting the heir nominated, to say to the eldest son, although you may be the heir of line, yet you are not the person described in the tack, who is the heir nominated, and not the heir of line.

"I have also great doubts, whether, supposing the second son is to be ejected, the eldest may not be entitled to the farm, although not in possession at the expiration of the thirty-eight years. If the father had died the day before the expiration of the thirty-eight years, and the eldest son had been then in Hamburgh, so that it would have been impossible for him to be in possession at the expiration of the thirty-eight years, could it be said that in such case he was to be deprived of his right? And, on the same principle, may he not plead the present cause as having precluded him from the possession of the farm, and that, as it was impossible for him to obtain possession, his interest ought not to be affected by the want of it?"

Ordered and adjudged that the cause be remitted back to the Court of Session in Scotland, generally to review

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the several interlocutors complained of, and to consider how far the meaning of the word "heirs," as that word occurs in the several parts of the lease of the 18th January 1759, and the general contents of that lease, may affect the construction to be given in this case to the words "William Grieve and his heirs," and the words "the heir or heirs of the said William Grieve "who shall, at the end of the thirty-eight years, have "succeeded to, and shall then be in the possession of "the said lands;" and whether any rent has been received by or for the respondent in this case, under such circumstances as ought to affect his right to succeed in this process of removing, and how far such right may be affected by any claim which the eldest son, and heir of line, of the said William Grieve may have to the possession of the farm, if the appellant hath not right thereto.

For Appellant, *Samuel Romilly, Thos. W. Baird.*
For Respondents, *Wm. Adam, Wm. Erskine.*

NOTE.—Under this the remit to the Court of Session, the Court, on resuming the question, ordered memorials, and afterwards pronounced an interlocutor (21st Nov. 1805) adhering to the interlocutors appealed from.

The eldest son then came forward to claim his right under the lease, and brought a reduction of his father's will, and a declarator of his right to succeed to the lease. These two processes having been conjoined, the Court pronounced an interlocutor reducing the nomination of his father, and in the declarator, decerned in favour of his right to succeed. The landlord then entered into an arrangement with the two brothers, by which he consented that the second son should be continued in the possession of the lease, and an interlocutor was pronounced upon that arrangement.—Vide Mor. App. Tack, No. 9.