1802.

HALLIDAY v. MAXWELL, &c.

Dam, placed near the intakes of the said mill leads respectively, and the other a Cruive Dam, belonging to the defender Scott, and his predecessors, placed below the said Cheque Dam, and that by means of such dams, that the water was so put back, as rarely to leave the Cheque dam dry, or obstruct the ascent of the salmon which had escaped the said cruives. But when the said cruive was abandoned, and the Cruive Dam demolished, the Cheque Dam was by no means sufficient to keep the water back, so as to be overflowed as it had theretofore been, and to give the salmon such free access up the river as had theretofore been allowed them ; on the contrary, the Cheque Dam, though made much broader, was still so constructed, that more water percolated it than would have served both the said mills. And it is therefore further declared, that so long as the defenders think fit to maintain the said Cheque Dam without a Cruive Dam below, so constructed as to prevent such percolation, the Cheque Dam ought, as far as circumstances will admit to be so constructed, that the water must flow over instead of percolating the same; and they must leave a slap in the said dam, in terms of the act 1696, if the same can be done without prejudice to the said mills: And it is hereby further ordered, That the said cause be remitted back to the Court of Session in Scotland to proceed accordingly.

For Appellants, *John Clerk*, *Ad. Gillies.*

For Respondents, *R. Dundas*, *W. Grant*, *Wm. Adam*, *John Burnett.*

NOTE.—Under this remit, considerable litigation again took place in the Court of Session, which ended in another appeal to the House of Lords, on 20th July 1813. Vide infra.

DAVID HALLIDAY, Grand-nephew and heir of line of John Carruthers, a Pauper, — *Appellant;*

AGNES MAXWELL and her Husband, - *Respondents.*

House of Lords, 9th June 1802.

SUCCESSION—DESTINATION—DISPOSITIVE CLAUSE AND CLAUSE OF RESIGNATION—HEIRS MALE—RES JUDICATA.—In the disposi-

tive clause of a settlement, an estate was conveyed to a person named, and the heirs male of his body, and to another person, and the heirs male of his body; and to a third person named, and his *heirs whatsoever*. In the procuratory of resignation the person last mentioned was not called along with his heirs whatsoever, or general; but his *heirs male*. There was no prohibition against altering the order of succession. The previous heirs male had changed the destination of the estate; and the appellant (who was not an heir male of John Carruthers, the third mentioned party, but the grandson of a brother of John Carruthers, through his mother, a daughter of this brother), claimed the estate: Held, on a construction of the dispositive and resignation clauses, that the appellant was not entitled to the estate. Affirmed in the House of Lords; the Lord Chancellor Eldon stating that the dispositive clause was to be explained by what appeared in the procuratory of resignation, and, both taken together, so as to support the intention of the granter, which was to favour the heirs male.

Mrs. Agnes Maxwell executed a conveyance of her estate of Dinwoodie and others, "to and in favour of *Robert Maxwell*, her grandson, and his heirs male, lawfully begotten "of his own body; whom failing, to *George Maxwell*, also "her grandson, and his heirs male, lawfully to be begotten "of his own body; whom also failing, to *John Carruthers*, "likewise her grandson, upon this condition allenarly, and "no otherways, that he take upon him the name and arms "of Maxwell, and to his heirs, bearing the said name and "arms of *Maxwell*, and others his assignees in his name "whatsoever." This deed contained no prohibition against selling, contracting debt, or altering the order of succession.

Jan. 1, 1669.

Mrs. Maxwell executed, of same date, an assignation and discharge, which narrated and referred to the above disposition, and set forth the destination to the same parties, and in the same terms, including "John Carruthers, and his "heirs and assignees whatsoever," as the last substitute.

1669.

By the obligation to infeft, Mrs. Maxwell bound herself to "infeft and seize the said Robert Maxwell of Tinwald, for "the behoof and utility of him and his heir male lawfully "to be begotten of his own body, in manner above mentioned; which failing, the said George Maxwell, apparent "heir of Munches, and his heirs male above written; which "failing, the said John Carruthers, and his above specified."

The destination in the procuratory of resignation upon

1802.

HALLIDAY v. MAXWELL, &c.

which the respondent rested his case, was in favour of the "said Robert Maxwell of Tinwald and his foresaids, and "his heirs male; which failing, in favour of George Max- "well, apparent heir of Munches, and his heirs male; which "also failing, in favour of the said John Carruthers, and *his* "*heirs male* bearing the name and arms of Maxwell allen- "arly, and his assignees whatsoever."

It was stated that this last clause varied from the dispositive clause, which disponed the estate to Robert Maxwell and George Maxwell, and the heirs. male of *their bodies* only, and not as in the procuratory, to heirs male generally.

There was also this provision in the deed, "That if the "said George Maxwell should have no heir male lawfully "begotten of his own body, the said estate shall pertain and "accresce to the said John Carruthers, taking upon him the "name, and bearing the arms of Maxwell, in fee and heri- "tage, that then and in that case, the said John Carruthers, "his heirs and successors, shall pay," &c.

Robert Maxwell, the institute in this settlement, succeeded the disponer, and died without heirs male of his body in 1707. The estate then descended to George Maxwell, who being a papist, and the next heir entitled to succeed (John Carruthers) a protestant, the latter executed a deed in favour of George Maxwell, renouncing every right that might accrue to him under the statutes against popery, and the disability of papists to hold heritable estate in Scotland.

1707.

George Maxwell therefore continued in possession of the lands until his death, without making up titles to the estate. On his death he was succeeded by his son, William Maxwell, who, in 1764, executed a new settlement of the estate in favour of himself in liferent, and his son George, his heirs and assignees in fee.

1764.

Afterwards (1774) George Maxwell obtained a charter of resignation from the crown, in terms of his father's disposition, conceived in favour of himself, his heirs and assignees whatsoever, in fee, which operated an entire change of the destination in Mrs. Maxwell's settlement.

George Maxwell, on his marriage, entered into a contract of marriage (1776), whereby he provided his spouse with a yearly annuity of £800, payable furth of lands, including Dinwoodie, and settled his real estate, including said Dinwoodie, for himself and the heirs male of the said intended marriage; whom failing, the heirs male to be procreated of his body of any subsequent marriage; whom failing, to the

heirs female of the said intended marriage; whom failing, to the heirs female to be procreated of his body of any subsequent marriage; whom all failing, to the said George Maxwell his own nearest heirs and assignees whatsoever.

Mr. Maxwell died in 1793, without leaving issue, having been predeceased by his wife, and the respondent was his only sister and heir at law, and was served heiress in special to her brother in the said lands.

John Carruthers died without heirs of his body, but he had an only brother, James, who had an only daughter, Ann Carruthers, married to William Halliday; and the appellant was the heir of this marriage, and claimed the estate as heir male of John Carruthers, and also as heir of line.

The appellant, in these circumstances, brought a reduction and declarator, to have the gratuitous disposition of William Maxwell in 1764 set aside, as containing a different destination from that in which the estate was previously settled; and also to have it found that he had best right to succeed to the estate.

In defence to this action, it was objected to the pursuer's title, 1st. That the appellant (pursuer) was not heir male of John Carruthers; and as the succession must be regulated by the destination in the procuratory of resignation, which was in favour of "John Carruthers, and his *heirs male*, and "his assignees whatsoever," the succession must be taken as limited to *heirs male* only. 2d. The action was barred by *res judicata*, because, in a former action brought on the same ground, decree of absolvitor was obtained. It was answered, 1st. That the dispositive clause, in a disposition or settlement of land, is the governing clause that settles and fixes the destination, and the heirs entitled to succeed by it: That in the dispositive clause the destination was to "John "Carruthers, and his heirs and assignees whatsoever," and these terms, beyond all question, denoted the heirs of line. That it was the intention of the maker, drawn from the other parts of the deed, to call John Carruthers' heirs of line, and not to limit the succession to heirs male. And therefore, though the procuratory of resignation in the deed is in direct opposition to the dispositive clause, yet the latter cannot be affected thereby, more especially as it is obvious it has crept in *per incuriam:* 2d. The plea of *res judicata* is ill founded, because the former action was against a different party—against an heir male. This action is against the heir female of the said George Maxwell, who is not called by that deed. The plea of *res judicata*, besides,

1802.

HALLIDAY v. MAXWELL, &c.

is only a plea on the merits, and not an objection to the title; and it is therefore incompetent, by the practice of Scotland, to enter into the consideration of it, in this stage of the cause.

May 27, 1795.

The Lord Ordinary (Dreghorn) pronounced this interlocutor: "Sustains the objection to the title of the pursuer, "and assoilzies the defenders from the action, and decerns; "and, in case the pursuer is not satisfied with this interlocutor, allows him to apply to the Lords for an alteration."

Nov. 19, 1795. Feb. 9, 1796. Feb. 25, and 5 March —— Jan. 27, 1797. Feb. 14, ——

On representation, and two several hearings, the Lord Ordinary adhered. Two short representations against these interlocutors were refused. And, on petition to the Court, the Court adhered. Also, on second petition, adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—By the law of Scotland the dispositive clause of a conveyance of landed property, is that in which the series of heirs called to the succession are pointed out. Formerly this was done in the *tenendas;* but, since the reign of James the I., the uniform practice has been to specify the order of succession in the dispositive clause. On this point, therefore, that is, on the question now in dispute, *that* clause must be the governing rule, and be held to control the other clauses in the deed which may appear in any degree to be inconsistent with it. This more particularly follows where the dispositive clause, as in this case, is itself clear and explicit; and it is quite incompetent to attempt to make out a contrary intention, from other parts of the deed, in opposition to legal and technical terms. In the present case, "heirs whatsoever," which is an expression synonimous with heirs of line, obviously and clearly carried the succession to the appellant as heir of line of John Carruthers. These are the express terms of the dispositive clause in Mrs. Maxwell's settlement. They are the express terms used in describing this settlement by the deed of same date with it; and these express terms of destination are borne out, from other parts of the deed indicating the strongest intention on her part to favour the *heirs whatsoever* of John Carruthers.

Pleaded for the Respondents.—Taking the whole of the settlement, and comparing the several parts together, it is clear that the destination was not to John Carruthers' heirs of line; but to his heirs male,—a character which, by his own statement, does not belong to the appellant. He has

therefore, no title or interest to challenge the subsequent titles and settlements of the estate. If the dispositive clause and procuratory of resignation had been inconsistent or contradictory, there might have been room for the question, Which ought to be preferred? If, for instance, the dispositive clause had been to heirs of line, or heirs female, and the procuratory to heirs male, or *vice versa;* but that is not the case here. The two clauses are perfectly consistent—the dispositive clause being only more *general*, and the procuratory more special and limited in its nature, and pointing out more precisely what was meant by the dispositive clause. It is further, a mistake to hold, that heirs whatsoever are synonimous with heirs of line. Heirs whatsoever is not descriptive of any particular class of heirs, but indefinite and flexible, and applicable to any description of heirs, and means either heirs of line, heirs male, heirs of conquest, heirs of provision; and to which of these it applies, must appear, either from intention, or from the deed itself. That it was intended to apply only to heirs male is strongly borne out by the whole clauses of the deed. In one clause, the term heirs whatsoever is dropped, and the term heirs male used. In construing "heirs whatsoever," the presumption is always in favour of the heir at law or heirs of line, and these are always held to be meant by the word *Heirs*, unless by the express words in the deed, a contrary intention clearly appears; But if it appear that, by the word *heirs*, were meant any special class of *heirs*, as *heirs* male, *heirs* of conquest, &c., that construction must be adopted, and effect given to it. And the same is meant by the expression, *heirs whatsoever*. Consequently, the term *heirs whatsoever* are explained in the procuratory of resignation, in this case, to mean heirs male.

After hearing counsel,

On 19*th May* 1802.

LORD CHANCELLOR ELDON said,—

"My Lords,

"It has been stated to your Lordships that this cause was three times argued before one learned judge of the Court of Session, and three times given against the appellant! And that, when it was carried before the whole Court to be farther considered, it was unanimously decided against the appellant by thirteen judges. The appellant,

1802.

HALLIDAY *v.* MAXWELL, &c.

however, states, that the final judgment was given without previous argument of counsel. We have no means of deciding upon the correctness of these statements. In the present case, I cannot take upon me to move that your Lordships should give any immediate judgment against the interlocutors appealed from, contrary to what is stated to have been the unanimous opinion of the Court below. At same time, I cannot help feeling considerable difficulty in the judgment of that Court.

Lord Thurlow.

"It is matter of regret that this cause has come on to be argued in the absence of noble and learned Lords, whose experience might have tended to remove any difficulties that may have occurred on this subject, and particularly of one eminent person, to whom, I will venture to say, that Scotland lies under high obligations for his attention to similar subjects. I lament also that we have not the assistance in this case of the notes of opinions formed by the judges of the Court below.

"This case is particular also, as being that of a pauper; though I am sensible that persons in that situation are at all times, in both parts of the island, sure of the exertions of honourable persons on their behalf, where their cases deserve it; I am not ignorant, however, that such persons often are inclined to entertain ideas of their own rights dangerous to the quiet of other individuals. The courts of the country, therefore, require a pledge that they have a good title to maintain their suits, and counsel must recommend that they have grave cause of dispute.

"With an inclination to pay every attention to the opinion of the judges, such an opinion so weighty on this case, demands, I conceive, that doubts must still have existed in the minds of the appellant's counsel, discharging an honourable public duty, by the cause having been three times argued before the Lord Ordinary, and then carried before the Court, where it is said to have been determined without argument.

"Here, I may take leave to say, that I wish no case were ever decided without argument on both sides. I learned this lesson from the great character to whom I have already alluded. He once mortified me, by stating that my argument had often prevailed with him against my own clients. He explained it upon this ground, that a judge, of necessity, had formed some opinion of a cause before it came to be argued; that counsel, having more leisure, examined their case, to see what objections lay to it, and endeavoured to obviate them; and in this way objections were often stated, which had not occurred to the judge, but were decisive of the cause.

"In the present case, I think we have a very narrow point to determine, the description of heirs called by a certain deed. Mr. Adam has stated that the whole depends upon the procuratory of resignation. If this be so, *cœdit questio.* I lay out of this case every consideration of favour to either party. The respondent has acted

with great propriety; she said, that upon the deed in question the appellant had no right to maintain his action. If the procuratory of resignation does not necessarily decide this question, and if it be really a question of construction on the whole clauses of the deed, I must then think that the respondent has to grapple with a very weighty argument.

"The conveyancers of this country are accused of great verbosity, but if Mr. Adam is correct, it is still worse in Scotland, where every clause is held to be a deed. The dispositive clause in the present deed, is to heirs in general, in so far as John Carruthers is concerned. It is said that heirs is a flexible term, and so it is held to be in this country. If lands are given to a man and his heirs, that is held to be a fee simple; but if they are given to a man and his heirs, with remainder to another and his heirs, we would inquire if this could be reconciled, on a construction of the whole deed? When you find here, in the dispositive clause, a limitation to one person, and the heirs male of his body, and to another person, and the heirs male of his body, and to a *third*, and *his heirs whatsoever*, the presumption is, that this was not so without design.

Mr. Montgomery, whom your Lordships may have heard repeatedly with satisfaction, argued well, that the obligation upon such third person, and his heirs whatsoever, to carry the name of Maxwell, was very unusual. I have no doubt that this is so; but the thing has been done in this case. The obligation to infeft makes no alteration of the preceding limitation, and if the deed had stopped there, no doubt could have remained how the deed was to be understood.

"Then comes the procuratory of resignation, which mentions the heirs male of John Carruthers, which, it is contended, narrowed the preceding description of heirs general. If it be necessary that the feudal investiture from the superior be granted in the very terms of this procuratory, then there is an end of the question; but if this be not so, a difficulty occurs, because this procuratory also enlarges the preceding destination in regard to the heirs called after Robert Maxwell and George Maxwell. The dispositive clause gives the estate to them, and the heirs male of their bodies, while the procuratory gives it to heirs male generally. If the procuratory, therefore, is to be the ruling clause, this suggests considerations material with regard to the heirs of Robert and George, for as long as the remotest heir male of either of them exists, in this view, neither the appellant nor respondent could claim any right.

"When we come to the clauses relative to the contracting of debts, and payment of sums of money, by the heirs in possession, the heirs male of the bodies of Robert and George are again so distinctly mentioned, that I conceive the words heirs male in the procuratory must be held to be flexible. This would let us again into the construction of the testator's intention from the whole scope of the deed.

1802.

HALLIDAY *v.* MAXWELL, &c.

"In these circumstances, I looked with considerable anxiety into a case quoted by Mr. Adams, as in point to the argument maintained by him; but I did not find that it made out the authority now pressed upon us. In that case, there was a first deed to heirs male, and a deed with a varying destination, sometimes heirs male, and sometimes heirs general; and, from the whole, I conceive it was properly found that heirs male were intended.

Maclachlan *v.* Campbell. Jan. 12, 1757. Mor. 2312.

"I really feel so much doubt whether or not this case has been rightly decided, though the authority for the judgment is so great, that I think it proper to move that the further consideration of this case be put off to this day fortnight."

On 9th June 1802, *Case resumed.*

The Lord Chancellor Eldon said,

"My Lords,

"When this cause was last before your Lordships, I stated at the close of the argument, a sincere doubt which then occurred to me on the fitness of the interlocutors of the Court of Session, and I proposed to your Lordships to postpone the pronouncing the judgment of the House, and I am now happy to declare my satisfaction that your Lordships acquiesced in that suggestion, as it has afforded me the opportunity of more maturely considering the case, and communicating with those on whose information and judgment I can rely, and I am now free to declare, that the doubts I then entertained are entirely removed, and that my opinion is, that the judgment of the Court of Session is right, and ought to be affirmed by your Lordships.

"It was said by one of the counsel at the Bar, that this cause had not been much considered by the Court of Session, but I can assure your Lordships, from the best authority, that the case was at two different times, most deliberately considered by the whole Court, as it had three times previously been by the Lord Ordinary; and on all these occasions the judges were uniformly unanimous.

"This action takes its rise upon the construction of an instrument purporting to be a settlement of the estate of Dinwoodie, executed by a lady of the name of Agnes Maxwell, in the year 1669. This instrument appears to have been prepared by a country notary of no great knowledge in his profession, assisted by the old lady, and probably by some books of precedents, which were useful to him on all occasions; for in many of the clauses which were supplied by the books of precedents, the deed appears properly technical, but when left to himself, and particularly in the proper legal description of the heirs who were to take the estate, he shows great ignorance,

inaccuracy, and apparent contradictions. We must, therefore, take the whole deed together into our contemplation, and consider, upon a fair and rational construction of the real meaning and intention of the granter.

" The appellant went too far when he argued, that the dispositive clause was the sole and only part of the deed which could regulate the succession of the estate to the different description of heirs who were entitled to succeed. And the respondent, perhaps, went nearly as far wrong, in arguing, that the procuratory of resignation was the only part of the deed which could be required to regulate the succession, and that every other part of the instrument must bind to the procuratory, however widely they might differ from it. '

" It rather appears, however, that the one may be examined and explained by the other, or by different clauses in the same deed; and if, upon the whole, the real intention of the granter can be rationally collected, without violence to any part of it, *that* is the sound rule to be adopted by your Lordships.

The first clause in the deed is what, in the technical language of the law of Scotland, is called the dispositive clause, and in this clause, Agnes Maxwell, the granter, dispones her estate to (here his Lordship read the destination.)

" If the estate had been given to John Carruthers and his heirs simply, without saying more, then the heirs of line of John Carruthers would have taken the estate; but there is more than a simple destination to John Carruthers and his heirs,—there is a condition imposed, that he take upon him the name, and bear the arms of Maxwell, and to his *heirs bearing the said name* and *arms* of *Maxwell.* The nature of the condition seems to imply that it shall be taken by an heir male, who could take the name and arms, and represent the whole estate. If the estate came to be divided among heirs portioners, which, by the nature of the settlement, it could do, it might have divided among a great number of female heirs of different families, all of whom, according to the appellant's doctrine, were bound to take, and bear the name and arms of Maxwell, a thing not very probably in the contemplation of the granter, but, on the contrary, that she intended the estate should go to J. Carruthers' heirs male; and the procuratory gives strong grounds for adopting this construction of the dispositive clause, and removing the doubts that arise from the words of it. (Here his Lordship read the words of the procuratory.)

" By this clause, the superior is directed to grant the estate to John Carruthers, and his heirs male, for the new infeftment thereof. The superior can only grant it in the manner pointed out by this clause, and must have granted it so, which would give these heirs male the feudal right to the estate under the procuratory, leaving, according to the appellant's doctrine, a personal right to the estate

1802.

HARLOW, &c. v. GOVERNORS OF THE MERCHANT MAIDEN HOSPITAL, &c.

in the heirs whatsoever, under the dispositive clause, which is inconsistent and untenable.

"When I last stated my sentiments to your Lordships on this cause, it appeared to me that the procuratory had granted a larger estate in these premises to the two Maxwells than they were entitled to claim under the dispositive clause, which limited the estate of Dinwoodie to them and the heirs male of their bodies, and that the procuratory gave it to them and their heirs male general; but, upon a more accurate inspection, I observe that the procuratory gives it to them and their heirs male *in manner above expressed,* which are words of reference to the limitation in the dispositive clause, which gives it to them and the heirs male of their body.

"All the other parts and clauses of the deed are consistent with the procuratory, and meanings and intentions of the dispositive clause, as thus explained; and, from a due consideration of the general tenor and contents of the whole deed, the doubts that formerly occurred to my mind are now entirely removed; and I am of opinion the interlocutors of the Court of Session are right, and ought to be affirmed."

It was accordingly

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Ad. Gillies, Chas. Moore.*
For the Respondents, *Edw. Law, Wm. Adam, Ad. Rolland.*

NOTE.—Unreported in the Court of Session.

JOHN HARLOW and Others, Feuars in the Barony burgh of Peterhead, - *Appellants;*

GOVERNORS OF THE MERCHANT MAIDEN HOSPITAL of the City of Edinburgh, GEORGE EARL OF ABERDEEN, and Others, Heritors of the Parish of Peterhead; and the Rev. DR. MOIR, Minister of Peterhead, - *Respondents.*

House of Lords, 24th June 1802.

BUILDING NEW CHURCH—WHO LIABLE—PROPORTION IN WHICH LIABLE.—In the building of a new church in the parish of Peterhead, which is part landward and part burghal, two questions