In arguing this cause, it was held to be law, that, in the case of heirs-portioners *ab intestato*, a *præcipuum* was due, without an equivalent; *Cowie* against *Cowie*, *anno* 1707 and 1708; case of *Peadres*, *anno* 1743; case of *Gadgirth*, *anno* 1750; and *November* 1765, *Govan* against *Ireland*.

HEIRS WHATSOEVER.

See case of *Douglass* against *Duke of Hamilton*,—interlocutor in that cause.

1749. BRODIES *against* BRODIE.

THOMAS Brodie was proprietor of the lands of Pitgaveny, under ancient settlements in favours of heirs-male, and which originally contained a clause of return to the granter and his heirs-male whatsoever, upon failure of the male descendants of his body. In 1721, Thomas Brodie settled the estate on his three sons, *nominatim*, and the heirs-male *respective* of their bodies; whom failing, on any other heir-male of his own body; whom all failing, on his own nearest lawful heirs and assignees whatsoever. After Thomas's death, and the death of his three sons, without issue,—his daughters, as heirs-portioners to David Brodie their brother, claimed the succession; and Mr Brodie of Lethem also claimed it, contending, that, as this was a male fee in Thomas, his *nearest heirs whatsoever*, in the above settlement, must denote, not his heirs-general, or heirs of line, but his *heirs-male*, who, by the investitures of the estate, were his nearest lawful heirs.

The Lords preferred the heirs of line; for although, where a person possessed of an estate taken to heirs-male, if he purchase a collateral right, and takes it to his heirs whatsoever, such collateral right will notwithstanding go to his heirs-male, not only upon the maxim that *accessorium sequitur principale*, but upon this, that he could not mean to divide them; yet, in all other cases, where a proprietor makes a settlement of his whole estate, and calls his *heirs whatsoever*, these technical words are taken in their proper sense, and will carry it to the heirs of line, more especially where, in the same settlement, he first calls the heirs-male of his body; and, upon their failure, his heirs whatsoever.

The decision in the case of Rosehall, between Miss Hamilton, daughter to Sir Hugh, and Hamilton of Dalziel, proceeded on the same principles, of interpreting technical words according to their legal and determined meaning. It is not collected, but is quoted in the information for *Mr Douglas* against *D. Hamilton*, decided December 1776. Miss Hamilton died whilst it depended on a reclaiming petition and answers.

There is a case collected in the Dict., Vol. II. p. 401, *Marquis of Clydesdale* against *Earl of Dundonald*, which seems to countenance a contrary doctrine, even in general settlements; but the decision, as collected, proceeds upon a mistake; for, upon looking into the papers, it appears that the disposition upon which the charter proceeded was to heirs-male; whereas the charter proceeding upon that disposition was expede to heirs whatsoever. When challenged, therefore, it was found disconform to its warrant, and the heir-male prevailed.

This decision has led Mr Erskine into a mistake, on this point, in his Institutes, p. , where he quotes it.

1777. *March* 4. ARCHIBALD DOUGLAS of DOUGLAS *against* DOUGLAS, DUKE of HAMILTON.

19th December 1776. "ON report of the Lord President, in absence of the Lord Justice-Clerk, Ordinary, and having advised the information for Douglas, Duke of Hamilton and Brandon, and his curators, and information for Archibald Douglas of Douglas, Esq., with the respective processes of reduction and declarator, raised by the said parties, now conjoined; in so far as concerns the declaratory conclusions, (those of reduction not being insisted in,) and writs therein referred to by each party,—the Lords find, that Archibald, late Duke of Douglas, was unlimited fiar of his whole estates in question, including the baronies of Bothwell and Wandell: That, under the clause of substitution, to his heirs and assignees whatsoever, in his contract of marriage, executed in the year 1759, the said Archibald Douglas, now of Douglas, as heir of line, was called to succeed to the said Duke, in his whole estates, including as aforesaid: That the parole evidence offered by the Duke of Hamilton, to the effect of giving a different meaning to the said clause in the contract of marriage, is neither competent, nor the condescendence of facts relevant; and, therefore, refuse to allow any such proof: repel the whole other defences pleaded by the Duke of Hamilton against the said Archibald Douglas's declarator; sustain those pleaded by Archibald Douglas against the three several processes of declarator at the Duke of Hamilton's instance against him; assoilyie Archibald Douglas from these processes, and decern. And also decern, at his instance, in the declarator against the Duke of Hamilton and his curators: And, in respect the said Archibald Douglas is already found to have a preferable right to the Earl of Selkirk to these estates, by final judgments of this Court, in former processes which depended between these parties,—Find it unnecessary to give any judgment in the processes of declarator at the Duke of Hamilton's instance, so far as the same concern the interest of the Earl of Selkirk, who has not made any appearance in these processes, now depending in Court."

At advising this cause, the Lords were unanimous; and rested their opinion chiefly upon the positive prescription creating the late Duke unlimited fiar of his whole paternal estates, (for, as to his own purchases, there was no question,)