nor plan, nor such as can be of use for a sufficient bridge," and yet find the respondent relieved from the obligations of the contract.

Pleaded for the Respondent.—By the plan to which the contract refers, the abutments and pillars of the intended bridge, are each 15 feet from the foundation to the spring of the arch, and all on a level with the bed of the river, at the deepest. Laurie and the other reporters say, that it was necessary to sink the foundation of the pillars 9 feet under the bed of the river, at the lowest part of it; and to fortify it with wooden piles or a causeway, and to make the abutments 5 feet broader than represented in the plan. But nothing of all this is stipulated for in the contract. They are additional works, which it cannot be maintained the respondent is bound to execute under his contract. The respondent is only bound for every thing enumerated in the contract; but for nothing beyond it. He undertook to build a bridge, with abutments rising 15 feet from the lowest bed of the river, for £1900. To build one with a sunk foundation of the nature chalked out by the report, would cost an expense of £5000; and, in the whole circumstances, the appellants have little cause to complain of this interlocutor.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be *affirmed*, with this addition to the interlocutor of the Lords of Session of the 26th November 1772, after the words (when the same are advanced), insert (together with the costs of this suit, except those occasioned by this appeal.)

For Appellants, *Ja. Montgomery*, *Al. Wedderburn.*
For Respondents, *Al. Forrester*, *Thos. Lockhart.*

Note.—Unreported in Court of Session Reports.

LIEUT. ANDREW LAWRIE, - - *Appellant;*

CAPTAIN JOHN MACGHIE, and ANNE his Wife, formerly ANNE LAWRIE, and Others, } *Respondents.*

House of Lords, 17*th March* 1773.

DEVOLUTION CLAUSE.—Held, where a party takes an entailed estate, on condition of devolving one he already possesses, on the next

1773.

LAWRIE
v.
MACGHIE, &c.

heir of entail, that he is bound to do so to the heir pointed out by the entail, although the party who succeeds to both may have younger sons nearer the line of succession, whose possesion would carry out the intention of the maker, of having the two estates separately and distinctly possessed.

Walter Lawrie, Esq. of Redcastle, executed an entail conceived in the following terms of destination, with a clause of devolution added thereto. Failing issue of his own body male and female, " to James Lawrie of Skeldon, my ne-
" phew, and the heirs male of his body; which failing, to
" William Lawrie, his brother german, also my nephew, and
" the heirs male of his body; which failing, to Walter Law-
" rie, my nephew, son to the deceased Thomas Lawrie, sur-
" geon apothecary in Stranraer, my brother german, and
" the heirs male of his body; which failing, to the *lawful*
" *daughters* procreate of the body of the deceased Mr.
" James Lawrie, minister of the gospel at Dalrymple, my
" brother german, *successively;* the eldest being always
" preferable, and succeeding without division, and the heirs
" male to be procreate of their bodies," &c.

Then followed this clause of devolution, " That in case
" the above James Lawrie, my nephew, or his heirs male
" shall, by virtue of the present tailzie, succeed to the lands
" hereby provided and tailzied, then and in that case, he
" and his heirs shall be obliged to convey and dispone the
" lands of Over Skeldon in favour of the said William Law-
" rie, his brother, and the heirs male of his body: And if
" the said William Lawrie shall succeed to the lands hereby
" tailzied, and shall likewise succeed to the lands of Over
" Skeldon, then and in that case he shall be obliged to con-
" vey and dispone the same to the said Walter Lawrie free
" of any burden: And sicklike whoever else of the heirs of
" tailzie above mentioned shall succeed to the foresaid lands
" and estate hereby tailzied, and shall at the same time
" have in their-person the right to the foresaid lands of
" Over Skeldon, shall be bound to convey the same in fa-
" vour of the next heir of *tailzie* following the person."

Besides this deed, on the nephew James Lawrie of Skeldon's marriage, his uncle became a party to his marriage articles, whereby the said James Lawrie was not only expressly taken bound to convey Skeldon, but actually *per verba de præsenti* to dispone the same in terms of the tailzie.

1742. Walter Lawrie, the maker, died without issue. His nephews, William and Walter, had both predeceased him without issue; and his estate of Redcastle then devolved on

his nephew James Lawrie of Skeldon, in virtue of the above entail.

The next heir of entail, failing issue of James Lawrie's body, was Margaret Lawrie, the eldest daughter of Mr. James Lawrie, minister of Dalrymple, and mother to the appellant. On the pursuer's succeeding to Redcastle, she claimed the estate of Skeldon, and insisted that it should be conveyed to her, in terms of the condition or clause of devolution contained in the said entail. In an action brought by her, the Lords found that James Lawrie was bound to denude of the estate of Skeldon, and, in consequence of this judgment, the Skeldon estate was conveyed accordingly.

Mr. James Lawrie dying without issue, the Redcastle estate also devolved on Margaret Lawrie; whereupon the present question arose, Whether she was obliged to divest herself of the Skeldon estate in favour of the next heir of entail; and if so, whether that heir of entail was her sister, Anne Lawrie, or her own son, the appellant? Hence the present action to determine that question. 1757.

"On the report of Lord Bankton, find that the defender Margaret Lawrie ought to make up titles to and denude of the lands of Over Skeldon in favour of Anne Lawrie, and her heirs." Jan. 2, 1759.

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The apparent intent of the devolving clause in this entail being only to keep up two distinct separate representations, this would be more effectually carried out by confining the succession to the nearer heirs, than allowing it to deviate into more remote. Hence Margaret Lawrie's *second son* was the proper party in whose favour the devolving clause was conceived; and however reasonable, therefore, it might be to exclude Margaret Lawrie herself, and her *eldest son*, as her heir apparent, yet there was no shadow of reason for excluding the second son, or other younger children.

Pleaded for the Respondent.—This is merely a question of construction, which must depend on the intention of the maker. By the deed of entail, failing Walter Lawrie and his heirs-male, the estate was to go to the *lawful daughters successively* of the Rev. James Lawrie. And it is manifest that the deed binds the person succeeding to both the estates of Redcastle and Skeldon, to convey the Skeldon estate to the next *heir of entail following the person, and the heirs of his or her body so suceeeding;* and if the person so

1773.

LAWRIE
v
MACGHIE, &c.

succeeding, neglect or refuse to do so, a forfeiture is imposed, extending to *all the descendants of his or her body.* To Anne Lawrie, therefore, who is the *next heir of entail,* and the heirs of her body, does the estate fall to be conveyed. Because Margaret having succeeded to both estates, her sister Anne, as heir of entail, and not Margaret's second son, is the party in whose favour this devolving clause is conceived, and in favour of whom the estate falls to be conveyed. And it is erroneous for the appellant to maintain that the words heirs male of the body apply only to those who are in immediate succession, and therefore do not exclude the younger sons of the contravener; because the heirs of the body signify not only the descendants in the oldest line, but all the descendants who are entitled to take the succession when it opens.

After hearing counsel,

Lord Mansfield observed, in giving judgment, that this was the clearest case that ever came before the House. He should affirm, but would refuse to give costs, because the appellant had the misfortune to be born between two estates, and to get neither.

It was ordered and adjudged that the appeal be dismissed, and that the interlocutor therein complained of be, and the same is hereby affirmed.

For the Appellant, *Ja. Montgomery, Al. Wedderburn, Al. Forrester.*

For the Respondents, *Andrew Crosbie, Tho. Lockhart.*

Note.—Unreported in Court of Session.

(M. 16,776.)

ALEXANDER M'CLATCHIE of London, - *Appellant;*

MARY BRAND or BURNET, Widow of WILLIAM BURNET, Merchant in Dumfries, } *Respondent.*

House of Lords, 22*d March* 1773.

DEED—INCAPACITY—PROOF—TESTAMENTARY WITNESS.—Circumstances held insufficient to reduce a deed on the head of fraud and facility. Also held, reversing the judgment of the Court of Session, that the writer who executed the deed challenged, and who was an instrumentary witness, is not, when adduced to prove the capacity of the maker of the deed at the time he executed it, an incompetent witness. Nor is he inadmissible on the ground of partial counsel, from having written into the Edinburgh attorney with instructions to defend this cause.

The deceased William Burnet, merchant in Dumfries,