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KER, &c.
v.
INNES, &c.

(In the First Appeal.)

COLONEL (LATE BRIGADIER-GENERAL) WALTER KER of Little Dean, and RICHARD HOTCHKIS, Esq. W.S., his Attorney, } *Appellants;*

SIR JAMES NORCLIFFE INNES, Bart., and JAMES HORNE, Esq. his Commissioner, } *Respondents.*

(In the Second Appeal.)

JOHN BELLENDEN KER, HENRY GAWLER, and JOHN SETON KARR, Esqrs. . . } *Appellants;*

COLONEL WALTER KER, and RICHARD HOTCHKIS, Esquire, . . . } *Respondents.*

(Competition of Brieves).

House of Lords, 15th, 16th, and 19th June 1809; and 20th June 1810.

Case of COLONEL WALTER KER and RICHARD HOTCHKIS, Esq., Appellants in the First, and Respondents in the Second Appeal.

First Appeal.

ENTAIL—CLAUSE OF DESTINATION—ELDEST DAUGHTER—HEIRS MALE—PRESCRIPTION.—The maker of an entail, after a series of substitutions, conveyed his estates and dignities "to the eldest "daughter of the said umquhil Hary Lord Ker, *without division*, and "*their heirs male.*" Lord Hary Ker had four daughters; and, in a competition of brieves, Held, (1.) That the expression, "Eldest daughter," was not, according to the construction of this deed, to be confined to the eldest born daughter, but to be construed as applicable to any of the four daughters of Lord Hary Ker, which ever of them might be the eldest at the time the succession opened, the whole four being, by the conception of the deed, called successive and seriatim. (2.) There was a prior deed of nomination (1644) which was not revoked by the later deed 1648. In it, the destination was taken to the four daughters by *name, and the heirs male of their bodies;* but, in the latter deed, the destination was conceived to "their heirs male." Held, that by the conception of this latter deed, the clause, "their heirs male," was to be construed as calling the *heir male of the body* of any of the four daughters, whichever of them was the eldest daughter at the time, in preference to the heir male in general, or collateral heir male; and that it was competent, though not

necessary, to refer to the previous deed in aid of that construction. (3.) The investitures, subsequent to the deed 1648, instead of being conceived to the eldest daughter of Hary Lord Ker, and "*their* heirs male," had dropped the word "*their*," and substituted "*her* heirs male," and prescription had run upon the title so made up. Held, That the Court was still entitled to give effect to what was conceived to be the true import of the deed 1648, in favour of "*their* heirs male," more especially as a subsequent deed (1747), had expressly referred to and adopted the destination in the deed 1648.

In the beginning of the 15th century, Andrew Ker of Altonburn was the head of a distinguished family of that name, on the southern border of Scotland. He had three sons, Andrew, James, and Thomas, from whom respectively descended the Kers of Cessfurd, and thence the Kers of Fawdonside, of Caverton, and of Dolphinstone, &c. From the Cessfurd branch sprung the Roxburghe family. In 1480 Walter Ker was the head of the Cessfurd family. He had two sons, Robert, afterwards of Caverton, and Mark, afterwards of Dolphinstone and Littledean. The appellant was a direct male descendant of Mark.

It also appeared, from the feudal investitures of the family estates of Ker of Cessfurd, during upwards of a century prior to 1573, the principle and rule of succession in the *male line* had been invariably adhered to; and the limitations in these investitures, the appellant stated, served to exhibit, from time to time, this prevailing rule of succession in the male line.

1573.

At this time, William Ker of Cessfurd had two sons, Robert and Mark. Mark died without issue; but Robert, the eldest son, in 1573, during the lifetime of his father and grandfather, (Sir Walter Ker), was feudally invested with the estates, and, after their deaths, became Sir Robert Ker of Cessfurd. He enjoyed his paternal inheritance under the charter 1573, during a very long life. After having obtained the honour of knighthood, he was, in 1606, raised to the dignity of a Lord of Parliament, and, in 1616, created by patent Earl of Roxburghe, with a remainder to his heirs male. He was twice married. By his first wife he had a son, William, Master of Roxburghe, who died before him without issue, and three daughters, all of whom were married, and had issue. By his second wife he had a son, Harry, Lord Ker, who also died before him, leaving four daughters, but no male issue.

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Robert, first Earl of Roxburghe, died in 1650, in extreme old age.

It was contended by the appellant, that under the investitures, which had subsisted in his family for nearly two centuries, and by virtue of the limitations contained in the patent of his peerage, the estates and honours of Roxburghe would have devolved, at Earl Robert's death, first upon John Ker, the only remaining male descendant of Mark, Commendator of Newbattle, who died without male issue about the year 1660, and afterwards upon Sir Walter Ker of Fawdonside, the only remaining male descendant of George Ker of Fawdonside, who also died without issue about the year 1644.

The next in propinquity to those two branches, were the descendants in the male line of Mark Ker of Dolphinstone, from whom the appellant was descended. Thus, more than a century and a half ago, the succession, both under the investitures and the patent, would have opened to the branch now represented by the appellant, Colonel Ker.

Change of Investitures.

But Robert Ker, Earl of Roxburghe, at a very advanced age, departed from this order of male succession, which had been so long established in the house of Cessfurd, a step suggested to him, it was supposed, by the situation of the family. His sons having died without male issue, if the destination had remained unaltered, all his descendants, of whom he lived to see a numerous train, would have been excluded without exception from the inheritance. He had three daughters and four grand-daughters, the issue of his deceased son Harry, Lord Ker. He conceived the project of uniting in marriage some of the progeny of his son with the issue of his eldest daughter, that the introduction of an heir-female might be compensated for by a double connection with the ancient line.

1643.

In order to carry his purpose into execution, the Earl of Roxburghe, 16th July 1643, granted four procuratories of resignation, comprehending his honours, and all his estates, for new investiture, to be given to himself, and the heirs male to be lawfully procreated of his body, "which failing, "to his heirs and assignees in his option, to be designat, "nominat, made and constitute by him at any time in his "lifetime, or before his decease, by assignation, designation, "or declaration, under his handwrit, and under the provi-"sions, restrictions, limitations, and conditions therein to be "contained."

Nov. 3, 1643.

In the same year he granted a bond, proceeding upon a

narrative of those procuratories of resignation, by which he obliged his "*heirs male, as well gotten of his own body* "*as his heirs male of tailzie and provision whatsoever,*" to ratify them in favour of the heirs whom he should nominate, and to renew them in case of his death, without having completed his proposed investiture by charter and infeftment.

Deed of Nomination and Tailzie 1644.

In 1644, before he had expeded any such charter, he executed a deed of nomination, designation of tailzie, which contained a power of revocation.

Charter of Earldom, 1646.

In 1646, he obtained a charter, in consequence of his former procuratories of resignation, by which his honours and estates of Roxburghe were granted to himself, and the heirs male of his body; whom failing, to the *heirs* or *assignees* whom he should nominate *by a future deed,* at any period of his life. The appellants strongly contended that this necessarily implied that his former nomination of 1644 was revoked and abandoned; while the respondents, on the other hand, denied this, and contended, that as there was no express revocation of the deed 1644, it was still competent, in construing the deed of nomination and tailzie 1748, to refer to that deed, in order to explain the destination in question. The grant of the charter is in these words:—
" Heredibus suis vel assignatis quibuscunque in ejus optione
" designandis nominandis vel constituendis per ipsum ali-
" quo tempore in vita sua vel ante ejus decessum per assig-
" nationem, designationem, nominationem seu declaratio-
" nem sub sua subscriptione ac sub provisionibus restrictioni-
" bus, limitationibus et conditionibus in dicta nominatione
" et designatione, continendis."

Second charter of lands omitted. June 21, 1647.

A second charter, referring to the former, and in favour of the same series of heirs, was expede in 1647, for the purpose merely of including certain lands which had been omitted in the charter of the earldom.

The FUTURE nomination and tailzie to which these charters referred, was executed in 1648; but, before reciting it, it is necesaary to elucidate the points here in dispute, and to refer to the deed of nomination and tailzie in 1644, alleged to have been revoked.

In order to elucidate more clearly the limitations and conditions in those deeds, the following account of his family is necessary. By his first marriage he had, besides his son William, who died without issue, three daughters, Lady Dudhope, Lady Perth, and Lady Southesk, all of whom, both in 1644 and in 1648, were alive, and had issue. Lady Perth had four sons, the youngest of whom was named Sir William Drummond; and two daughters, of

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whom the eldest was married to John Lord Fleyming, afterwards third Earl of Wigton, by whom she had several sons, and the second to Lord Tullibardine, of which marriage there was likewise issue. By his second marriage, the Earl of Roxburge had one son, Hary, Lord Ker, who died before him, leaving four daughters, Jean, Anna, Margaret, and Sophia. The destination in the first deed of nomination 1644 ran thus:—

Deed of Nomination and tailzie, 1644.

By the first deed of nomination and tailzie, the Earl of Roxburghe, to the exclusion of all his daughters, and of the issue of the younger two, selected Sir William Drummond, fourth and youngest son of Lady Perth, and Robert Fleming, second son of Lord Fleming, with all his younger brothers, procreated or to be procreated of the marriage, and the heirs male of their bodies, to take the estate and honours successively, in the manner and under the conditions specified in the following clause:—"And we being willing "to make the said designatione and nominatioune of the "persons to succeed to us in our said estate and living, "Thairfoir witt ye us of certain knowledge and proper mo-"tives to have designat nominat maid constitute and be thir "pnts designs nominates makes and constitutes Sir Wil-"liam Drummond, son to the Right Honourable John "Earl of Perth, and the aires maill lawlie to be gottine "of his bodie to be the person wha sall succeed to us "in our saidis lands baronies estate and living contenit in "the saids pröries (procuratories) and infeftments following "or to follow yrupoune (failzeing of aires maill lawlie to be "gottine of our own bodie) always under the provisiounes re-"strictiounes limitatiounes and conditiounes after spect and "na otherways. And failzing of the said Sir William Drum-"mond and his aires maill foresaid or in their not observing "keeping fulfilling of the samyne provisiounes restrictiounes, "limitatiounes and conditiounes afterspect We have de-"designit and by thir pnttis designes nominates makes "and constitutes Fleyming second son to John "Lord Fleyming and Dame Jane Drummond his spouse "and the aires maill lawlie to be gottine of his bodie, to "be the person wha sall succeed to us in the saids landes "baronnies estate and living conteint in the saides pröries "(procuratories) and infeftment following or to follow "yrupoune always also under the samyne provisiounes limi-"tatiounes restrictiounes and conditiones afterspect and na "otherways. And failzing of the said Fleyming "second son and the aires maill to be gottine of his bodie "or in cais of thair not fulfilling observing and keiping of

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" the samyne provisiounes restrictiounes limitations and
" conditiounes afterspect We have maid constitute designit
" and nominate and by thir pnttis makes constitutes designes
" and nominates Fleyming third son to the said Lord
" Fleyming and Dame Jeane Drummond his lady and the
" aires maill lawlie to be gottine of his bodie to be succes-
" sors to in our said estate lands baronnies erldom and
" others abovewrn conteint in the saides pröries and infeft-
" ments to follow yrupon always under the provisiounes
" restrictiounes and conditiounes afterspect and na other-
" ways. And failzeing of the said Fleyming third
" son foresaid and the aires maill lawlie to be gottaine of
" his bodie, or in thair not observing keiping and fulfilling
" the saides provisiounes limitatiounes and conditiounes
" afterspect We have maid designit and nominat and be
" thir pnttis designes and nominates Fleyming fourt
" sone of the said Lord Fleyming and Dame Jane Drum-
" mond his lady and the aires maill lawlie to be gottaine of
" his bodie to be successors to us in our estate lands bar-
" ronies and others abovewrn conteint in the said pröries
" and infeftments following or to follow yrupon alwayes
" under the provisiounes and conditiounes following and no
" otherwayes viz. That the said Sir William Drummond
" and failzeing of him be deceis the said Fleyming
" second son foresaid of the said Lord Fleyming and failze-
" ing of him be deceis the said third sone of the said Lord
" Fleyming and his lady and failzeing of him be deceis the
" said fourt sone of the said Lord Fleyming and his lady
" sall marie and tak to thair lawll spouse Lady Jeane Ker
" aldest lawll dochtor of umql Hary Lord Ker our sone
" and failzeing of her be deceis or by any other occasion
" qlk may failzie on hir pairt Lady Margaret Ker secound
" daughter lawll dochter of the said umql Hary Lord Ker our
" sone. And failzeing of the said Lady Margaret Ker be deceis
" or by ony other occasion on hir pairt Lady Anna Ker
" third lawll dauchter of the said umqll Hary Lord Ker our
" sone. And failzeing of the said Lady Anna Ker be deceis
" or be ony other occasion qlk may fall out on hir pairt
" Lady Sophia Ker youngest lawll dochtor of the said umqll
" Hary Lord Ker."

Second clause of destination.

After inserting other conditions and restrictions which were to be obligatory on the substitutes, the deed continues in the following terms:—" And in caise it sall happen all
" the foresaides personnes particularlie before namitt ap-
" poynted to succeed to us in manner foresaid to depart this
" lyffe without aires maill lawlie gottine of yr awne bodies

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"on lyffe they mareing as sd is Or zitt give they sall all "faill in the observing and fulfilling of the conditiounes "above and after mentionat set down to be performit be "them Thaine and in ather of these cases We have de- "signet nominat and appoynted, and be thir pntts designes "nominattes and appoyntes *the immediate next eldest lawful "sones of the saides John Lord Fleyming and Dame Jeanne "Drummond his Lady, being immediatelie next in birthe* to "*thair eldest sone and aire ilk ane of them successivè after "uyrs* To be the personnes wha sall succeed to us in our "sd estate landes baronnies and uyrs abovespect. They "alwayes mareing and taking to yr lawll spousez the eldest "lawll dochter of the sd Lord Ker, our sone, being on lyffe "and unmarried for the tyme. And they and yr aires maill "foresaid of the said mareadge keipand performand and "fulfilland the haill remanent conditionnes of this pnt no- "minatioun. And falzeing of all the before namit person- "nes be deceis or not performance of the forsd conditiounes "In that caise we have designit and be thir pntts designes "the saides *Lady Jeane, Margaret, Anna and Sophia Kers "our oyes. And failzeing of the first the next immediate "eldest of the sds dochters successivè after uyrs and yr aires "maill lawlie to be gottine of yr bodies* to *be the personne "wha sall succeed* to *us in our sds landes baronnies, erle- "dom and uyres abovewrn.* They always mareing and "taking to yr lawll spouses ane gentelman of the name of "Ker of lawll and honoll descent and yr saides husbands "and yr aires forsds taking keiping and reteining the sd "surname of Ker, and arms of the sd house of Roxburghe "allenarlie in all tyme yrafter. As also performand the re- "manent conditiounes of this pnt nominatioun. And falze- "ing also of all the sdes personnes be deceis or not perfor- "mance as said is In that case we have designit and be "thir pntts designes and appoyntes *our narrest and lawll "air maill qtsumever* being ane gentleman of the name of "Ker of lawll and honoll descent and the aires maill lawlie "to be gottine of his bodie To be the person to succeed to "us in our said estate landes baronnies living and others "abovewrn." To these destinations were subjoined the usual prohibitions against alienation, contraction of debt, and granting deeds in prejudice of the order of succession. A power to revoke or alter was also inserted. The deed purported to have been written by Alexander Don, clerk, Kelso. Various blanks had been originally left in it, some of which were afterwards filled up in the handwriting of the Earl of Roxburgh, and in that of Alexander Don.

In this deed too, by mistake apparently, Lady Margaret is called the *second* daughter of Lord Hary Ker, when, in fact, she was the third daughter, and, in like manner, Lady Anna was called his third daughter, when, in fact, she was his *second*.

It was stated that this deed was revoked by the charters in 1646 and 1647, but this, as has been already mentioned, was denied by the respondent, who alleged it was merely superseded, and a new nomination and tailzie substituted in its place in 1648, upon which all the subsequent investitures of the family were made.

Deed of nomination and tailzie 1648. First clause of destination.

The first clause of destination in the deed 1648, with the conditions which affect it, was thus expressed:—" There-" fore wit ye us of certane knowledge and proper motive to " have made nominate declared and constitute and by " thir pnts makes nominates declares and constitutes (failz-" ing of aires male lawfully to be gottin of our awin bodie) " upon the provisions restrictions and conditions always " after specified the persons after mentionat in manner " after specified to be airis of tailzie to us and successors in " our saids erledom lands lordship baronies titles dignity offi-" ces jurisdictiones patronages and others qtsomever contain-" it in the infeftments pröries and others richtis aud secu-" rities generally and specially above written viz. Sir Wm. " Drummond youngest lawful sone to an Noble Erle John " Erle of Perth &c. and the aires male lawfully to be gotten " of his body with his spouse after mentionat To be heir " of tailzie and successor to us in the saids erledom titill " dignity lands lordship baronies and others above speci-" fied ; Qlks failzying or in case the said Sir William Drum-" mond or the saidis heirs male of his body sall failzie to " observe the provisions restrictions and conditions after " specified In ather of the saidis cases we nominate declare " and constitute Robert Fleyming second lawful sone to " John Lord Fleyming and Dame Jeane Drummond, his " lady, and the airis male of his body to be gottin with his " spouse after nominate To be heir of tailzie and successor to " us in the said erldom title dignity lands lordship ba-" ronies and others above written Qlks failing, or in case " the said Robert Fleyming and the saids airis male of his " body sall fallzie to observe the provisions restrictions and " conditions after specified In ather of the saidis cases we by " thir presents make nominate declare and constitute " Fleyming third lawful son to the said John Lord Fleyming " procreate betwixt him and his said lady and the airis " male lawfully to be gottin of his body with his spouse

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"after nominate To be heir of tailzie and successor to us in "the said earldom title dignity lands lordships baronies "and others above specified Qlks also failing or in case "the said Fleyming third sone foresaid and the "saidis airis male of his body sall failzie to observe "the provisions restrictions and conditions after specified "In ather of the saidis cases we be thir presents makis "nominate declare and constitute Fleyming fourth "lawful sone to the said John Lord Fleyming and his said "lady and the aires male lawfully to be gottin of his bodie "with his spouse after nominate To be heir of tailzie and "successor to us in the saids erledom title dignity lands "lordship baronies and others above written. And failzing "of the airis male of all the saidis four persons their bodies "with their spouses after nominate or otherwise in case "they all or their saidis airis male sall all failzie to perform "the provisions restrictions and conditions after mentionat "In ather of the saidis cases we by thir presents nominate "declare and constitute the next immediate eldest lawful "sones of the said Johne Lord Fleyming procreate or to be "procreate betwixt him and the said Dame Jeane Drum-"mond his Lady and the airis male lawfully to be gottin of "their bodie with their spouses respectivè after nominat to "be airis of tailzie and successors to us in our saids erledom "lands lordship baronies title dignity and others above "written under the express provisions restrictions and con-"ditions after specified viz. That in case it sall happen the "saids persons nominate by us or onie of them quha sall "have right to succeed for the time to be married upon "any other spouse than the spouse hereby nominate be us "in manner after mentionat In that case the person or "persons sua otherwise to be married and the airis male of "*his* body is and shall be excludit from the said tailzie and "succession and sall have na right thereto without any "declarator or process of law to be suted or cravit there-"anent. And Als providing that the said Sir William "Drummond and failing of him by decease, or in case of "his marriage, or not observing of the conditions above and "after mentionat the next person havand right for the time "to succeed as said is sall marry and take to thair lawful "spouse Lady Jeane Ker eldest lawful dochter to umql "Hary Lord Ker our sone, they being baith marriageable "for the time. In qlk case he or that person having right "to succeed for the time sall be halden to marry the said "Lady Jeane Ker before he be servit and retourit air of

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" tailzie to us. And in caice they be not baith marriageable
" In that caice it sall be lawful to the said Sr Wm or our
" next succeeding air to obtain himself servit retourit and
" infeft as air of tailzie foresaid bot withal sall be halden
" astricted and obleist to marry the said Lady Jeane Ker
" qn they sall be marriageable thereafter. And failing of
" hir by decease before marriage or that the said Lady
" Jeane Ker be unwilling or refusis to marry or be married
" to ony other spouse In ather of the saids caices the said
" person quha sall have right to succeed for the time sall be
" halden and obleist to marry and take to his spouse Lady
" Anna Ker second lawful dochter to the said umql Hary
" Lord Ker qn they sall be marriageable. And failing of
" her by decease or that the said Lady Anna Ker be un-
" willing or refuse to marry or be married to onie other
" spouse In ather of these caices the said person quha sall
" have right to succeed for the time sall be halden to mary
" Lady Margaret Ker third lawful dochter to the said
" umql Hary Lord Ker our sone. And failing of hir by de-
" cease or in caice she refuse or sall happen to be married
" to onie other spouse he sall be halden to marry Lady
" Sophia Ker youngest lawful dochter to the said umql
" Hary Lord Ker our sone And sicklike it is providit, That
" in caice it sall happen all the foresaids persons to qm our
" saids airis of tailzie respectivè are appointed by us to be
" married to depart this life or be all married before the said
" airis of tailzie respectivè sall fall to succeed to our said
" estate and living or zitt in caice they sall all refuse to
" marry our saids airis of tailzie and provision specially and
" generally above mentionat In that caice the persons and
" airis respectivè nominate by us in manner foresaid are
" hereby declarit be us na ways to amit bot to have and en-
" joy the benefit and right of tailzie and succession they
" always marrying persons of honourable quality and lawful
" birth and withall keepand observand and fulfilland the
" remanent otheris conditions provisions and restrictions
" before and after mentionat and na otherwise."

Other conditions and restrictions followed, which were secured by prohibitory, irritant, and resolutive clauses necessary to constitute a strict entail.

Second clause of destination.

A second clause of destination was then inserted, on the construction of which the question between the parties in this appeal exclusively depends: " And qlks all failzeing be
" decease or be not observing of the provisions restrictions
" and conditions above written The right of the said estate

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" sall pertain and belong *to the eldest dochter of the said* " *umql Hary Lord Ker without division and yr aires-male* " she always mareying or being married to ane gentleman " of honourl and lawful descent wha sall perform the condi- " tions above and under written Qlks all failzing and yr sds " airis-male to our nearest and lawful airis-male qtsomever."

Then followed conditions relative to debts, and serving under the tailzie,—a conveyance of other subjects,—provisions to three of Lord Henry Ker's daughters.

It was alleged by the appellant, as material to observe in considering his case, that this deed was framed by John Learmount, writer to the Signet, that it had several blanks, which were afterwards filled up by Alexander Don, clerk of Kelso, by whom the deed of nomination 1644 was written.

On comparing these two deeds of nomination and tailzie, that of 1644 with that of 1648, two important distinctions were said to be observable. In the first clause of destination in the deed 1644 Sir William Drummond and the younger sons of Lord Fleming are called, under the condition of marrying agreeably to the entailer's injunctions, and the *heirs male* of *their bodies respectively;* consequently, if they fulfilled that condition, the *heirs male* of *their bodies* by any subsequent marriages would have been, according to the appellant, admitted. But, by the corresponding clause in the deed 1648, the destination is limited to the *heirs male* of the *prescribed intermarriages.* Again, in the second clause of destination in the deed 1644 *each of the four daughters of Hary Lord Ker is called by name;* they are called in succession, and the substitution is limited to the heirs male of their bodies. Whereas in the corresponding clause of the deed 1648, the daughters of Lord Hary Ker are not called by name, but the destination is confined to the eldest daughter of the said deceased Lord Hary Ker, *without division;* and the succession, instead of being limited to *heirs male of their bodies,* is *extended to heirs male.*

Parliamentary ratification of the Charter 1646, and infeftment as to the lands and dignities.

As already mentioned, there was a parliamentary ratification of the charter 1646 and the infeftment which had followed; declaring " that any nomination or designation made, or to be " made, by the said Earl of Roxburghe, of any person, or per- " sons, to succeed to him as heirs of tailzie in the said lands, " baronies, and earldom of Roxburghe, title and dignity fore- " said, or of any other of his Lordship's lands or others be- " longing to him, sall be als valid and sufficient," &c. In virtue of this, the deed 1648 was executed.

Subsequent investitures.

Upon the death of Robert, Earl of Roxburghe in 1650,

Sir William Drummond made up titles to him by service as heir of tailzie and provision, and afterwards obtained a charter of confirmation and novodamus, on which he was infeft.

1655.

In compliance with the injunctions of the entail, he married, in 1655, Lady Jeane Ker, daughter of Lord Hary Ker. To give still greater validity to his title, he obtained a decree of adjudication in implement on the bond granted by Earl Robert in 1643. In 1661 he procured a parliamentary ratification of the deed of nomination 1648; and, two years afterwards, it was likewise ratified by Sir Walter Ker of Fawdonside, who had then become heir male of the Kers of Cessfurd, and, consequently, heir under the ancient investitures.

1665.

Sir William Drummond thus became William, second Earl of Roxburghe. He had two sons by his marriage with Lady Jeane Ker, Robert, who succeeded him in 1665, and John, who was afterwards Lord Bellenden Ker. Robert, third Earl of Roxburghe, was succeeded by his sons, Robert and John, fourth and fifth Earls of Roxburghe. All these heirs of entail completed their feudal titles to the estate, in terms of the deed of tailzie 1648.

New Patent of Nobility 1707. Destination in do.

In 1707, John, fifth Earl of Roxburghe, obtained from Queen Anne a patent, granting "to him, and to the heirs "male of his body; whom failing, to his other heirs destin-"ed to succeed to the title and dignity of the Earl of Rox-"burghe, by the former patents or diplomas heretofore "made and granted to his predecessors, the title of Duke "of Roxburghe, Marquis of Bowmont," &c.

1729.

In 1729 John, first Duke of Roxburghe, executed a disposition of his estates, in which, proceeding expressly upon the narrative of the deed of nomination and tailzie 1648, he "gives and dispones these estates to Robert, Marquis of "Bowmont, my only son, and the heirs male lawfully to be "procreated of his body, which failing, to the other heirs "of tailzie substituted to them, contained in the said "tailzie made by the deceased Robert, Earl of Roxburghe, "my great-grandfather's father, and in my said infeftments "thereupon; all which heirs of tailzie are held as herein "insert and expressed; which failing, to me, my heirs and "assignees whatsoever."

1740.

Having relieved the estate of certain incumbrances, and acquired other lands, the Duke of Roxburghe, in 1740, executed another deed of entail of those lands; but, in like manner, "under the several provisions, conditions, limita-"tions, restrictions and irritancies therein mentioned con-"tained in the deed of tailzie of the said estate of Rox-

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' burghe granted by the said deceased Robert, Earl of " Roxburghe, his great-grandfather's father, bearing date " 23d Feb. 1648." In this deed the lands were disponed to his son Robert, Marquis of Bowmont, and the other heirs male of his body; and to his brother german, Lieutenant-General William Ker, and the heirs male of his body; " whom failing, to the other heirs of tailzie substi-" tuted to them, contained in the said entail of the said " estate of Roxburghe, made and granted by the deceased " Robert, Earl of Roxburghe, my great-grandfather's father, " and in the infeftments following thereon; and which heirs " of tailzie are held as herein expressed."

1741.

In 1741 Robert, second Duke of Roxburghe, succeeded to his father, and completed his investiture by executing the procuratories contained in the two deeds last mentioned; by virtue of which he afterwards expeded a charter from the crown in favour of the heirs named in the entail 1648. The clause in this charter contained in the substitution in favour of the eldest daughter of Hary, Lord Ker, is conceived in the following terms:—" Et quibus omnibus " deficien. per decessum at et per non observantiam seu " prestationem provisionum, restrictionum et conditionum " supra script. jus dict. status et patrimonii per dict. literas " talliæ declaratur cadere, devolvere et pertinere *ad filiam* " *Natu Maximam quondam Henrici Domini Ker filii* " *Roberti primi Comitis de Roxburghe*, absque divisione, et " ad ejus heredes masculos, illa omni modo obligata nubere " seu nupta esse generoso viro præclari et legitimi stemma-" tis, qui omnes conditiones supra script. perimplebit: Qui-" bus omnibus deficien. ad præfati quondam Roberti primi " Comitis de Roxburghe, propinquiores et legitimos hæredes " masculos quoscunque; *et per præsentes providetur et decla-* " *ratur, quod eadem iis cadent et devolvent conformiter.*"

Charter 1741.

New Entail of 1747.

In 1747 Robert, second Duke of Roxburghe, executed a new entail of his whole estate, founded upon the preceding entails, and exactly similar in its limitations and conditions. And under this deed John, third Duke of Roxburghe, succeeded to his father in 1755, and in 1756 completed his investiture.

Death of 3d Duke of Roxburgh, March 1804.

He died in March 1804, without issue, and, consequently, the male line of Robert, third Earl of Roxburghe, ended; whereupon the succession opened to William, Lord Bellenden, who was grandson of John Bellenden, second son of William, second Earl of Roxburghe, and only remaining male descendant of the marriage between Sir William Drum-

mond and Lady Jeane Ker, the eldest daughter of Hary, Lord Ker. Under the entail 1747 he made up a feudal title, by special service and infeftment.

William, fourth Duke of Roxburghe, when he succeeded, was far advanced in life. He had no issue, and in him was to terminate the line of Drummond, which had been intruded into the house of Cessfurd. The line of Fleyming, also conditionally called by the nomination 1648, had for a considerable time been extinct. The whole series of heirs female, for which the first Earl of Roxburghe had shown a predilection, being thus exhausted, the inheritance, according to his settlement, and every subsequent entail raised upon it, was, as the appellant stated, to be restored to the heir male general of the eldest daughter of Lord Hary Ker, that is Lady Jeane Ker, and the fee replaced and secured in the channel of that investiture by which its descent had been regulated for a period of two hundred years.

William, fourth Duke of Roxburghe, died at Fleurs on the 22d day of October 1805.

Claims of the competing parties.

The appellant was a male descendant of the house of Cessfurd, and claimed as heir male general to Robert, first Earl of Roxburghe, and heir male general to his son Hary, Lord Ker. He stated that Walter Ker of Cessfurd, in 1480, had two sons. Robert of Caverton, the eldest; and Mark Ker of Dolphinstone, the youngest. That Lady Jane Ker, who was married to Sir Wm. Drummond, was descended in a direct line from Robert Ker of Caverton, the eldest son, and after the extinction of her heirs by her marriage with Sir Wm. Drummond, he, as being the heir male of Mark Ker, in a direct line, was entitled to succeed, as heir male general, both to her and to Lord Hary Ker. He also claimed as heir male whatsoever under the destination in the deed 1648, on the assumption that the destination was confined to the "eldest daughter" of Hary Lord Ker and her heirs male.

Sir James Norcliffe Innes contended that the terms "eldest daughter" were not to be confined solely to Lady Jane Ker, but included the other three younger daughters of Hary Lord Ker; and he therefore claimed as heir male of the body of Margaret, the third daughter of Hary Lord Ker, alleging that his great-grandfather was the eldest son of Sir Robert Innes of Innes, who was married to the said Margaret, and therefore that he was the heir male of the body of his great-grandmother Lady Margaret Ker. He also offered to prove that there

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were no heirs male of the bodies of Ladies Jean and Anna alive.

Mr. Bellenden Ker claimed through William, last Duke of Roxburghe, who had been, previous to his accession, of the younger branch of the family, under the title of Lord Bellenden. Lord Bellenden was descended of John, the youngest son of Sir Wm. Drummond (second) Earl of Roxburghe. He stated, that at the time of the late Duke's succession, the nearest relations of the former Duke (John) were his sisters, Lady Essex Ker and Lady Mary Ker, the heirs of line of the elder branch of the family; and Mr. Bellenden Ker, who was the eldest son of the Honourable Mrs. Gawler, who was the eldest daughter of John, the third Lord Bellenden, grandson of Sir William Drummond and Lady Jean Ker. He was therefore the great-great-grandson of these parties, and, on failure of Lady Essex and Lady Mary Ker, was the heir of line of the family. He, besides, contended that the last Duke of Roxburghe (Duke William) being the last member of the tailzie of the Drummond line, by the marriage with Lady Jeane Ker, the eldest daughter of Lord Hary Ker, and under the assumption that the destination was confined to her alone, as "eldest daughter," he was entitled to execute the new entail in his favour, because he then held the estates in fee simple, unburdened and unfettered in favour of any other heirs.

Change of previous investitures by him.

Accordingly, and before Duke William's death, he had granted, in June 1804, certain deeds, intended to change entirely the previous investitures, by disponing the estate to a second cousin of his own, John Bellenden Gawler, Esq., now John Bellenden Ker. This was effected by the Duke executing a conveyance in the form of a trust disposition of the estates, with a relative deed of entail, limiting the succession, in the first instance, to Lady Essex Ker and Lady Mary Ker, sisters of John, Duke of Roxburghe, and, after their death, to Mr. Bellenden Ker and his brother Mr. Gawler, and the heirs of their bodies. In September 1804 he granted to Mr. Bellenden Ker sixteen feu dispositions, comprehending the absolute property of the whole estate, which is the subject of an after appeal.

He, in January 1805, made a new settlement, revoking the former destination to the sisters of his predecessor, and limiting the succession, on failure of himself, and the heirs of his body, to Mr. Bellenden Ker and the heirs of his body. Lastly, he executed in June 1805 a third entail, conveying

the estate directly to Mr. Bellenden Ker, and the heirs of his body, whom failing, to a series of substitutes, under a declaration of nullity in case any descendants of his own body should exist at the time of his death.

The appellant conceiving himself entitled, by the failure of the prior substitutes, to enter into the possession of the estate as heir of tailzie, empowered a person to demand admittance in his name to the mansion house of Fleurs, and this being refused, he presented a petition to the Sheriff depute of Roxburghshire, for the purpose of obtaining judicial authority to enforce his claim. To this petition answers were put in on the part of Mr. Bellenden Ker and the trustees.

Present actions.

Pending these proceedings, a petition was presented to the Court of Session by the respondents, Sir James Norcliffe Innes, Bart., late of Innes, in the county of Moray in Scotland, now of Innes House in the county of Devon, claimant of the estates and honours of the family of Roxburghe, and James Horne, Writer to the Signet, his commissioner. His claim set forth, that he was the heir male of his great-grandmother, Lady Margaret Ker, *third* daughter of HaryLord Ker, and, in that character, entitled to succeed to the honours and estates of Roxburghe, under the clause of destination in the entail 1648, in favour of the heirs male of the eldest daughter of Hary Lord Ker; and as he was about to take the necessary steps for establishing his right, he prayed the Court to award sequestration of the estate until the issue of his competition with the other claimants. Answers were put in by Mr. Bellenden Ker and the trustees, and the proceedings before the Sheriff were advocated *ob contingentiam*, and an interlocutor was pronounced, sequestrating the estates. Against these interlocutors appeals were taken to the House of Lords, which are now in dependence.

Sequestration of estates pending competition.

In the meantime, the appellant, Colonel Ker, proceeded to obtain himself served heir of tailzie to the late Duke of Roxburghe, a character which he conceived himself to possess, in consequence of his previous services expede as already referred to.

Competition of brieves.

Sir James Norcliffe Innes having likewise purchased brieves for serving himself heir of tailzie and provision to the deceased, a competition arose between them, in which, on the application of both parties, the Court of Session appointed four of their number to be assessors to the macers.

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In this competition, appearance was made for Mr. Bellenden Ker and the trustees of the late Duke of Roxburgh, who insisted that they had both right, title, and interest, to be heard as parties in the services, upon the ground that they stood infeft in the estates of Roxburghe, which the claimants were severally claiming to be served heirs in special. This demand gave rise to a debate of some length before the Court of Macers and their Assessors. In that court, another discussion arose, in consequence of Sir James Norcliffe Innes having, contrary, as was alleged, to all established form and practice, insisted, that before it was determined which of the two competitors had a title to be served heir of tailzie, or, in other words, what was the legal construction of the subsisting investitures of the estate, a jury should be called, and evidence of the propinquity of each of the competitors laid before them for their verdict.

The appellants, on the other hand, objected to this mode of procedure, as an inversion of the established procedure of the Court; that it was inexpedient to investigate facts before their relevancy be tried; and that the previous decision of the question of law would shorten the cause, and relieve one competitor from proving an unavailing propinquity.

After parties had been heard on both points, the Court of Macers pronounced the following interlocutor:—" The " Macers having heard the above debate, and advised with " the Lords' Assessors, they make avizandum to the Lords of " Council and Session therewith; and appoint the questions " with regard to the form of proceeding in the service, as " also of the competency of Mr. Bellenden Ker, Gawler, " and Seton Karr, being allowed to appear to be heard as " parties in this service, to be stated to the said Lords of " Council and Session, in memorials to be reported by the " Lords' Assessors for that purpose; and appoint the memo" rials to be boxed on or before the 31st January instant."

Jan. 20, 1806.

In consequence of this order, memorials were presented to the Court of Session by all the three parties; upon advising which, this interlocutor was pronounced:—" Upon " report of Lord Hermand, and having advised the mutual " memorials for the parties, the Lords remit to the Macers, " with an instruction to find, *Primo*, That John Bellenden " Ker, and Henry Gawler, and John Seton Karr, Esqrs., " have a title to appear in the services of Brigadier-General " Ker, and Sir James Norcliffe Innes, Bart., and to be heard

Feb. 14, 1806.

" for their interest; and, *Secundo*, That the points of law, " with respect to the construction of the tailzie and settle- " ments of the estates of Roxburghe, must, in the first place, " be determined; and, for that purpose, recommend to the " Macers to hear counsel for the parties, and to proceed " otherwise in the cause as to them shall seem proper."

Feb. 17, 1806.

The Court of Macers accordingly pronounced this interlocutor:—" The Macers having considered what has been " respectively stated by the counsel for the parties in the " mutual brieves before mentioned, and advised with the " Lords' Assessors, they, in terms of the aforesaid interlocu- " tor of the Lords of Council and Session, find, *Primo*, That " Messrs. Bellenden Ker, Henry Gawler, and John Seton " Karr, have a title to appear in the services, and to be " heard for their interest. And, *Secundo*, That the points " of law, with respect to the construction of the tailzie and " settlements of the estate of Roxburghe, must, in the first " place, be determined; and, in order thereto, make aviz- " andum to the Lords of Council and Session with the case, " in order to be reported to their Lordships by the Lords' " Assessors, *quam primum*, for their opinion and direction; " and, in the meantime, adjourn further procedure in the " Courts of Service, to the day next."

While this competition was going on, both the appellants and the respondents, in this *First Appeal*, had raised actions of reduction improbation against Mr. Bellenden Ker, &c. to annul and set aside the conveyances executed by the fourth Duke of Roxburghe, by which the Duke had attempted to defeat and destroy the standing tailzied investitures, by which he held the titles and estates. These actions are the subject of the appeal which immediately follows this.

Vide the Appeal in the Reduction.

In the competition of brieves, when the cause came back to the Court, on the above interlocutor, they directed it to be argued in memorials.

In these memorials, the appellants pleaded, That the clause of destination, upon which the question turned, as expressed in the deed of nomination and tailzie 1648, was, " Qlks all failzing, &c. the right of the said estate sall per- " tain and belong to the eldest dochter of the said umql " Hary Lord Ker, without division and yr aires male she " always mareing or being married to ane gentleman of " honourl and lawful descent, wha sall perform the condi- " tions above and under written Qlkis all failzing and yr " sds aires male to our nearest and lawful aires male qtsom-

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" ever." Unless the respondents therefore can show, first, that under the description of "eldest daughter," a *third* daughter is comprehended; and, secondly, that, by the term "heirs male," the male line or heir-male general of Lady Jeane Ker is not exclusively called, the claim of Sir James Norcliffe Innes is manifestly unfounded. If they establish the first proposition, but fail in the second, Colonel Ker, as heir-male of the eldest daughter of Hary Lord Ker, will of consequence be preferable to Sir James Norcliffe Innes, as heir male of Lady Margaret the third. If they establish the first proposition, but fail in the second, it will also follow, of necessity, that Sir James Norcliffe Innes, as heir male of the body of Lady Margaret, will not be comprehended in the destination at all, and the succession will devolve on Colonel Ker, not indeed as heir male of Lady Jeane, but as heir male of Robert, Earl of Roxburghe, the entailer. The first proposition was untenable, because a single substitution, in favour of an eldest daughter, cannot consistently, either with common or technical language, be extended into four consecutive substitutions in favour of a series of daughters; and that the second proposition is untenable, because it is contrary to the fundamental principles of construction, to convert a legal phrase of fixed and definite import into another legal phrase of an import entirely different, by an arbitrary interpolation of the words which distinguish them:—That the destination, as it stands, is simple, intelligible, and practicable:—That the words of the entail ought not to be controlled by the conjectured will of the entailer, who has been a century and a half in his grave; but, nevertheless, that it may be inferred, from every reasonable source of conjecture, that he had expressed the meaning which he was desirous to convey:—That neither the structure of the clause, its relation to the context, the phraseology of the deed, nor the import of any other clause, gives the smallest countenance to that construction for which the respondents contend:—That the deed in 1644, which had been revoked and abandoned by the maker, cannot expound the posterior deed which he substituted in its room; but, if it were receivable for the purpose, that it would prove highly advantageous to the argument of the appellants:—That feudal grants *inter vivos*, and in particular, Scottish entails, admit no latitude of construction; and that this principle has been established by a numerous and unbroken series of decisions, both in the Court of Session and in the House Lords:—That

in both, destinations depending on the identical terms now in question, have been repeatedly construed, and the appropriate and technical meaning of these terms invariably adhered to, in circumstances much more favourable to the plea of intention:—And, finally, if others were indulged in that disregard of legal phraseology and license of interpolation which the respondents demand, that not an investiture in Scotland could be relied on, nor the title of a landed proprietor be deemed secure.

The Court of Session having advised these memorials, pronounced this interlocutor:—" The Lords having advised " the mutual memorials given in by the parties in this " cause, in obedience to the interlocutor of 18th day of " February 1806, writings produced, and having heard " counsel for the parties in their own presence, they remit " to the Macers, with this instruction,—that they prefer the " claimant Sir James Norcliffe Innes, heir male of the body " of Lady Margaret Ker, in the foresaid competition of " brieves relative to the estates and honours of the family of " Roxburghe, and to dismiss the brieve at the instance of " Brigadier-General Ker; but supersede extract until the " first box-day in the ensuing vacation."

March 6 and 10, 1807.

On further reclaiming petition and answers the Lords pronounced this interlocutor:—" The Lords having resumed " consideration of this petition, and advised the same, " with answers thereto, they of new remit to the Macers, " with this instruction,—that they prefer the heir male of " the body of Lady Margaret Ker in the aforesaid competi- " tion of brieves relative to the estates of the family of " Roxburghe, on his proving his propinquity; and, in that " event, to dismiss the brieve at the instance of Brigadier- " General Ker; and, with these explanations, they refuse " the desire of the petition, and adhere to the interlocutor " reclaimed against."

July 7 and 8, 1807.

Opinions of the Judges:—

(*Interlocutor*, 6*th March* 1807.)

Lord President Campbell said,—" 1st Point. The eldest daughter denotes, in my opinion, seniority; for example, eldest magistrate, eldest judge, &c. It is not usual to say senior person, e. g. a senior son or senior daughter, or senior heir portioner; but eldest just means the same thing, and implies progression, for, upon failure of the person to whom that designation applies in the first place, the next daughter comes in her place as eldest,—and therefore a younger son or daughter may come to be the eldest. Besides, the

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words 'without division,' and word THEIR, clearly implying, in the present case, not individuality in a strict sense, but a description applying successively to different persons. It is just primogeniture. It is not the *vulgaris substitutis* of the Roman law; but must have its effect at whatever time the succession opens in favour of the eldest heir portioner then existing. It is not necessary that the daughter who was generally the eldest should be now alive, for if she has left such heirs as are designed in the deed, these come in her place. If she has left none, the person who was second daughter has now become the eldest, or heir who, of course, must next take. But the great difficulty lies in the 2d Point, namely, the import of HEIRS MALE expressed generally. See the case of Linplum, and Justice Clerk's (Braxfield) opinion in that cause. While, on the one hand, the terms *heirs male* are generally understood to be technical, and it is difficult for a Court to construe the legal signification of words from probable intention; on the other hand, every deed ought to be construed so as to be consistent with itself, and avoid absurdity. If he meant to call only Lady Jean and her *heirs male* whatsoever, he might have stopt there.

Mor. 15425. Ante vol. ii. p. 322.

"The second daughter could not have any other collateral heirs male except those of her sister, and these also included her own heirs male, and yet these are called in after the former are exhausted, i. e. after they themselves are exhausted. If he had meant to exclude the younger daughters when they became eldest in their order, he would have said so. He had only to call Lady Jane alone by name and not by description, and to have added some words of exclusion as to the rest. Eldest heir portioner would not have been proper, as he did not mean to call their posterity in the female line. Heirs male *whatsoever*, or heirs male general, are technical. But *heirs male* may be so or not, according to circumstances. (See case of Linplum). The word *their* heirs male, if taken literally, would bring in General Ker even before the son of Jane.

"Heirs male, and heirs male whatsoever, are contrasted in the same clause. The first, which is introduced by the word *their*, means the peculiar heirs male of the family. It is not a simple destination, but a complicated clause—the common words heirs male would bring them in too soon. In the case of Linplum, there is great reason for thinking that the phrase was properly altered, to let in the third and other younger sons of Drummelzier, and even eventually the eldest, as the only object as to the eldest son was to exclude the eldest of the Tweedale branch. Besides, suppose one daughter only to have been here meant, must we not hold it to be the eldest at the time of the succession opening? It could not mean eldest born, for she might have predeceased him. Neither could he mean the eldest daughter *at his death*, for he called first the Drummonds, whose father was married to the eldest, and then the Flemings, whose father was married to a daughter of Sir William Drummond's.

"We must first see what the deed does *not* mean, and then see *what* it does mean. The instance of an elliptical mode of expression, given from Livy, in the case of the College of St. Andrew's, must be explained. There is a distinction in the English law between testaments or devises, and deeds. The latter are strictly construed; the former more favourably for intention. A nomination of heirs with us is purely testamentary. This is clearly made out in the memorial for Mr. Douglas, drawn by Mr. Burnet in the Douglas cause. A deed, in England, is a writing or instrument in which two parties at least are concerned,—a granter and a grantee,—and proceeds upon a consideration as the cause of granting. Vide Fonblanque on Equity, p. 144. A deed imports consideration, and is for the advantage of the granter, and if there be doubt in the words, they must be construed against the granter. Vide also Blackstone, vol. ii. p. 296. A testament is a conveyance of the personal estate, and a devise of real estate, which, by the Statute of Wills, is allowed, but under certain precautions imposed by the Statute of Frauds. Testaments and devises are liberally interpreted, so as to give effect to the *intention* of the granter, who alone speaks, no other party being understood to be concerned; with attention always to certain general rules of construction, such as, that we are not to go out of the words of the writing itself: but must take the whole of it together, with this limitation only, that we are not to imply restraints upon property. A testamentary deed, which flows from will alone, does not cease to be so because it is changed afterwards into a feudal investiture. It is not to be differently construed at different times. The question, *who is heir?* is always a question *inter familiam*, with which the public has no concern. The act 1685 has nothing to do with this, but merely with limitations on property: and this is the meaning of the judges' decision in the case of Duntreath. In the present case, Earl Robert meant, upon failure of the first branch of the destination in the Drummonds and Flemings, to carry back the succession to his granddaughters and their representatives in the male line, or at least *ex concessu* to one granddaughter, and her male representatives of a certain description. The word *their*, and the words *without division*, denote plurality, and, in a question of intention, 'every string must have its sound.' But, suppose *one daughter* only to be meant, Who is she? The word eldest is *relative*, i. e. it must either refer to the time of birth, or the time of decease of the tailzier, or the time of succession opening to the second branch of substitutes last meant; with this qualification, that she and her heirs male must be taken together, so that although a daughter has failed before that time, yet if she has left a representative in the male line, i. e. a son's grandson, &c. who were representatives, and, by the plain meaning of the deed, stands in her place, these male descendants must take just as she herself would have done had she been alive. A collateral heir could never be understood as the meaning under that de-

scription. He can never claim through her as his ancestor, especially if there be any substitution after him, with which such a claim would be inconsistent. The competition might have happened between the collateral heir male and Lady Ann or Lady Margaret then living.

Lord Justice Clerk (Hope).—" We must always look to the words of a deed. Writing is a reiterated speech. If a word or phrase is used capable of two meanings, we must find out which of them was meant. If it is capable only of one meaning, we must take it. Heirs male are technical words, having a precise legal sense and meaning, and therefore no question of intention, and no construction can be allowed to control these terms. There are many patents of honour taken to heirs male, but no one ever doubted who that means. As to the destination 'eldest daughter,' I think this means the eldest born, and that it would be a stretch to carry it farther. In this view, I think General Ker ought to be preferred.

Lord Meadowbank.—" My Lords, Having considered this case as a very doubtful one, and being fearful that, if decided according to the indications of intention afforded in the deeds, it might touch on the rules of interpretation of settlements of succession, which I have ever deemed it of the last importance to preserve sacred and inviolable, it is a very great satisfaction to me to find myself relieved from this anxious state of mind by the very able discussions which have taken place at the bar, and the opportunity they have afforded of contemplating the case at leisure in a variety of lights. One simple view of it appears now to me to admit of no reasonable doubt, and to be free of the difficulty which certainly attends the attempt of giving a full legal interpretation to the controverted clause, suited to all the events which might have happened and might have called for such an interpretation. In my humble opinion, under the events which have happened, Lady Margaret Ker is now entitled to the legal description in the controverted clause of the eldest daughter of umql Hary Lord Ker, and Sir James Norcliffe Innes is her nearest heir male, and, of consequence, the heir of the destination contained in that clause. In this opinion nothing, I think, admits of any debate, but the application to Lady Margaret of the description of eldest daughter of Hary Lord Ker; for truly I do not think it admits of debate that Lady Jane Ker ever took under the destination, and can be held to have exhausted it. Lady Jane, without doubt, was a substitute heir of entail, and Earl William Drummond's marriage with her was the condition on which he succeeded to the estate and titles; but she never succeeded to the estate, nor did any of her descendants succeed in her right, or ever serve, or have occasion to serve, heir to her. I think it therefore utterly impossible for any lawyer to conceive that the destination to the eldest daughter has ever taken place in the person of Lady Jane Ker, or her descendants; and, accordingly, General Ker claims to serve, not to Lady Jane herself, or any of her

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descendants, but only through her as her collateral heir male, under the controverted destination to the eldest daughter. Holding it then clear that the failure of the male descendants of Earl William Drummond by Lady Jane now opens the succession to a different destination from that in which the estate, since the death of Earl Robert, has been enjoyed, the only question for your Lordships' determination at present, in my opinion, is, Whether the controverted clause in question ought to carry the succession to General Ker, as collateral heir male of Lady Jane Ker, under the description of 'eldest daughter of umql Harry Lord Ker, without division, and 'their heirs male?' or whether this same description does not now belong to Lady Margaret Ker, and, of course, confer the succession on her undoubted heir male, Sir James Norcliffe Innes?

Tennant v. Baillie, Mor. 14941. House of Lords, ante vol. ii. p. 243.

" It will be remarked, in trying this question, that the cases of Tennant *v.* Baillie, and Linplum, may be laid quite out of consideration. The term *heirs male* here is interpreted the same way by both parties, and it is equally unquestionable that General Ker is heir male of Lady Jane, and that Sir James Norcliffe Innes is heir male of Lady Margaret. The only point, in this view of the case, at issue is, who is the eldest daughter of Hary Lord Ker, now that the succession, by the failure of the Drummonds and Flemings, has opened to Hary Lord Ker's eldest daughter?

" It will also be observed, that the controverted clause says nothing of the eldest daughter favoured marrying a gentleman of the house of Ker. All that is there conditioned in this way, is the marrying a gentleman of honourable and lawful descent, which there can be no doubt Lady Margaret fulfilled in marrying into the very ancient family of Innes. Nothing therefore need be said on this qualification.

" Returning thus to what is plainly the only debateable question, under this state of the case, to whom does the description of eldest daughter of umql Hary Lord Ker now apply? I observe, in the first place, that here there is no room for any attempt to stir a doubt whether your Lordships are to read the clause as it stands in the deed 1648 or charter 1650, for in the disposition 1747, granted for the purpose of forming the late Duke John's title to the estate, and which formed it accordingly, on which prescription followed, the destination in the controverted clause is expressed in the same terms precisely as in the deed 1648, except using the term *her* heirs male, instead of *their* heirs male, a circumstance which I consider as of mighty little consequence, especially as regards the question I am to examine. At the sametime, I think it right to state it as my clear and decided opinion, that the deed 1648, and the language there used, form the legitimate subject of your Lordships' construction in deciding between these parties. That deed is expressly referred to in the deed 1747, and in previous deeds of a similar nature, for the very purpose of maintaining its des-

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tinations and provisions in force, and of holding them up as the *regula regulans* of the succession. And as I conceive it to be settled law, that a destination of succession may be competently referred to in the investiture, as contained in a separate document, and by such reference will be equally effectual as if it were specially set forth in the investiture, I have not a shadow of doubt that your Lordships are equally at liberty to give effect to what you reckon to be the true import of the deed 1648, as your predecessors would have been, had the question occurred within the forty years' prescription of the date of that deed. Clauses of destination contain no real rights at common law, nor form burdens on estates.

"I hold, secondly, that your Lordships are bound to construe the terms eldest daughter, in the controverted clause, according to what you reckon was the true intent and meaning of Earl Robert in employing it. 'Eldest daughter' is not, like heir male, a technical term; it is a term of common and vulgar use, and is always employed and construed in settlements as relative to some circumstance, as eldest at the date of the settlement—eldest at the death of the testator—eldest when the destination opens—eldest relatively to, or eldest absolutely in point of birth. She, as the Jews, to prevent ambiguity, expressed it, 'was the first that opened the womb.' In the clause which soon follows the controverted one, where Earl Robert means to provide for his granddaughters, he says, 'and giff they be *all three* in life, to content and pay to the eldest the sum of 50,000 merks, to the second the sum of 30,000 merks, and to the youngest the sum of 30,000 merks.' It is plain, from the words *all three* here used, that the clause proceeded on the preconception that one of the four ladies would certainly enjoy the estate as wife of the heir, and that therefore three were all that there would be to provide for. And utterly uncertain as the Earl was which of the three would be in this situation, he describes one of them as the eldest, and gives her 20,000 more than the others, in consequence of that title, without regard to whether she should chance to be Lady Jane Ker or Lady Anne; and I suppose, that as the fact happened, Lady Anne, who I believe was Countess of Wigton, enjoyed under this description of eldest daughter this bonus of 20,000 merks above her sister, while Lady Jane, the first born, was alive and bearing children. Again, in the deed 1644, after naming the Flemings to be his heirs, the Earl conditions, 'They always marrying and taking to them lawful 'spouses, the eldest lawful daughter of the said Lord Ker, our son, 'being in life and unmarried at the time.' Here the eldest lawful daughter may plainly import either the first born or the youngers, or even the youngest, according to circumstances.

"Considering, therefore, eldest daughter as an ordinary term of common use, I apprehend we have nothing to do with all the discussion about strict and liberal interpretation to be applied to settlements. My own opinion on the point is very clear,—that in the

His opinion how deeds fall to be construed.

construction of destinations in settlements, the will of the testator, if proved, must be the rule :—that the proof must be precise, if the intent is to control technical words, and give them a sense different from their proper one. But, where the words used are not technical, and admit of different meanings, I cannot doubt that the more probable and rational one ought to be adopted in preference even to one more primary and direct, and that this must obtain with particular force in the construction of settlements where the testator had no person to bargain with, so as to call attention to every word, and where we have no resource but to judge of intention from the contents, and all the circumstances of real evidence that the case affords.

"But several cases may be supposed :—1st Case. Suppose Lady Jane had predeceased the Earl without issue, and that the Drummonds and Flemings were all gone, Would eldest daughter have applied to her? Could it have been maintained that Ker of Fawdonside would have served through her as heir of tailzie and of provision, while Lady Ann, Margaret, and Sophia were alive?

"It is said he knew what 'eldest daughter' signified,—that it signified the first born; but, did he know it always? Why, rather, did he not use the terms 'Lady Jane' at once, if he meant so?

"2d. Suppose Lady Jane survived her father, but died without issue male, and was followed by her husband after the Earl's death, and that the Flemings had failed, Could there be any doubt more than in the former case, that the destination opened to the eldest daughter of Lord Ker then actually in existence?

"It must have been perceived that it was impossible the collateral heir male could plead on any rational intention to support a claim in right of Lady Jane, in prejudice of the person then the eldest daughter when this controverted clause was to take effect. Nothing could have been more absurd than, when he expressly intended to prefer his eldest granddaughter, to have introduced collateral heirs male in preference."

Lord Armadale said,—"I think there is no prescription run against the deeds, particularly under the deed 1648, because the subsequent charter 1747, refers *in terminus* to the destination 1648. I admit the rule of interpretation as to *voluntas testatores* in the construction of a destination; but I observe that the deed 1644 is only superseded, not revoked *per expressum*, and therefore it is a fair ground of interpretation to look back to it. I agree with Lord Meadowbank, that there is no indication in the rest of the deed 1648, as unfavourable to the younger granddaughters. Nor are you to consider taxative the terms, "eldest daughter." Suppose Sir William Drummond and his heirs male, and all the Flemings dead, and Lady Jane herself before her father, would your Lordships not have held Lady Anne eldest daughter? or would you have preferred the heir male in general of Lady Jane? I also lay stress on the

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words, "*without division.*" I think the construction of technical terms, "heirs-male," more difficult. But I also confess, that there are a variety of circumstances, and a few seem to me decisive in favour of the limitation. 1. The deed was executed at a period when the terms were used in substitutions in tailzies, viz. "Heirs-male" denoted heirs-male of the body. So thought Craig and Stair. So it is recognized in the statute 1685; and the decisions of this Court in the case of Tennant *v.* Baillie. The case of Linplum was only decided in 1748. Of course, you interpreted Linplum by present language, not by the language of the 17th century. But, secondly, the clause of *acquirenda* is decisive. I rest my opinion on these two points; but there are other points also of considerable importance, viz. 1. The eldest daughter marrying a gentleman of honourable descent, which is a strong expression to indicate that the destination was not confined to one only. 2. The absurd consequence of calling the heirs male whatsoever of Robert, before the descendants of the younger. I am satisfied, from the deed 1648, that the ladies were viewed in the same light, and to take *suo ordine.* In the cases of Linplum and Tennant, the question was a mere abstract question for decision, where there was nothing to infer the deceased's intention. I agree with Lord Meadowbank otherwise."

Lord Newton.—"I am of the Lord Justice Clerk's opinion, and for giving greatest weight to technical words. A judge would take a heavy responsibility on him if he interpreted them against the true meaning perhaps of the testator, which I hope I shall never hear done. (Quotes a passage where Lady Jane is described as eldest daughter). It is clear, therefore, that the terms in the clause of destination must signify Lady Jane. 2. I think, as to the term heirs male, both from the deed 1644, and even from a clause in this very deed 1648, that Earl Robert knew perfectly well the import of heirs-male of the body, and uses it when he meant it. But here, in the deed 1648, he has not used it; and, therefore, I suppose he did not mean it. But the deed 1644 removes all difficulty, if that deed can have any effect on the question; for there the destination is more favourable to Sir James Norcliffe Innes."

Lord Hermand.—"I am for preferring Innes."

Lord Glenlee.—"I am for preferring Innes. The rule of interpretation is not to take destinations and remote analogies, but in settlements we must take some latitude of interpretation, and General Ker needs most latitude; for it is by going back to the deed 1648 that he infers eldest daughter is a nominatim designation of Lady Jane. But you must take not partial technical meanings, but take the whole clause as it stands. Words become technical by the operation of them, or the use of them, and their meaning thus become fixed. For example, you might repeat decisions in a case exactly like it, but a slight alteration from these technical words, as for instance, calling the heir-male claiming, after the heir-

female, with whom the contest occurred, would alter the case. I am therefore of opinion that the eldest daughter at the moment of the succession opening was here meant. There is a marked opposition between heirs male of the Earl, and the heirs male of the daughter."

Advising, 7th July 1807.

Lord Meadowbank said,—" In considering the clause, the first point to settle is, Whether it requires construction ?

" It calls as substitutes the eldest daughter of Lord Hary Ker without division, and without other mention of her sisters than is implied in this expression, " without division." It calls in the plural number, *their heirs-male,* under the *proviso* of marrying a gentleman of lawful and honourable descent, who shall perform the conditions of the entail, and then calls certain parties, and which all failing, and their said heirs-male, our nearest heirs-male whatsoever.

" The first point is, What does eldest daughters mean ? It is said to be equivalent to calling Lady Jane Ker by name ; but had she been called as an individual, would ever any person have thought of adding the words, *without division?* Whom was she to divide with ? But if without preference to one above another, further than mere seniority, as it happened, when the succession under this branch of the destination opened, the words, without division, seems a proper and natural addition.

" Second, Then what is the antecedent to ' *their ?*' General Ker at first said, that the gentleman of lawful and honourable descent that she was to marry was meant, and the heirs of her and the gentleman. But general Ker now says, that this word is a mere blunder, but I am not to suppose a blunder necessarily, or even if there is a grammatical blunder, am I entitled to deny a meaning to it, if I can find one ? And the words *their* is essential to the interpretation of heirs male. I must know *whose heirs male* are preferred before I can say who the heirs male called are. *Third,* Which all failing, ' *and their saids heirs male.*' Now, who are these *all,* and what are the *saids heirs male ?* Are they the heirs male of the bodies, or the heirs male general of the *all ?*

Second Point. What is the true construction ? The rules of construction have always been against conjectural construction. A person must not only have the power and the intention, but must express his intention, to entitle a court of justice to give effect to his purposes. But the expressions of intention are sometimes very obscure ; and, therefore, I hold it fair to seek for any unsuspected source of discovering their true meaning, and to judge with such aids. Expressions, otherwise obscure, become often in this way quite clear, and apparently pregnant with meaning. Hence, we inquire after the circumstances of a man's family and situation, when we have such passages to construe in his will ; and shall we refuse to look into

former settlements, where we may discover the views he had been in the habit of entertaining and cherishing in this very matter of settlements. The sources of construction, in this view, are, in this case, 1. A corresponding clause in a deed 1644. 2. A general correspondence between the deeds 1644 and 1648, and the latter deed generally more favourable to his granddaughters than 1644, particularly in the disability of the Drummonds and Flemings succeeding to transmit the succession to children by any other wife than the ladies, unless they decline the honour.

" But still we are not at liberty to hold that clause transfused into the deed 1648. I have got probably the key to the riddle, but still I must see whether the riddle be so constructed as that it answers the key.

" 1. I can have no doubt that it sufficiently denotes the eldest at the time of the succession opening to the substitution. This is the ordinary construction in all such cases. It is favoured by the whole conception of the deeds. The daughters of Hary Lord Ker were to be offered marriage, according to seniority—portions to any three, not the countess, and the eldest of them has her two-fifths more.—Without division, alludes to a calling of other sisters; and whether or not this and other words in the clause shall be held to amount to an actual calling of them; still they plainly infer the calling of one of a number, not an abstract individual, and, of consequence, the eldest at the time.

" 2. I am clear that the heirs-male of the body is the import of the term used in this destination to eldest daughter.

" The first key to the riddle admitted that import, and there is no reason to suppose any change of mind, but every reason to the contrary.

" The second riddle itself, *i. e.* The doubtful clause, if narrowly examined, admits of that construction better than any other. 1. *Their heirs* male, *i. e.* as General Ker first alleged—' *Eldest* daughter and *her husband* (and rightly, according to the correct principles of construction), their heirs male, viz. the heirs male of both, and who are these, but heirs of the marriage only. 2. The *marrying* applies only to heirs as a condition precedent, as Mr. Cranstoun terms it, not to eldest daughter. Could it ever bar a child's service, or an aged lady's service, that she was not married? But if it applied only to heirs, What heirs could it rationally apply to? Certainly only to the production of an honourable *union*, not to heirs male general, nowise countenanced by the circumstance;—as, for example, the heirs male of a disgraceful *union*. 3. And what I hold conclusive (and taking this case as clearly one out of the case of Linplum), is the clause of general appointment."

Lord Armadale.—" I am clear, that by the general law, a destination to ' eldest daughter,' means the eldest daughter alive when the succession opens. ' *Heirs male*' here mean heirs male of the marriage, viz. by her husband, of lawful and honourable descent.

The clause of *acquirenda* supports this opinion ; and in this no contrary intention is expressed."

Lord Glenlee—" I remain of my former opinion."

Lord President Campbell.—" I remain also of my former opinion."

Lord Justice Clerk (Hope).—" There is a doubt even as to intention, for when the Earl executes a deed in 1644, to his four daughters by name, and afterwards, by another deed in 1648, alters this destination, and conveys to the eldest daughter only, the intention cannot be very clear in favour of Sir James Norcliffe Innes. Besides, if intention is to rule, it must be an intention appearing within the four corners of the deed 1648 : for to read that deed by the intention discoverable from a previous deed, would be incompetent. So that, on all hands, the intention being doubtful, I think this binds us imperatively to follow the technical words."

Lord Woodhouselee.—" Sir James Norcliffe Innes must make out that a destination to a man and his *heirs-male*, means heirs-male of his body *alone*."

The Court, at this advising, was divided as formerly.

STATE OF VOTE.

For Sir James Norcliffe Innes.	*For General Ker.*
Lord President Campbell.	Lord Justice Clerk.
Lord Polkemmet.	Lord Woodhouselee.
Lord Cullen.	Lord Robertson.
Lord Armadale.	Lord Newton.
Lord Bannatyne.	
Lord Balmuto.	
Lord Hermand.	
Lord Dunsinnan.	
Lord Craig.	
Lord Glenlee.	
Lord Meadowbank.	

From these interlocutors, in which these opinions were given, the appellants brought the present appeal to the House of Lords ; and the respondents also, in conjunction with the appellants, brought a cross appeal as to the previous interlocutors of the Court of Macers, and the Court allowing Mr. Bellenden Ker and Mr. Gawler, and John Seton Karr, to appear in the competition for their interests.

Vide next Appeal.

Pleaded for the Appellants.—The appellants maintained the following propositions at great length :—1. In the limitations of a Scottish tailzie, the term " eldest daughter," in its usual and appropriate sense, is the description of an individual, and not a collective signifying a series of daugh-

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ters; therefore a substitution, conceived in favour of the eldest daughter of Hary Lord Ker, did not comprehend his *third* daughter. 2. The term "heirs male," in the law of Scotland, invariably extends to heirs male in general; therefore, under the second clause of destination in the tailzie of Roxburghe, the heir male in general of the eldest daughter of Hary Lord Ker, is preferable to the heir male of the body of his third daughter. 3. If the limitations of a tailzie are intelligible and practicable according to the usual and technical import of the words in which they are expressed, they ought not to be controlled by a reference to the presumed intention of the entailer; therefore presumptions with regard to the Earl of Roxburghe's intention ought not to be allowed as a ground for extending a substitution in favour of his eldest granddaughter into a substitution in favour of his four granddaughters, or for contracting a substitution in favour of heirs male into a substitution in favour of heirs male of the body. 4. The presumptive evidence with regard to the entailer's will, upon which the respondents rely, is as inconclusive as it is incompetent; and there is reasonable ground to infer, from every source of probable conjecture, that the words he employed, taken in their common acceptation, express the meaning which he wished to convey. 5. No inference arises either from the structure of the clause in question, its relation to the context, the import of other clauses, or the peculiar phraseology of the entail, in favour of that interpretation which the respondents propose; on the contrary, they all tend to show that the terms "eldest daughter," and "heirs male," are employed in their usual and appropriate acceptation. 6. The clause to be construed does not import a destination singly to whichever daughter, or whichever male line descending of the daughters of Lord Hary Ker happened to be eldest when a right opened under it, or in the words of the respondents, to the eldest *debito tempore;* and although that construction were to be adopted, it would not avail the plea of Sir James Norcliffe Innes. 7. The Earl of Roxburghe's deed of nomination in 1644, virtually revoked by the charter in 1646, and by the subsequent deed 1648, ought not to be admitted as evidence of the entailer's intention, for the purpose of controlling or explaining the latter deed. 8. If the deed of nomination in 1644 were admissible evidence of the Earl of Roxburghe's intention in 1648, and as such might be used in expounding his entail, it would redargue the construction for which the respond-

ents contended, and serve to show that the terms "eldest daughter" and "heir male," in the clause in question, are meant to be taken in their ordinary and appropriate sense. 9. Other documents which have been resorted to, as explanatory of the clause in question, support the construction for which the appellants contend. 10. By the law of Scotland deeds are more strictly construed than wills; of deeds those connected with the investitures of land are more strictly construed than others; tailzied investitures are the most strictly construed of all; yet the respondents have applied a latitude of construction to the tailzie of Roxburghe utterly inadmissible, even in the case of a will. 11. The principles of construction on which the appellants rely, have been established by a numerous train of decisions in the Court of Session and in this Honourable House. In every case which has occurred tailzies have been strictly interpreted, the express destination of the entailer has been carried into effect, if intelligible and practicable, and the legal import of the terms "heirs" and "heirs male" has been scrupulously adhered to, in opposition to presumptions much more conclusive than the respondents can urge, that they were meant to be confined to descendants. Here the appellants referred to the following cases: Duke of Hamilton *v.* Selkirk, 3d April 1740; Scotts *v.* Carfrae, 13th Dec. 1769, Hailes' MSS. Notes; Bailie *v.* Tennant, 17th June 1766, House of Lords, 26th March 1770; Hay *v.* Marquis of Tweedale, 20th June 1771 and 19th Feb. 1772, Fac. Coll. House of Lords, 23d April 1773; Hay *v.* Hay, 25th Nov. 1788, Mor. 2315, House of Lords, 7th April 1789; Campbell *v.* Campbell, 28th Nov. 1770, Fac. Coll.; Coutts or Descury *v.* Ball, 6th March 1806. 12. The rights of the parties in this competition must be regulated by the subsisting investiture, and not by the tailzie in 1648; therefore the respondents are not entitled to plead on any expression in the former which was altered in the latter. *Second Appeal.* John Bellenden Ker, Henry Gawler, and John Seton Karr, having been allowed to appear, pleaded that neither Sir James Norcliffe Innes nor Brigadier-General Ker were entitled to be served, because the late Duke of Roxburghe was the last substitute under the entail, and being, of consequence, an unlimited proprietor, had effectually conveyed the estate to his trustees and disponees. Consequently, in the cross appeal, the appellants concur with Sir James Norcliffe Innes in contending that John Bellenden Ker and Mr.

Ante vol. i. p. 271.

Ante vol. ii. p. 243.

Ante vol. ii. p. 322.

Ante vol. iii. p. 142.

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Gawler, and John Seton Karr have no interest to appear in this competition of brieves.

Pleaded for the Respondent, Sir James Norcliffe Innes.— 1. In consequence of the death of William, Duke of Roxburghe, who was the last male descendant of the marriage between Sir William Drummond and Lady Jean Ker, the issue male of Lady Anna Ker, and of the persons in succession designated for her husband, having also failed, the right of succession has devolved upon the respondent, Sir James Innes Ker, the great-grandson, and lineal male descendant in the direct line of the marriage between Lady Margaret Ker and Sir James Innes, under the following clauses contained in the deed of nomination of 1648, " and qlkis all " failzeing be deceis, &c. the richt of the said estait sall per- " teine and belong to the eldest dochter of the said umql " Hary Lord Ker, without divisioune and *yr aires maill* she " alwayes mareing or being married to ane gentleman of " honnol and lawful descent wha sall performe the condi- " tiounes above and underwrn Qlks all failzeing and yr " sds aires maill to our narrest and lawful aires maill qtsum- " ever :"—— " And Quhilkis personnes successivè designit " be us in manner foresaid and under the provisiounes re- " strictiounes and conditiounes above written and no other- " wise we by thir pnts design nominate and appoint to suc- " ceed to us as aires of tailzie in our haill lands and baronies " erledom and others above written, contained in the said " pröries and infeftments and in all utheris lands and heri- " tages pertaining to us (failzeing of airis maill lawfully got- " tin or to be gottin of our awin body as said is) and sall be " servit retourit entirit and infeft thereintil as airis to us " sicklike and in the samen manner as giff they were spe- " cially and particularly insert in the saides pröries and in- " feftments following or to follow thereon and ordains that " the samen conditiounes provisiounes and restrictiounes " abovewrn sall be ather particularly or generally expressed " and set down in the service and retour and infeftment to " follow thereupon in favour of the saidis airis of tailzie *re- " spectivè* and in caise we will be exprest and set down there- " intil nather generally nor particularly in that caice we will " and grant and be this pnts expressly declare that the sa- " men provisiounes restrictiounes and conditiounes above " specified sall be as effectual as giff they were specially " exprest and set down thereintil." 2. It is unnecessary to resort to construction, in order to interpret the true mean-

ing of this clause of destination under which Sir James Innes Ker claims, it is, according to the soundest principles of law, indispensably requisite that the whole words shall be taken together, and the fair sense and meaning of all of them allowed to have full effect; that words are not to be taken separately from others with which they stand necessarily connected; that where the intention of the granter of the deed is fairly discoverable it ought to rule the words, and that the words ought not to rule the intention; that the intention may properly be collected not only from the whole clause itself, but from the rest of the deed in which it occurs, as well as from *any other deed* executed by the same person, with reference to the same subject, *which has not been expressly* cancelled or revoked; and, lastly, that a sound, rational, and probable meaning be put upon the whole instrument.

In conformity with these principles, the respondents, with all deference, insist that, by the destination in question, the right of succession to the estate of Roxburghe is provided, on failure of the prior substitutes, not to the individual eldest *born* daughter of Hary Lord Ker, and her heirs male general, but to each of the daughters of his Lordship *seriatim*, and the heirs male of their respective bodies, in their order.

The appellants maintain, in support of an opposite construction of this clause, that the words "eldest daughter" and "heirs male," are of so fixed and determinate a meaning, as to be equivalent to a destination only in favour of Lady Jean Ker, the eldest *born* daughter of Hary Lord Ker *nominatim*, and her heirs male general, to the total exclusion of her younger sisters, and the heirs male of their bodies. The respondents, upon the contrary, contend that the words "eldest daughter" and "heirs male," even taken by themselves, are not of the precise and definite import represented; but even if they were much more so than they truly are, they are not to be taken merely by themselves, but must be viewed and explained by other words of the clause with which they obviously stand united. It is submitted, that the words, "to the eldest daughter of the said "umql Hary Lord Ker, *without division*, and *their* heirs "male, she always marrying," &c. so far from necessarily designating, in the language of the law of Scotland, *the eldest born daughter* of his Lordship, and her heirs male general, to the exclusion of her younger sisters, and their issue

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male, do plainly import a destination in favour of the whole daughters of Hary Lord Ker successively, and the heirs male of their respective bodies, the eldest for the time, or her issue male, having right to succeed without division.

3. The term "eldest," when applied either to a son or a daughter, does not necessarily denote individuality, but is generally used collectively, to designate one of a class or series, and becomes, in the progress of time, applicable to a variety of individuals in their order. Thus, according to the established principles of the law of Scotland, an estate destined to the "eldest son" of A, in the event of the death of the eldest born son, descends to the eldest living at the time when the destination opens. And, in this sense, the term is evidently used in a variety of passages of the very deed now under consideration. Nothing can, indeed, more clearly demonstrate the absurdity of a contrary interpretation than the circumstance, that if Hary Lord Ker had had a daughter born elder than Lady Jean, she as well as all her younger sisters, must, on the appellant's hypothesis, have been completely excluded from all right to their grandfather's succession under the clause of destination in question. Upon this point a very familiar authority may be borrowed from the law of England, for, according to it, though the Duchy of Cornwall is declared to pertain to the King's *eldest son*, yet, upon the death of the *first-born*, it has been decided that the duchy descends to the *eldest then living*. Lord Hardwicke, in Lomax *v.* Holmden, observed, "That the eldest son of the King of England takes the "Duchy of Cornwall as *primogenitus;* although Lord "Coke, at the end of the Prince's case, says otherwise. "But this was not the point there, being only an obser- "vation of his own, and has ever since been held a mis- "take of that great man. He was mistaken in the fact, "in saying Henry the VIII. was not Duke of Cornwall, "because not *primogenitus;* for Lord Bacon, in his His- "tory of Henry the VII., affirms the contrary, that the "Dukedom devolved to him on the death of Arthur, and "this is by a great lawyer, and who must have looked into "it, as he was then Attorney or Solicitor-General." Mr. Christian, in his notes on Blackstone, adds these words to the above authority of Lord Hardwicke: "But this point was "solemnly determined in 1613, upon the death of Prince "Henry, the eldest son of James I., in the case of the Duchy "of Cornwall, the report of which is inserted at length in

Vesey, p. 294.

Blackstone, p. 224.

"Collins' Proceedings on Baronies, p. 148, in which it was "resolved, that Prince Charles, the King's *second* son, was "Duke of Cornwall by inheritance." 4. But in the clause under consideration, the words "eldest daughter" are by no means left unexplained, but are coupled with other words, which preclude all doubt with regard to the true sense in which they are used by the entailer. They stand thus: "To the eldest dochter of the said umqll Hary "Lord Ker, *without divisioune* and *yr aires maill.*" Here then eldest daughter is called, with the important addition of the words "without divisioune," followed by those, of "*yr* "*aires maill, she always mareying,*" &c. Now it is a principle firmly fixed in the language of Scotch conveyancing, both ancient and modern, that when several daughters, or heirs female, are intended to take an estate in their order, or successively, the words "without division," are uniformly added, it being an established maxim in the law of Scotland, that when a real estate descends to females, in the same degree, they succeed to it in equal shares as heirs portioners. In order therefore to show that he unequivocally intended his four granddaughters to take the succession in their order, and to exclude all succession of heirs portioners, the Earl of Roxburghe used the words "without division," as the proper and technical expression of the law. The brief expressions thus adopted by the entailer were evidently used to convey the same meaning he had previously declared, at greater length, in the deed 1644, in which, instead of applying the words "without division" to the "eldest daughter" of his son, he designed "the sds Lady Jean, Margaret, "Anna, and Sophia Kers, our oyes, and failing of the first, "the next immediate eldest, of the said daughters, successive after oyrs, and their airis male lawfullie to be gottin "of their bodies to be the persoune wha sall succeed," &c.

If any farther evidence was necessary to prove that Lord Roxburghe had not the most distant intention to limit his succession to his eldest born grand daughter, it is to be found in the subsequent words, "*Yr aires maill,*" and "Qlks *all* failzing, and yr saids airis maill," which are of themselves utterly exclusive of the idea of one individual only being called. Had Lady Jean Ker alone been intended to succeed, with her heirs male general, it is impossible that the plural "*their*" would have been twice repeated; or that the word "*all*" could have been used in reference to the

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failure of a single individual. As the whole of this branch of their destination is introduced by the words, " *Qlks all failing,*" in obvious reference to Sir William Drummond and the other substitutes previously designed, the repetition of similar phraseology in the concluding part of the clause, can only be considered as referable to a destination in favour of a plurality, viz. the four daughters of Hary, Lord Ker, according to their order of seniority.

There are, however, other passages in the deed 1648 which demonstrate the Earl of Roxburghe's intention, in using the words of the destination in question, to have been, not to call the eldest only, but the whole of his granddaughters, in their order. Thus, with regard to the obligation to take the name and arms, the words used are, in case of failure, or that they refuse or forbear to take upon them the said surname, &c. " In that caise, the persone " failzein, and the aires of their body sall amit and tyne," &c.

In like manner, in the obligation for provisions to remanent daughters, these words are used:—" In case it sall " happen the said William Drummond, or any utheris, our " aires of tailzie, specially or generally before mentionate, " or ony of them, to succeed to the said estate and living, " by virtue of thir pnts, that then and in that case, the " samen persone sua succeeding, and *yr* (*their*) spouses to " be joined in marriage with *them,* &c. sall pay," &c. From these instances, it is manifest that the expressions used are clearly not applicable to one individual only, but to any number as the case might happen.

The words adopted in this clause, which are in themselves perfectly proper, for the purpose of calling the whole daughters of Lord Ker in their order, are, in fact, sanctioned by the highest authority in the law of Scotland. Lord Stair, in treating of tailzies, says, " Some also tailzied their lands, " so as by infeftment to establish a primogeniture among " females, as the law has done among males; as if the land " was granted to the fiar and the heirs male of his body, " which failing, '*to the eldest heir* female without division, " and their heirs, carrying the arms and name of the fami- " ly." Now, it cannot be supposed that, in using these words, Lord Stair had conceived that such a destination would be confined to one individual only, as he has distinctly stated, that a primogeniture *among females* was thereby introduced; and it is a certain fact, that many entails have

been constructed in the very terms prescribed by his Lordship. 5. The words, "aires maill," which the appellants maintain can only mean heirs male general, when occurring in a deed like the present, are capable of being limited and explained by the other words with which they are accompanied, and if this be conceded, then there is an end to the appellant's case. 6. Besides, from the whole tenor of the deed 1648, it is evident that the granter's intention was to call his four grand-daughters, and their issue male, in their order, and not Lady Jean Ker, his eldest grand-daughter individually, and her heirs male general. He undeniably entertained the strongest predilection and partiality for the whole of his four grand-daughters, by his son, Lord Hary Ker, as evinced by the anxiety with which he provides for their marriages with the persons first called to his succession, all of whom are required, as the condition of their inheritance, to marry the *second*, *third*, and *fourth* in their order, on failure of the eldest, or her declining to comply with the conditions of the entail. 7. Yet it is not the deed 1648 alone that the will and intention of the Earl of Roxburghe, with regard to his succession, may be considered to be evinced ;—the surrenders of the estates and honours in 1643, and charter 1646, indicate the same fixed purpose, as well as the deed of nomination and tailzie 1644. If any part of the deed 1648 can be said to be left in doubt, the former deeds may therefore be resorted to as affording additional means for ascertaining the true intention of the granter. By the nomination of the deed 1644, there can be no doubt that the whole four daughters of Hary, Lord Ker, and the heirs male of their bodies, were, on the failure of the first branch, distinctly called to the succession ; and on their failure only, the granter's heirs male whatsoever were appointed to take; and in the deed 1648, the very same provision is made, though in a less amplified form. 8. The decisions founded on by the appellants establish no principle that can be considered adverse to the judgment of the Court below in the present case. (Here the several cases were gone into to show that they did not apply).

On the Cross Appeal.—In regard to the admission of John Bellenden Ker, Henry Gawler, and John Seton Karr, to be heard as parties in this competition, the respondents beg leave to reserve to themselves competent arguments in this matter. Perhaps by arrangements, as to the hearing of the different appeals in dependence, it may be unnecessary to enter in any discussion as to this. If the inter-

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locutors appealed from by John Bellenden Ker, Henry Gawler, and John Seton Karr, as to the existence of the entail, are previously disposed of, as they stand first in order, all discussion on this matter may be unnecessary.*

For Appellant, General Ker,—*Fra. Hargrave, Henry Erskine, Ad. Gillies, Geo. Cranstoun, Thos. Thomson.*

For Respondent, Sir James Norcliffe Innes,—*David Boyle, Sir Samuel Romilly, Ad. Rolland, Robert Craigie, Arch. Cullen, William Horne.*

For Respondents, Mr. Bellenden Ker and Others,—*John Clerk, James Moncreiffe.*

(Cross Appeal.)

GENERAL KER and RICHARD HOTCHKIS, W. S. *Appellants;*

SIR JAMES INNES KER, Bart., and JAMES HORNE, W. S. . . . *Respondents.*

(*Et e contra.*)

Case of Sir James Innes Ker, Bart., and his Commissioner, Respondents in the Original; and the Appellants in the Cross Appeal.

House of Lords, (ut supra.)

For this case, which has been stated in the original appeal, see first appeal, with the argument there maintained for Sir James Innes Ker, which is substantially the reasons of appeal set forth in that case for him. He further showed, that when the heirs of Lady Jean Ker, procreated of her marriage with Sir William Drummond, became extinct, which was the case by the death of the last Duke of Roxburghe, and since her sister, Lady Anna Ker, married to Lord Fleming, and their heirs male called by the entail 1648, in the second place, had also now become extinct, he, by the construction of the entail, was called to succeed as the heir male and great-grandson of Lady Margaret, the third daughter.

David Boyle, Sir Samuel Romilly, Ad. Rolland, Robt. Craigie, Archd. Cullen, W. Horne.

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* The judgment will be found after the Speeches in the House of Lords at the end of the three Appeals.

(Second Appeal and Cross Appeal.)

BRIGADIER-GENERAL WALTER KER, and RICHARD HOTCHKIS, . } *Appellants;*

JOHN BELLENDEN KER, HENRY GAWLER, and JOHN SETON KARR,
Also
SIR JAMES NORCLIFFE INNES, Bart., and JAMES HORNE, . . } *Respondents.*

In so far as it allows Bellenden Ker to appear in the Competition of Brieves, and in so far as it prefers Sir James Norcliffe Innes in that competition.

And Appeal for

JOHN BELLENDEN KER, and HENRY GAWLER, and JOHN SETON KARR, Esqs. } *Appellants;*

Against preferring in that Competition.

SIR JAMES NORCLIFFE INNES, Bart., and JAMES HORNE, and GENERAL WALTER KER, and RICHARD HOTCHKIS, . } *Respondents.*

Case of John Bellenden Ker, Esq.; and also of Henry Gawler and John Seton Karr, Esqs., Trustees of Wm. late Duke of Roxburgh, (In Competition of Brieves).

House of Lords, 15th, 16th, and 19th June 1809, and 20th June 1810.

As has already been seen from the preceding appeal, the Court allowed John Bellenden Ker, and the Duke of Roxburghe's trustees, to appear for their interest " in the services " of Brigadier-General Ker and Sir James Norcliffe Innes, " Bart., and to be heard for their interest; and, *secundo*, " That the points of law with respect to the construction of " the tailzie and settlement of the estates of Roxburghe, " must, in the first place, be determined, and, for that pur- " pose, recommend to the Macers to hear counsel for the " parties, and to proceed otherwise in the cause as to them " shall seem proper."

Feb. 14, 1806.

In consequence of this remit to the Macers, they pronounced this interlocutor: " Having considered what has

Feb. 17, 1806.

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" been respectively stated by the counsel for the parties, " and advised with the Lords Assessors, they, in terms of " the foresaid interlocutor of the Lords of Council and " Session, find, *Primo*, That Messrs. Bellenden Ker, Henry " Gawler, and John Seton Karr, have a title to appear in " these services, and to be heard for their interest; and, " *Secundo*, That the points of law, with respect to the con-" struction of the tailzie and settlements of the estate of " Roxburghe, must, in the first place, be determined; and, " in order thereto, make avizandum to the Lords of Council " and Session with the case, in order to be reported to their " Lordships by the Lords Assessors *quam primum* for their " opinion and direction; and, in the meantime, adjourn fur-" ther proceedings in the courts of service to the " day of ."

The Lords Assessors having accordingly reported the case to the Court of Session, their Lordships directed the parties to give in memorials. Memorials were given in, and counsel heard at the bar, whereupon the Lords pronounced this interlocutor: " Remit to the Macers, with this instruc-" tion, that they prefer the claimant Sir James Norcliffe " Innes, heir male of the body of Lady Margaret Ker, in " the foresaid competition of brieves relative to the estates " and honours of the family of Roxburghe, and to dismiss " the brieve at the instance of Brigadier-General Ker; but " supersede extract until the first box-day in the ensuing " vacation."

Mar. 6 and 10, 1807.

General Ker presented a reclaiming petition against the above interlocutor, which was followed by answers, after which the Lords pronounced this interlocutor: " Remit to " the Macers with this instruction, that they prefer the heir " male of the body of Lady Margaret Ker in the foresaid " competition of brieves relative to the estates of the family " of Roxburghe, on his proving his propinquity; and, in " that event, to dismiss the brieve of Brigadier-General Ker; " and, with these explanations, they refuse the desire of " the petition, and adhere to the interlocutor reclaimed a-" gainst."

July 7 and 8, 1807.

It is needless to repeat the argument here, which is set forth, in so far as General Ker is concerned, in the previous appeal; and, in so far as John Bellenden Ker is concerned, also set forth in that appeal, as well as in the appeal in the action of reduction brought to set aside his right to the estates.

General Ker has brought his original appeal from such parts of the above interlocutors as sustain the title of John Bellenden Ker, Henry Gawler, and John Seton Karr, to appear and be heard for their interests; and also against the interlocutors which preferred Sir James Norcliffe Innes in the competition of brieves. Sir James Norcliffe Innes has also presented a cross appeal, complaining of the interlocutors, in so far as Messrs. Bellenden Ker, Gawler, and Seton Karr, are allowed to appear for their interests in the competition of brieves. On the other hand, Mr. Bellenden Ker, Mr. Gawler, and Mr. Seton Karr, have appealed from the interlocutors of the Court of Session, dated the 6th and signed the 10th of March 1807, and the other interlocutor, dated the 7th and signed the 8th July 1807, preferring Sir James Norcliffe Innes. And, in order that every point might be kept entire, Mr. Bellenden Ker and the Duke's trustees presented their cross appeal against General Ker, and Sir James Norcliffe Innes, appealing from the interlocutors dated 6th March and 7th July 1807. Mr. Bellenden Ker and the trustees humbly hope that those parts of the interlocutors complained of in the original appeal of General Ker, and in the subsequent cross appeal by Sir James Norcliffe Innes, which sustains the title of Mr. Bellenden Ker and of the Duke's trustees to appear and be heard in the foresaid competition of brieves, will be affirmed; and that the interlocutors preferring Sir James Norcliffe Innes will be reversed.

For Mr. Bellenden Ker and the Duke's Trustees,—*John Clerk, James Moncreiffe.*

(Third Appeal—The Reduction.)

JOHN BELLENDEN KER, Esq., HENRY GAWLER, Esq., and JOHN SETON KARR of Kippielaw, Esq. . . . . . } *Appellants;*

SIR JAMES NORCLIFFE INNES, Bart., and JAMES HORNE, his Commissioner, } *Respondents.*

JOHN BELLENDEN KER, HENRY GAWLER, and JOHN SETON KARR, . } *Appellants;*

BRIGADIER-GENERAL WALTER KER, and RICHARD HOTCHKIS, . } *Respondents.*

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JOHN BELLENDEN KER, Esq. (in Competition of Brieves,) . . . . . . *Appellant;*

SIR JAMES NORCLIFFE INNES, Bart., and GENERAL KER, . . *Respondents.*

Case of the Appellants in the Three Appeals.

House of Lords, 15th, 16th, and 19th June 1809, 20th June 1810, and 8th June 1811.

ENTAIL—FETTERS—ALTERING THE ORDER OF SUCCESSION—PROHIBITORY CLAUSE.—(1.) A reduction was brought of deeds executed, as an alteration of the order of succession contained in an entail. There were two clauses of destination in the entail, by which different classes of heirs were called. After the *first* clause of destination there followed the prohibitory, irritant, and resolutive clauses, which were made to apply to the heirs in that clause, by the terms "before and above mentioned." It was thence contended that the prohibition against altering the order of succession was made only to apply to the heirs called by the first clause of destination, but not to those called by the second clause of destination; and, therefore, that the last Duke of Roxburghe, who succeeded under the latter clause, was not bound by the prohibitions. Held that the second clause of destination was to be viewed as a continuation of the first, and that the prohibitory clause against altering the order of succession must be held to apply to the whole heirs of tailzie; and the heirs in the second clause to be viewed as heirs of tailzie to whom these prohibitions applied. (2.) It was further contended that the prohibitory clause, if it did apply, was not in itself sufficient to prohibit the alteration of the order of succession conceived in these words:—"Nor to do any "other thing to the hurt and prejudice of thir presents, and of the "foresaid tailzie and succession, in hail or in part." Held these words were sufficient to protect the alteration of the order of succession as in a question between heirs. (3.) A defence was stated to the reduction, setting forth, that as Duke William was the *last heir* of the tailzied destination, he did not hold the estates fettered with limitations in favour of any other heir, (Lady Jane's descendants having terminated with him, and the destination to the "eldest daughter" being confined to her alone), but that he held a fee simple estate, and was entitled to make the entail and trust deed in favour of the appellants. Defence repelled.

The progress and investitures of the estates of Roxburghe have been fully detailed in the previous appeal.

It has been seen in what manner the first Earl of Rox-

burghe completed the tailzied investiture of his estates by the deed of nomination and tailzie 1648, and the previous deeds connected with it.

That deed, after expressing the first clause of destination, thus proceeds to fortify that destination of the estate and dignity, with such clauses, prohibitory, irritant, and resolutive, in the following terms:—" That the saids persons and " heirs of tailzie respective sall be halden and obleist to as- " sume and take upon them the sirname of Ker and carry and " bere the arms of the house of Roxburghe," &c. " And in the case of their failing to do so, they, and the heirs male of their bodies, are declared to forfeit the benefit of the tailzied succession. Then it is declared that it shall not be lawful " to the persons *before designit* and the airis male of " their bodies, nor to the other airis of tailzie above written, " to make or grant any alienation, disposition or other right, " or security qtsomever of the said lands, lordship, baronies, " estate and living above specified, nor of no part thereof, " neither yet contract debts nor do ony deeds qrby the " samen, or any part thereof, may be apprisit, adjudgit, or " evictit fra them, *nor yet to do any other thing in hurt and* " *prejudice of thir pnts and of the foresaid tailzie and suc-* " *cession in haill or in part,* all whilk deeds sua to be done " by them are by thir presents declared to be null and of " nane avail force nor effect, reserving always liberty and " privilege to our saids heirs of tailzie to grant feus and " rentals of sic parts and portions of the said estate and " living as they sall think fitting, provided the same be not " made nor granted in hurt and diminution of the rental of " the samen," &c. Next followed the irritant and resolutive clauses, by which it was declared that " in case it sall hap- " pen the foresaids persons and airis of tailzie respective " above written to failzie in observing keiping and fulfilling of " the haill provisions, restrictions and conditions respective " above rehearst, and every one of them, in form and man- " ner as is particularly before set down, in that caise the per- " son or air of tailzie sua failzeand and doing in the contrair, " and the airis male of his body, sall amit lose and tyne in " all time thereafter, the foresaids erledome, title, dignity, " lands, lordship, baronies, estate and living above specified, " and all benefit and right of succession thereto, and the samen " sall appertain and belong to the next person or air of " tailzie appointed to succeed in manner foresaid, and sua " forth successive in caice of several failzies as said is, likeas

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Irritant and resolutive clauses.

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" the person failzier and the aires male of his body sall be " halden and obleist to denude themselves *omni habili modo* " of the said estate and living, and to make and grant all " writs and rights requisit and necessar thereof in favors of " the next succeeding person or air of tailzie," &c.

The appellants stated that the entail of the estate and honours thus concluded, was conceived in a form altogether different from that which had been adopted in the deed 1644, but without the smallest mention being made of any of the daughters of Hary Lord Ker as heirs of tailzie, a general devolution or destination of the estate alone, unconnected with the honours, was superadded, and followed the preceding prohibitory, and irritant and resolutive clauses, in these words: " And qulks all failzeing be decease, or be not observing of the provisions, restrictions and conditions above " written, the right of the said estate shall pertain and belong to the *eldest dochter* of the said umql *Hary Lord* " *Ker, without division, and yr aires male*, she always " mareing, or being married to ane gentleman of honourable " and lawful descent, wha sall perform the conditions above " and under written, qulks all failzeing, and their saids aires " male, to our nearest and lawful aires male qtsomever."

Second clause of destination.

It was alleged further by the appellants, in their case, that in the copy of the deed 1648 which has been produced, the last destination ends with the words, " our nearest and " lawful heirs male whatsomever," according to which the succession, failing the other heirs, would have descended to the heirs male of the entailer. But in the investitures following the deed 1648, the last words of the destination are " *heirs whatsoever*," not heirs male whatsoever, by which the estate, failing the other heirs, became descendable to the heirs whatsoever of Earl Robert. From this circumstance in the investitures, it is probable that they had been made up agreeably to some other duplicate of the same deed 1648, different from that which has been adduced. But, at all events, the succession ought to be regulated by the terms of the investitures which were made up by William, Earl of Roxburghe, in 1650, and which were ratified in Parliament, and renewed in the same terms, and to the same effect.

John, Earl of Roxburghe, who was a grandson of Earl William, was created Duke of Roxburghe by a patent from Queen Anne in 1707, by which this higher dignity was limited to the heirs of his former titles. He died in 1741,

being succeeded by his eldest son, the second Duke, who died in 1755, and was succeeded by his eldest son, John, third Duke.

In the interval, by the later investitures of the estate, consisting of the deeds executed in 1729, 1740, and 1747, it was alleged by the appellants that the destination in the deed 1648 had been effectually altered in such a manner that the heirs of the last clause of destination were totally deprived of their character of heirs tailzie, if they ever possessed it. And by these investitures, which are now established by prescription, the *heirs of tailzie are the heirs of the first destination only;* whom failing, the heirs whatso- " ever of Robert, Duke of Roxburghe, which all failing, the " heirs of the *last destination*, viz. the eldest daughter of " Hary Lord Ker."

Sir William Drummond, the second Earl of Roxburghe, died in 1675. He had four sons, of whom Robert, the eldest, succeeded him in the honours and estates of Roxburghe, and John, the youngest, acquired the honours and estate of Bellenden. The second and third sons having died without issue, the family divided into two branches, the elder of which became extinct by the death of John, Duke of Roxburghe, who died in the month of March 1804. He was succeeded by William Ker, Lord Bellenden, who was then the only remaining heir male of the younger branch of the family descended from John, the youngest son of Earl William, and the only remaining heir male of the body of Jean, the eldest daughter of Hary Lord Ker. Thus he was the heir of investiture in two different characters; heir male of the body of Earl William, and heir male of the body of the eldest daughter of Hary Lord Ker.

At the time of Duke William's succession, the nearest relations of the *former Duke* were his sisters, Lady Essex and Lady Mary Ker, the heirs of line of the elder branch of the family. After these ladies, Duke William very justly considered that the appellant, Mr. Bellenden Ker, came next in order, as being the eldest son of the Honourable Mrs. Gawler, who was the eldest daughter of John, the third Lord Bellenden, and the eldest heir portioner of line of the younger, or Bellenden branch of the family.

Duke William succeeded to the estates and honours of Roxburghe, when far advanced in life, after having passed a great length of years in struggling with difficulties and misfortunes. It was natural, therefore, for him to provide for

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those who had shared with him those calamities, or who had alleviated his distress.

Mr. Bellenden Ker, his father, and his brother, were among the most liberal of his friends, and conceiving that he had full powers to execute the deeds of tailzie and of trust in question, he conveyed his estates, by the deed of tailzie now challenged, failing heirs of his own body, to Lady Essex and Lady Mary Ker, the sisters of Duke John, they being the heirs of line of the marriage between Sir William Drummond and Lady Jane Ker, by the elder branch of that family; after these ladies were called, the appellant and his brother, Mr. Henry Gawler, and the heirs of their bodies in succession, they representing Mrs. Gawler, the eldest heir portioner of line of the same marriage, by the junior branch of the family; and after them were called certain other substitutes descended from John, third Lord Bellenden; but reserving power of revocation, liberty to burden, &c.

June 18, 1804.

By the trust deed the Duke conveyed his whole estates in trust to the Marquis of Lorne, Sir John Smith of Sidling, William Adam, Esq. of Blair-Adam, Henry Gawler, Esq. of Lincoln's Inn, and John Seton Karr, Esq. of Kippielaw, for the purpose of paying his debts, and certain legacies and annuities, after which the trustees are directed to pay over the residue of the rents, &c., to renounce their infeftments, and to convey the estate to the heir for the time appointed by him in the deed of tailzie above mentioned. The Duke afterwards executed a supplementary trust deed applicable to some lands that had been omitted.

Jan. 1805.

Afterwards, in January 1805, the Duke revoked the above deed of entail, in so far as the estate stood thereby conveyed to Lady Essex and Lady Mary Ker, and disponed to himself, and the heirs male of his body, whom failing, to the appellant, Mr. Bellenden Ker, &c. He afterwards, of this date, executed a new deed of entail, by which, on the narrative that he had no prospect of heirs of his own body, and for certain other good causes, he directly disponed, under the conditions therein contained, the said estate, "heritably "and irredeemably, to the said John Bellenden Ker, and "the heirs male and female of his body, whom failing, to "my other heirs of tailzie hereinafter written." This disposition contained all the usual clauses prohibitory, irritant, and resolutive, for transmitting the estate to a series of heirs as a tailzied fee.

June 8, 1805.

William, Duke of Roxburghe, died on 22nd October 1805, and sasine was immediately thereafter obtained on the last entail and trust deed. The appellants were taking other measures for carrying the Duke's settlements, when they were interrupted in their proceedings by two other competitors, being Sir James Norcliffe Innes and Brigadier-General Walter Ker of Littledean. Both their claims were founded on the investitures of 1648.

In these circumstances, they brought each of them actions of reduction against the appellants.

Sir James Norcliffe Innes' reduction sought to set aside the deeds executed by William, Duke of Roxburghe, on the following, among other grounds:—"3. They are all on "the face of them so many fraudulent and unlawful con-"trivances and devices by the defenders, to defeat the "standing entails and investitures of the family of Rox-"burghe, and to break down and dismember the said estate; "and obtained from a person having no power to grant "such deeds, the said William Ker, designed Duke of Rox-"burghe, having held and possessed the said estate as an "heir of entail, therein fettered and prohibited from grant-"ing such deeds by the said entails, and the tenor of his "own title following thereon, to the prejudice of the pur-"suer, the heir of entail."

General Ker's reduction proceeded on the same grounds.

The other grounds insisted on were deathbed, facility, and circumvention, and the want of delivery; but these were little relied on. And the only ground insisted upon was, that the late Duke had no power to grant the deeds in question, in respect that he held the estate under the fetters of a strict entail.

In consequence of these actions, the appellants had a manifest interest to prevent the establishment of any title in the person, either of Sir James Norcliffe Innes, or of General Ker, as heir of tailzie and provision to the late William, Duke of Roxburghe. They therefore appeared in the competition of brieves, and after some discussion, their title to appear in that competition was sustained; and it was also found that the question of law, which occurred in the competition, should, in the first place, be determined, upon which the Court ordered memorials.

Feb. 17 and 18, 1806.

The action of reduction having come into Court, the appellants, in the first instance, objected to the title of both pursuers; but afterwards, in consequence of the points set-

tled in the service, they agreed to produce the deeds called for, which was done accordingly, and the action proceeded.

In defence, the appellants maintained various pleas. Generally, they stated, that the rule of construction in the law of Scotland, with regard to all deeds of entail, was strict, and that which favoured freedom from fetters. That the question was, Whether the late Duke of Roxburghe, who was vested in the fee of the estate, held that estate subject to particular fetters or limitations, preventing him from executing the deeds in favour of the appellants? They submitted, therefore, that according to all the authorities, and to an uninterrupted course of decisions, from the first existence of entails to the present time, it had been completely settled that, in every such question, the strictest construction must be applied to the clause or clauses from which the limitations are sought to be established; that nothing but the most express words can have the effect of the prohibition; that no such prohibition can be created by inference or implication; and that general words not directed against specific facts or deeds, can in no case be held as effectual. From these they subsumed that it was impossible to hold that the late Duke held the estates subject to fetters and limitations in favour of the other claimants.

In particular, they farther contended, 1. That neither Sir James Norcliffe Innes nor General Ker was at all called to the succession. 2. That supposing one or other of the pursuers to be called by the second clause of destination of the entail, on which they both founded, the entail and the investitures of the estate were so framed, that the prohibitory, irritant, and resolutive clauses therein contained, did not apply to, nor in any manner protect, the hopes of succession of that class of heirs to which the pursuers (respondents) alleged themselves to belong. It is plain, that according to the form of the original entail, to which all the subsequent investitures referred, the destination in favour of the eldest daughter of Hary, Lord Ker, and her heirs male, was only introduced after all the restrictive clauses had been previously set down, applying exclusively to the heirs of tailzie "*before written;*" and it was also to this previous class of heirs only to whom the prohibitions and irritancies applied, and the dignity of peerage, as well as the estate, was provided, while the heirs of the second, or *last* clause of destination, were only called to the estate *without* the dignity. And as, on the one hand, there was nothing to be found in

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the deed by which these restrictive clauses were expressly applied to, or made to operate in favour of the heirs of the last destination; and, on the other hand, by the settled law as to the construction of entails, the existence, or the particular application of the fetters of an entail, can in no case be deduced by implication, or without express words; and as, at all events, the pursuers were, by the later investitures, postponed even to heirs whatsoever of Duke Robert, by which they were totally excluded from the character of heirs of tailzie, it was contended that the late William, Duke of Roxburghe, was the *last heir* of the *tailzied destination*, and so being fettered by no limitations in favour of any other class of heirs, he held his estate in fee simple, and so had full power to execute the deeds brought under reduction. 3. That, in point of reality, there was no clause in the entail by which any of the heirs of tailzie were effectually prohibited from altering the order of succession. Although there were general words having a reference to other special prohibitions, prohibiting any other thing to the prejudice of the tailzie and succession; yet, according to the rules of construction, which had heretofore been uniformly applied to other cases, there was no such express technical and unambiguous prohibition against that particular class of deeds, known by the appellation of deeds *altering the order of succession*, as could be effectual to set aside the deeds executed by the late Duke of Roxburghe.

Jan. 13 and 15, 1807.

Upon this argument, the Court of Session, of this date, pronounced this interlocutor:—" The Lords having resumed " consideration of this cause, and advised the memorials of " the parties, finds, That the estates of Roxburghe were " held by the late Duke William under an entail, which " contains an effectual prohibition against altering the order " of succession. And find, That the persons called to the " succession, under the branch of the destination, begin- " ning with the eldest daughter of Hary Lord Ker, are heirs " of tailzie under the said entail; reserving to the defend- " ers all objections to the pursuers' title, as accords." *

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* Opinions of the Judges.

Lord President Campbell said,—" The question is, Whether the late Duke held his estate under an entail, or in fee simple? He made up his titles as heir of tailzie under Earl Robert's entail, as contained in the investitures. Did it then become unlimited by the circumstance

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An interlocutor in similar terms, was pronounced in the reduction at the instance of Brigadier-General Ker and his commissioner.

June 23, 1807.

On reclaiming petition, presented by the appellants, the Court adhered.

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of his having no male issue, and by his collateral heirs male in the first branch of the destination having failed?

"This is not a question with creditors, nor with purchasers, but a question *intra familiam*, having nothing to do with the regulations of the act 1685.

"It is admitted on all hands, that there was another branch or series of heirs called. This is said, in the argument for Mr. Bellenden Ker, to be a devolving clause, but it is truly a continuation of the substitution, or rather it is a substitution of *return* to the right heirs of the family, failing the stranger heirs to the succession, who are preferred by the first part of the destination. The Drummonds or Flemings were neither heirs of line nor heirs male, nor heirs of investiture. The succession might have gone through them, and the heirs male of their bodies, by their wives. At any rate, the lineal succession was cut off so far as that destination went, and the male succession also excluded.

"The effect of clauses of return are not sufficiently attended to in the argument. Vide the case of the Duke of Hamilton *v.* Douglas, 9th December 1762. (House of Lords, 8th March 1777, April 1778, and 27th March 1779.)

Ante vol. ii. p. 449.

"The old investitures, prior to Earl Robert's deeds, stood in favour of *heirs male*, who were also heirs in the patent of honour. His charter 1646, under the sign manual, devises both estate and honours to heirs male of his body, whom failing, his heirs and assignees whatsoever, to be named and designed by him by any deed or declaration made by him at any period of his life, with and under the provisions and restrictions to be therein contained. Had he died without any further nomination, it might have been a question of some difficulty, whether these words were sufficient to do away the old line of succession to heirs male in general, and to introduce his legal and lineal heirs, or whether *hœredibus quibuscunque*, &c. were of pliable signification, and to be held as referring to the investitures. But one or other of these constructions certainly must have been put on that investiture. When, therefore, by the nomination 1648, he preferred the families of Drummond and Fleming to take the succession, qualified and limited in a certain manner, and then eventually brought in his granddaughters and their heirs male, and his own heirs male, he did no more than was perfectly natural and just, by restoring the succession to his own heirs; or, in other words, to make a substitution of return in their favour.

Vide previous Appeal.

"It is a strange perversion of argument to say, that the daughters and their issue were strangers, or that the heirs male of the

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March 6 and 10, 1807, and July 7 and 8, 1807.

In the competition of brieves, the Court, of this date, pronounced the two interlocutors quoted in the previous appeal.

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

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family were such, and that the Drummonds and Flemings were the natural heirs of the family. The reverse was the case; and a more proper clause of return never was inserted in any settlement than this, whether with or without special limitations is of no importance to the argument, for it is a clear and fixed rule of law, that clauses of return cannot be gratuitously defeated.

" It appears to me, however, that the secondary destination is guarded by special clauses of limitation, as well as the first, very awkwardly indeed brought in, being chiefly by reference to preceding clauses, though partly also by express *provisos* in the clauses which follow.

" The destination to the 'eldest daughter' of Lord Hary Ker, without division, and their heirs male, is limited and qualified by the words, 'who shall perform the conditions above and under written;' for the intermediate words, she always marrying, &c., are clearly parenthesis. The estate was not to be in the husband, but in the lady herself, who alone could perform the conditions of the entail. The utmost that the husband could do would be to take the name of Ker; but every thing else must have been done by the wife. Not only she, but her heirs male, were expressly tied down, as heirs of tailzie to perform the conditions of the entail.

" This also appears from the succeeding clauses. The words, 'Quhilk persons successively designed be us in manner foresaid 'under the provisions, restrictions, &c., we by thir presents nomi-'nate and appoint to succeed us as heirs of tailzie in our hail lands, 'baronies, earldom, and others, above written, contained in the said 'procuratories,' &c. This includes the whole persons before named, whether in the first destination, or in the second without destination, and comprehends not only all the conditions, but also all the subjects contained in the former procuratories, &c. *i. e.* titles of honour as well as estate, the reference being extensive and general, without any exception whatever.

" Neither is it of any consequence to say, that the writer in Edinburgh having left so small a share for the second destination, did not probably mean that it should be so ample. We must necessarily take the deed as it is, without indulging such idle conjectures. There was at least more space than could be required for the common termination of heirs and assignees whatsoever.

" All the after deeds and settlements are in substance and effect just a repetition of the original entail 1648. The framer of the

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Pleaded for the Appellants.—The appellants here pleaded in substance the same arguments as above set forth, 1. That neither Sir James Norcliffe Innes nor Brigadier-General Ker is called as an heir by the tailzie or investitures 1648 of

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deed 1648 would have done much better to have followed the arrangement in the former nomination 1644. He did not mean to depart from the substance of the first deed, which had been drawn in the country, but, considering himself to be a more skilful conveyancer than Mr. Don, he chose to follow an arrangement of his own, and the blanks being left to be filled up in the country by Mr. Don, they contrived between them to put it into a most absurd and blundering form, and this seems to have puzzled all the after conveyancers employed by the family. They seem to have thought it best, in framing the after title deeds, to recite the different clauses of the original entail precisely as they stood, and so to renew and confirm it without any variation, as indeed none of the succeeding heirs had it within their power to alter the entail in the smallest particular without incurring an irritancy.

" None of these heirs, prior to the last Duke, had any pretensions to be the last heir in the first special destination. None of them therefore could safely have done what the last Duke attempted. See the case of Menzies of Culdares.

Ante vol. iv. p. 242.

" Yet it is argued, that the very first succeeding heir made a very important alteration, by introducing his own heirs and assignees whatsover, *i. e.* his heirs of line, immediately after the first series of substitutes, and before the second. But this is evidently a mistake in point of fact. Heirs and assignees whatsoever are only introduced upon failure of all the heirs of tailzie, whether first or last, contained in Earl Robert's entail. The contrary argument is founded on mere criticism, arising from the absurd arrangement of these deeds, but contrary to the real sense of them. An irritancy would instantly have taken place had so material a change been intended.

" The observations too, respecting the titles of dignity, which is supposed to be now at an end, by the failure of the first branch of the substitution, are much too critical, though, at the same time, it is not *hujus loci* to inquire how or to whom the titles of dignity now go, or whether they have become extinct altogether ? The last is a most improbable supposition, as the titles formerly conceived to heirs male were resigned, not for the purpose of earlier extinction, but for the purpose of prolongation, by first carrying them to certain series of adopted heirs, though less connected with the family, and then bringing them back to heirs more naturally connected, both in female and male lines.

" As to the argument upon the clauses against alienation, &c. in

the estate of Roxburghe. 2. That the prohibitory, irritant, and resolutive clauses in the tailzie did not operate in favour of that class of persons who are mentioned in the clause of destination, on which the respondents founded their titles,

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the first place, the clause of return alone would be sufficient to bar gratuitous alienation.

"2. The general words, prohibiting the heirs from doing any thing in hurt or prejudice of the tailzie and succession, are likewise perfectly sufficient, upon the grounds fully stated in the memorial for the pursuers. The case of Argaty was of a particular nature, not a permanent entail, but a temporary interdiction. See Lord Strathmore *v.* Duke of Douglas; Kames' Decisions, Feb. 2, 1729, p. 277; Ure *v.* E. of Crawford, July 17, 1756, (Mor. 4315); Don *v.* Don, Feb. 5, 1713, (Mor. 15591.) Rights of succession may be qualified, and will have effect without resolutive and irritant clauses. Vide Gibson *v.* Reid, Nov. 24, 1795, (Mor. 15869.) The act 1685 was made for creditors and purchasers alone. The rights of succession, and questions among heirs and gratuitous donees, are left to common law. Prohibitions to alter may even be implied from the nature of the deed—clauses of return—settlements in contracts of marriage, and mutual settlements. The rules of construction in England ought to be attended to—See Blackstone, p. 376, &c. 500; Fonblanque, p. 442; Lord Mansfield's decision in the case of Duntreath goes inadvertently too far in applying to a question *among heirs*, a principle which only applies to questions with *third parties*. General and indirect prohibitions are sufficient against heirs. Suppose the last word alone had been there, it would not have been sufficient against selling or contracting debt, but sufficient against altering the order of succession. If a power to alter is allowed, there are no creditors to enforce even the direct clauses against selling."

Stewart v. Home. July 8, 1789. Mor. 15535.

LORD JUSTICE CLERK (HOPE).—"There is no doubt that one or other of the pursuers is heir of tailzie, *i. e.* they fall under the destination under these titles. But the next question is, Whether the *limiting clauses are effectual*, and to be held valid in a question *among heirs*? I admit the principle in the case of Duntreath, but we ought not to overstretch it. The very making of an entail implies unlimited power and unfettered will in the maker, and therefore he may annex what conditions he pleases, which *heirs* cannot find fault with. It was therefore natural, in this case, to return the estate to his heirs of investiture. The succession might have come very soon to Lady Jane, by the Drummonds and Flemings refusing to marry the daughters of Lord Ker. In short, the late Duke was limited in his enjoyment of the estate, and therefore could not make

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and did not prohibit deeds to their prejudice. That the prohibitory, irritant, and resolutive clauses had reference alone to the heirs or substitutes called by the first clause of destination, and did not include or comprehend those substitutes called by the second clause of destination. And, 3. That there was no clause in the tailzie prohibiting the heirs of tailzie from altering the order of succession. This is the natural order of the propositions on which the appellants endeavoured to establish, 1. That the respondents had no title to pursue; and, 2. That their actions of reduction were ill founded on the merits. And, further, if they prevailed in

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the entail, because of the conditions under which he himself held the estate."

LORD CRAIG.—" I am of the same opinion."

LORD ARMADALE.—" I doubt if the case of Cassillis applies to this case; but the clauses of limitation apply equally to the whole destination, first and last. But my doubt is on the last point, namely, that there is no sufficient prohibition against altering the order of succession, while strict words are necessary in order to secure this effect."

LORD HERMAND.—" I am clear that the late duke was bound by the limiting clauses in Earl Robert's entail; and, as to the last point, there are *three* distinct prohibitions, the first being directed against doing any thing to defeat the entail, that is, to alter the succession."

LORD WOODHOUSELEE.—" I am of the same opinion."

LORD MEADOWBANK.—" I was of opinion, at first, that the words ' hurt and prejudice,' in the prohibitory clause were feeble, and liker those in the rigmarolle of an adjunct, than of a fundamental separate clause; but I find my doubts removed by Mr. Thomson's bringing forward the language of the act 1685, where, taking a fair comparison between the words of the act and the words in the two prohibitory clauses in the entail, it is impossible to sustain the one as effectual and the other ineffectual; ' nor do any other deed whereby ' the succession may be frustrated or interrupted;' ' nor yet do any ' other thing whereby the aforesaid tailzie and succession may be ' hurt and prejudiced.' I think the last branch of the prohibitory clause sufficiently explicit in order to protect against the alteration of the order of succession."

LORD CULLEN.—" I think the words not sufficiently explicit."

LORD NEWTON.—" I am of the same opinion with the President and Lord Meadowbank as to both points."

LORD BANNATYNE.—" I agree as to the first point, but doubt as to the second. The words are too general."

any one of these propositions, they contended that a reversal of the interlocutors appealed from must follow.

Pleaded for the Respondents.—The persons called to the succession, "as the eldest daughter of Hary, Lord Ker, "without division, and their heirs male," by the deed of nomination in 1648, and all the subsequent investitures till 1804, are heirs of tailzie, and protected by the conditions and limitations contained in these deeds.

The form of expression, by which the heirs under this second branch of the destination were called, is the same which is most commonly used in a clause of devolution, properly so called, *i. e.* where the entailed succession in a certain event, is to be transferred from one branch of the heirs, or substitutes of entail, to another. A similar phrase is also used, where, in express words, it is provided, that on the failure of the heirs of entail, or in any other circumstances, the estate is to return to the proper heirs of the entailer. It is the very same which had been used to indicate the right of those who unquestionably are, and have been admitted to be heirs, viz. the persons to whom the right of succession was to fall, in consequence of a forfeiture by any of the prior heirs. And a similar expression is employed in the later investitures for the same purpose. And by the introductory clause or preamble of the deed in 1648, as well as by the clause which almost immediately follows the words of the second destination, they are expressly stated to be heirs of tailzie. It has not been, and cannot be said, that they are not protected in the same manner as the other substitutes against the payment of debts contracted by the preceding heirs of entail; that they were not, like them, obliged to pay the entailer's debts and legacies; the assignment of personal estate too, and also of the writings, was equally available to them; and also, the appointment of tutors and curators, as to any of them who might be in minority, when the succession opened to them; and it would be perfectly absurd to maintain, or to suppose for a moment, that they were not entitled to succeed to the lands afterwards acquired by the first Earl of Roxburghe, or which had not been particularly mentioned in the titles specially recited in the introduction of the entail, although in all and each of these instances, they could be protected and liable, and institute their claims, in the characters of heirs of tailzie only. Whether they were to succeed to the landed property only, or also to the dignities, they must

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take as heirs of tailzie, and under a special destination, whereby they are preferred to the proper heirs and representatives of the prior heirs of entail.

But the persons called under the second destination are heirs in the dignity, as well as in the landed property. The words, "the *said* estate," as they are used in the deed in 1648, comprehend the whole right of succession as it stood in the entailer, all the different subjects of which it was composed, and, amongst the rest, the title of Earl, and all privileges, pre-eminences, and immunities thereto belonging, having been contained in the same royal grant, and made descendible to the same series of heirs, after having been resigned for that very purpose. It is impossible to doubt the intention of the entailer; and the terms used do clearly convey that meaning. The words, "estate and living," had been employed to signify both the landed property and the dignities; but these words were clearly used as meaning the same thing. Indeed, if any distinction were to be admitted, "estate" would be held more properly to mean the dignities than the lands, which would be denoted by the word "living," in ordinary acceptation, and held to import the maintenance or fortune on which one lives; whereas, "estate," at the date of the entail in 1648, as well as at the present time, is employed to signify the whole fortune or circumstances of an individual, including his rank and condition in life, as well as the property of which he may be possessed; but, as the words here were used, no distinction was meant between the one and the other. One clause alone, viz. that which provides for the forfeiture of the heirs, and the devolution of the right of succession to those afterwards called, taken in connection with the words of the second substitution, appears to put this beyond all doubt. The party contravening is to "forfeit the earl-"dom, title, dignity, lands, lordship, baronies, estate, and "living above specified," &c., and "the samen" is to appertain and belong to the next person or heir of tailzie appointed to succeed; and the contravening heir is to denude "of the said estate and living," &c. Here there is to be a forfeiture of the dignity as well as the lands. These together, under the general description of the "estate and living," are to go to the next person or heir succeeding. And now, by the second substitution, it is provided that the person so called shall succeed not only, by decease of the prior heirs and substitutes, but also "in case of their failing to observe

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" the conditions," &c. Is it not then perfectly clear that the word " estate," employed in the second substitution, was meant to give all that was conveyed in the first substitution by the words " earldom, title, dignity," &c., or by " estate and living?" Without this the two clauses would be at complete variance with each other.

The meaning of the entailer that the heirs called by him were to take his honours and landed estates, as one undivided succession, is farther demonstrated by the clause in the deed 1648, settling his *acquirenda* in the same way with his *acquisita*, in these words: " And, moreover, It is hereby ex-" pressly declarit, that the airis of tailzie respectivè havand " right and succeeding to the said estate living and dignity, " sall na ways be halden to pay onie debtis or perform onie " deidis contractit or otherwise done be the person or air " of tailzie qrunto he sall happen to succeed ather be service " and retour or be the failzies above written, excepting al-" ways sick debts as are or sall be auchtand be us the " time of our decease, qrunto our saids airis sall always be " obleist Quhilkis personnes successive designit be us in " manner foresaid, and under the provisions restrictions and " conditions above written and na otherwise we be thir pnts " design nominate and appoint to succeed to us as airis of " tailzie in our haill lands, baronies, erledome, and others " above written containit in the said prories and infeftments, " and in all others lands and heritages pertaining to us " (failing of heirs male lawfully gottin or to be gottin of our " awin body as said is) and sall be servit retourit enterit and " infeft thereintil as airis to us."

Upon this part of the cause the appellants maintained a singular species of argument; though they fully admitted that the landed estates were destined to the heirs called in the second branch of the destination, they urged that the dignities were not also contained in it. In illustration of their argument upon this, they stated, that the respondents had understood, or had misstated what was contained in the charter 1646, as to the erection of the earldom of Roxburghe; that the lands alone, and not the title with the lands, were erected into this earldom; and, coupling this with the deed of nomination, they inferred that Earl Robert contemplated two successions, one of his title and dignity, together with his lands, to go to certain favoured heirs, fortified with proper clauses of strict entail: and, beyond that, a mere destination of his landed estates to those called by the second branch of the destination.

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But the argument of the appellants upon this admits of a very conclusive answer. This is a question of construction upon the meaning and intention of the entailer; there is evidence amounting to demonstration that the Earl himself understood that the charter of 1646 had erected both the honours and landed estates into *one earldom.* In his recital of this charter, in his tailzie 1648, he expressly states his conception of it to be, that the lands as well as the title and dignity were erected "*in an hail and free erledom.*" It is obvious from this, that he could have no idea of this supposed division of the honours and estates, or of adapting his nomination to such a divided succession, more especially as his natural heirs were called by both branches of the destination. The appellants have no right, however, to argue this matter further, than as to the intention of the entailer.

In the same manner, the acts of Parliament of the 10th of June 1648, and 20th May 1667, ratifying the charter 1646 and nomination 1648, recite, that by this charter both the landed estates and the honours had been by it created "in ane "haill and free erledom, called the erledom of Roxburghe."

It may be further noticed on this point, that the royal charters of 1663 and 1687, containing new grants of both the honours and landed estates, are perfectly exclusive of the idea of a divided succession as set up by the appellants.

2. If the persons by the second destination were heirs of entail, it could be of no importance whether they had been, in their turn, subjected to limitations or not. It was decided by the case of Cassillis, that unless where the entail ends by letting in heirs or assignees, or heirs whatsoever, the prior heirs or substitutes of entail must continue bound. But there can be no question that, by the deed 1648, as well as by the subsequent investitures, some of the heirs of the second destination, and who are not the heirs or assignees, or heirs whatsoever of the prior heirs, are also subject to limitations, although at one period or other, after it has reached them, the succession will become unlimited. It may be admitted that the eldest daughter was under limitations in favour of the heirs male immediately substituted to her; and, in the same manner, those heirs may stand limited to one another. And various arguments have been used for the other respondent General Ker, which it is not necessary now to enter upon, to show that the heirs male whatsoever of the entailer, who are called in the first place, are also in their turn protected by the fetters of the entail.

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But, be that as it may, it is clear beyond all doubt that the heirs of the first substitution were, and that the late Duke of Roxburghe stood, limited in favour of those of the second.

It has been determined that an entail restraining the power of alienation, might be extended, by reference to another deed of entail, so as to prevent a sale. It had been also determined at a more early period, that when a person had made an entail of his estate, with prohibitory, irritant, and resolutive clauses, among others, directed against changing the order of succession, and having thereafter purchased another estate, which he took to himself in liferent, and his second son, and the heirs male of his body, in fee, &c., which failing, to the heirs contained in his former entail, "and under the prohibitions and limitations contained in "the said former entail," the second son, and his heirs male, could not gratuitously alter the order of succession, the restraining clauses in the first entail taking place in the second, in virtue of the general reference. But that there could be an effectual reference from one part of a deed to another, whether it related to the order of succession, or sales, or debts, or the irritant or resolutive clauses, was never before disputed. Such a power, indeed, is expressly recognized by the enactment 1685, which authorizes entails in any *manner* or *form* expressive of the entailer's intention, if it be followed in the way pointed out by the statute, so as to be effectual against purchasers and creditors, as well as against the heirs of entail.

Laurie v. Spalding, July 24, 1764. Mor.p.15612.

Sir Alexander Don, Feb. 5, 1713. Mor.p.15591.

But, in the entails in question, it is surprising how such a question could have been made. It could not have been maintained for a moment, without keeping out of view the words which have been used, and which, in various ways, and most expressly, limit the heirs under the first substitution in favour of those of the second, as well as to one another. (1st,) It is declared, in the outset of the deed 1648, that the heirs of tailzie were to be called under the provisions, restrictions, and conditions after specified, which would have been alone sufficient to limit the heirs afterwards called, in so far as they were not specially exempted. (2d,) The prohibitory clause is not, as the appellants have imagined, or have chosen to assert, confined to the heirs called by the first substitution, and particularly designed before, but reaches the other "heirs of tailzie *above written*," by which could only be meant the whole heirs of tailzie,

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whom the entailer had previously declared his purpose to call to his succession, although they were not particularly named till afterwards. With this explanation the whole argument arising from the words "heirs foresaid," "conditions above written," &c. as are referable to the persons called by the first substitution, must completely vanish. (3d.) The persons called under the second substitution are to succeed not only by the decease of the heirs previously called, but if these parties "should not observe the conditions, "provisions, and restrictions above written," which necessarily gave them in the second substitution a *jus crediti* under the entail, and a title to have the contravention declared with their own right to the estate in consequence. (4th.) It is declared, after the second substitution, that the quhilkis persons *successive* designed (not *before* designed, as in the former clause), are to be "heirs of tailzie, under the provi-"sions and restrictions above written, and no other ways." The deed, therefore, of 1648 is sufficient of itself to prove beyond all doubt that the limitations and conditions were applicable to both classes of substitutes.

3d, Even without any special prohibitions, the persons called under the first class of substitution were, by the tenor of the deeds, and the circumstances of the case, debarred from gratuitously altering the order of succession; the words being, in effect, a clause of return in favour of the heirs *alioqui successuri* of the entailer; and where ever there is a clause of return this fetters the heir of tailzie from disappointing that return. It was not necessary that the word "return" should be used in the clause, if the intention of the entailer was fully expressed to that effect. It could make no difference, that instead of the estate, or right of succession, returning to the granddaughters of the entailer, as heirs portioners, it had been necessarily destined, as a dignified fief to them successively, one after another; and it was of no importance that, by some of the more ancient investitures, and with regard to particular lands, heirs male had been called, or that, on the failure of the heirs *alioqui successuri*, other heirs, *not* entitled to the succession *ab intestato* had been called. By the various procuratories of resignation and crown charters which have been noticed as preceding the deed of nomination in 1648, the whole former destinations have been done away. The determination of the Court, in Douglas case, was not that a clause of return was ineffectual to bar gratuitous alterations of the succession, but that the claim there

Dict.—Fiar—Absolute—Limited, ut supra.

founded on a clause of return, had been cut off by the negative and also by the positive prescription, thus clearly recognising its general effect, as had been previously done by numerous decisions.

4. The late Duke of Roxburghe was expressly debarred from altering the order of succession, as prescribed by the deed in 1648 and after settlements. It will be remembered, that the Duke and his advisers had not the most distant idea that this could be disputed. The grounds on which, after much and repeated deliberation, he thought himself authorized or justified to exclude the proper heirs and representatives of the family and honours of Roxburghe from the estates to which he had succeeded, was not that the entails did not contain an effectual prohibition against altering the order of succession, but that the whole prohibitions and limitations had come to an end, and that he himself was "*the last heir of entail.*" It may be doubted whether the Duke would have availed himself of such a plea or defence for frustrating the heirs called, if he had believed such to exist. But it does not augur much for the justice or legal soundness of the argument on which the appellants now almost wholly and exclusively rely, that it did not once occur to the late Duke, or to any of the able and numerous counsel to whose assistance he resorted in framing his settlements. It is beyond all doubt that, by the common law of Scotland, the owner of lands might, by any express declaration of his will, debar his successors from altering the order of succession. And it is quite a mistake to say, that a general prohibition to do nothing to the prejudice of the tailzie or succession annexed to a nomination or substitution of heirs will not be effectual to prevent gratuitous alienations, whether *inter vivos* or *mortis causa*. The contrary is laid down by all our lawyers, and completely fixed by decisions. Vide Dirleton *voce* Tailzie (B. ii. t. 3, § 59). And Bankton to the same effect, B. ii. t. 3, § 139. So Erskine, B. iii. t. 8, § 22, 23.

In the case of Bruce *v.* Forsyth, where a person had disponed his lands under a condition "that it shall not be lawful to the said James Bruce, nor to any of the subsequent heirs of tailzie, *to do any act or deed whatsoever that may frustrate* or prejudge the tailzie or course of succession;" the Court held it did not protect against contracting debts, but was effectual against altering the order of succession. In like manner, in the case of Scott Nisbet *v.* Young, Nov.

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Ante vol. ii. p. 98.

1763, (House of Lords, 21st Feb. 1765,) the clause, to do any " acts or deeds in prejudice of the other heirs, their right " of succession," it was not even imagined that the heir could alter, though the deed was not sufficient to prevent selling the estate.

5. The authorities and decisions quoted by the appellants are altogether foreign to the issue. Although inferences from the presumed will of an entailer, in general, be precluded, at least when the question is with purchasers or creditors, a full and fair effect must be given to the words he has used. Although prohibitions are not to be implied, those he has expressed are to be enforced according to their true sense and meaning; and although no regard is to be paid to intention not expressed, it is surely not enough to disappoint an entailed settlement, that ingenious men, when it is for their interest, can invert and confound words into a double or no meaning. While entails are permitted, it would be most extraordinary if courts of law were to give their sanction to every possible device for the purpose of disappointing a settlement which the owner of lands has made with such laudable views.

After hearing counsel for many days on the three preceding appeals,

(*First Day.*)

15th June 1809.

Lord Chancellor Eldon said,—

* " My Lords,

" Before I proceed to state to your Lordships my humble sentiments upon the points, or several of the points, which have been discussed in the questions, which have been long in agitation before your Lordships, with respect to the estates and honours of the late Duke of Roxburghe, you will allow me first, in a few words, to explain the reasons which induce me to adopt the course which, your Lordships will perceive in the sequel of what I have to state to you, appears to me, under all the present circumstances of the case, the most advisable.

" My Lords, After your Lordships had heard at the Bar a great deal of most able argument, upon various questions relative to the landed property, I mean, in the first place, the question, Who were to be considered as heirs of tailzie under the deed, which, your Lordships will recollect, was executed in 1648? upon the question, How far that deed, by its prohibitory, irritant, and resolutive clauses, had forbidden an alteration of the course of succession? upon the

* From Mr. Gurney's short-hand notes.

question, What is the effect of a certain clause to be found in that deed, which described the eldest daughter of Hary Lord Ker and their heirs-male? upon the important question, What is the meaning and import of those words "their heirs-male," as the words occur in that clause of the deed of 1648? upon the questions which arise, with reference to the effect of subsequent instruments, executed from time to time down to 1747, and the effect of length of time operating as prescription; and a great variety of other important questions, which it is not necessary now to detail to you; it occurred to me, that some of the same questions which were to be decided with reference to the title to the landed estates, must also be decided by your Lordships, first in a Committee of Privileges, and afterwards by the House, upon a report from the Committee of Privileges; and that it was at least advisable, therefore, that such a number of your Lordships as are necessary to constitute a Committee of Privileges, which, your Lordships know, is a larger number than is necessary to constitute a House sitting either in judicial or legislative business, should proceed to some extent: That, with a view to avoid the danger of coming to different decisions, where those decisions appear to be on the construction of the same instruments, in the House and in the Committee, though decisions applied to different subjects, to dignities in the one case, and to landed property in the other, it was at least advisable your Lordships should go to a considerable extent, in the Committee of Privileges, in your enquiries with respect to the dignities. And, my Lords, I certainly had a very strong persuasion, that if, without that delay, which operates mischievously and injuriously, your Lordships could, in the first instance, decide altogether the questions as to the dignities, before you came to a determination upon the questions as far as they respected the landed estates, that would be a most desirable course for you to take. Upon reflection, however, it does appear to me, that if your Lordships shall suspend your judgments upon the points in litigation with reference to the landed estates, until you shall be able to come, consistently with your own rules of proceeding, to a decision upon the dignities claimed, it must be attended, of necessity, with a tedious procrastination of this business, and with a delay before you come to judgment, which I am afraid would operate too severely upon the parties. I cannot, therefore, permit myself further to recommend to your Lordships that course of proceeding.

Remarks on the Titles and Dignities

"Your Lordships will recollect, that the dignities claimed are, that of the Dukedom of Roxburghe,—the Earldom of Roxburghe and the Barony of Roxburghe,—the Marquisate of Beaumont and Cessfurd,—the Earldom of Kelso—the Viscountcy of Broxmouth, —and the Lordship of Ker of Cessfurd and Caverton. I need not put your Lordships in mind, because I am sure it will be in your recollection, that the deed of 1648 applies only to the Earldom of Roxburghe; that the patent of Queen Anne, by which she granted

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to the then Earl of Roxburghe the Dukedom of Roxburghe, does not, if I collect its effect rightly, confer any other dignity: It limits the Dukedom of Roxburghe to the Duke and his heirs of tailzie entitled to the Earldom of Roxburghe. But in the course of so much argument as we have had at the Bar with respect to these titles, we know nothing more of the creation of the Lord Roxburghe, who was created early in the century before the last, except that there was such a creation. We have not had laid before us what was the origin of the titles of Lord Roxburghe, and Lord Ker of Cessfurd and Caverton; and before we can come to a decision upon the claims to those dignities, the history of all those dignities must be circumstantially and accurately laid before us.

"My Lords, It will be necessary also, if we are obliged to content ourselves with as little of information respecting many of these dignities as we have hitherto had, to come to a decision upon the question, what it is that the law, with respect to dignities, authorises us to presume to have been the contents of instruments not produced; what limitations we are by presumption, legal presumption, to suppose to have been contained in those instruments which are not produced. I need not tell your Lordships too, that I believe this would be the very first case which ever occurred in judicature in this House, I mean judicature with respect to titles and dignities, in which your Lordships have ever come to abstract decisions as to what was the effect of instruments appearing, or passages contained in instruments producible, and what was the effect of the law with reference to presumptions upon the probable contents of instruments that cannot be produced before you. Your Lordships have had at your Bar persons who have proved themselves, by establishing their pedigree and propinquity, to be individuals who had a right to call upon you for some decision upon such subjects. It would be a new proceeding in this House, with respect to titles and dignities, that we should be deciding upon the rights of parties, who, for aught we know at this moment, may not have been at your Lordships Bar; coming to decisions, therefore, which might eventually not benefit those who have been at your Lordships Bar, and which unquestionably could not operate against those who had not been there.

"My Lords, By the course, however, which your Lordships adopted, in referring it to the Committee to take into their consideration, whether the titles and dignities under the charter of 1646 and the charter or deed of 1648 were conveyed to that series of heirs who are called to succeed to that property, by that clause of the deed in 1648, beginning with the words, 'and qlkis all failzie- 'ing be decease, or be not observing of the provisions, restrictions, and 'conditions above written;' and by another direction which your Lordships House gave to the Committee, to take into their consideration what was the effect, with reference to the dignities, of the words 'heirs-male,' contained in the deed of 1648, you have secured

to yourselves the benefit of a further and repeated discussion of those points before a more numerous audience than that which constituted the House when the same points were under consideration with reference to the landed estates. If, therefore, there is a danger of our miscarrying in judgment when it is now proposed to your Lordships to take under your earlier consideration, how you should determine the questions with respect to the landed estates, the House has at least secured to itself this benefit, that there has been given a repeated opportunity, and to a more numerous body of your Lordships, the opportunity of considering those very questions; and if any of your Lordships who attend the Committee of Privileges thought it fit to object, by reason of what they had heard in the Committee, to any determinations which shall be proposed, and which, directly affecting the lands, may also consequently affect the honours, it is open to any of you so to object. Besides that, there has been another advantage gained by the mode of proceeding, and that is, that your Lordships have had under your consideration, how far it can be said that the honours are affected by this deed of 1648; a consideration which was represented at the Bar to be material, as undoubtedly it is in some degree, and in an important degree, to enable you to decide what is the effect of many of the words, the meaning of which has been in controversy, which occur in the deed of 1648, with regard to the landed property, as it will be in your Lordships recollection that it was contended, that an opinion upon the question, whether the honours passed by that deed, might enable you the better to conclude what was the right judgment as to the construction of the words that occurred in that deed of 1648 with respect to the landed property.

"My Lords, To this extent, it appears to me, the course your Lordships have taken has been useful; but I own I cannot myself approve our proceeding in that line of conduct further: but your Lordships must determine, whether you think it right to pursue that line of conduct throughout, and to the end. And the consequence of that, it is too manifest, must be this, that your Lordships cannot give to these litigant parties at the Bar any opinion in judgment upon the title to the lands, till that time shall have elapsed, which it appears to me is no very short period, till you can have had before you all those proofs which would justify you, according to the usages of this House, to come to a determination upon the titles to all those dignities, and upon all the questions of law that affect each of them; and all the questions of fact that affect the claims of those who are contending before your Lordships, and calling upon your Lordships to give his Majesty your advice in their favour with respect to those dignities.

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"In this state of things, it has occurred to me, that your Lordships would pardon me, if I presume now to ask your permission to give my own opinion at least upon the points which have been un-

der consideration in the question relative to the estates; and whatever your Lordships may think proper to do after that opinion is delivered, I shall at least retire from this House with the satisfaction of recollecting, that, as far as any industry on my part,—any attention on my part,—any diligent investigation of this subject on my part, can be of use to the parties, or to your Lordships, I shall not have run the risk of withdrawing from your Lordships, or those parties, the humble assistance that I may be able to offer, or have run the risk, perhaps, of not having another opportunity to offer that assistance. In the course of last summer, I do assure your Lordships, that this matter lay very painfully upon my mind. It has affected that mind very painfully ever since: it still does so; and I hope your Lordships will excuse me, if I take the present opportunity of relieving myself, by declaring my opinion, as far as I can, upon the subject: and for the purpose of doing this, I must recall to your Lordships attention, with as much of accuracy as I am able, the facts of this case, as the case relates to the landed property.

"My Lords, I am as little a friend, upon principle, as any body can be, to the notion of construing the meaning of one deed by ascertaining what is the meaning of another, more especially if the purpose of the latter deed be to alter the effect of the former; but still it is necessary to state to your Lordships the history of the titles, for two reasons: First, Because I do apprehend it is perfectly competent to every court of justice, when it is construing an instrument, to look at other instruments with a view to determine what is the language and style, and what is the phrase of the law, or of those who are conversant with the law; but, more particularly, I am desirous to state the history of the title to your Lordships, because I am extremely anxious that the parties should themselves be satisfied that we have not overlooked any of those facts, or circumstances, which they have thought sufficiently material, and sufficiently important, to be made the topics of reasoning and argument at your Lordships Bar.

"My Lords, As Colonel Walter Ker states the history, and, for the purpose for which I am now addressing myself to your Lordships, I will take it to be correct; he says, that in the beginning of the fifteenth century, a person of the name of Andrew Ker of Altonburn, was the head of a distinguished family of that name on the southern border of Scotland; that he had three sons, Andrew, James, and Thomas; that from these respectively descended the families of Ker of Cessfurd, of Lynton, and of Gateshaw. He states, that in 1467, Andrew, the eldest son, obtained from the Crown a grant of the lands of Cessfurd; that those were limited to the heirs-male of the institute, and all the substitutes, and the heirs-male of their bodies respectively, and, upon default of them, to the nearest true and lawful heirs whatsoever of Andrew Ker. My Lords, in 1474, he represents, that this Andrew Ker resigned the lands of Cessfurd, and

obtained a charter from the Crown, granting them to Walter Ker, the son and heir-apparent of Andrew Ker of Cessfurd, and his heirs-male lawfully begotten, and to be begotten; in failure of them, to Thomas Ker and his heirs-male; in failure of them, to William Ker, and his heirs-male; in failure of them, to Ralph Ker, and his heirs-male; and in failure of all of them, to the nearest lawful heirs whatsoever of the said Andrew Ker.

"My Lords, He states a great variety of other charters, particularly, I think, a charter in the year 1542, another charter in 1553, and another in 1573, all of which, it may be represented to your Lordships, as it has been represented from the Bar, keep alive the right to the estate in a male-succession, confining the right to a male-succession; and it is indisputable, that according to this claim, which, for the present I presume to be made good, when Robert, who was the first Lord Roxburghe, created by his patent Lord Roxburghe, which patent does not appear, and who was afterwards created Earl Roxburghe, that, when that Earl Roxburghe was seised of the estates, he had them vested in him descendible to a male line, and to a male line only.

"My Lords, I am anxious to state this circumstance distinctly to your Lordships, and I have stated it repeatedly, for the purpose of stating it distinctly; because it will be within your Lordships recollection that it has been contended, that it might at least be probable, that as this estate had come in the male line, according to the history of it, from the year 1467, down to the year 1648, that the first Earl of Roxburghe did not mean to disturb that species, and that line of succession, beyond that degree, and beyond that extent, in which he has, in the most express terms, disturbed it; and I, therefore, stop here one moment to say, that previous to the year 1643, previous of course to 1644, when there was one charter or deed, as your Lordships recollect, executed, and (previous) to 1648, this Earl had these estates descendible to the male line of heirs, heirs-male of the body, and heirs-male in general.

"My Lords, The then Earl of Roxburghe was not prohibited, by any of those clauses which, in Scotch entails, have that effect, from making an alteration in the order of succession; and accordingly, in the year 1643, it appears that he granted several procuratories of resignation, comprehending his honour, and comprehending all his estates, for a new investiture, to be given to himself, and the heirs-male to be lawfully procreated of his body, which failing, to his heirs and assignees, in his option, 'to be designat, nominat, made, 'and constitute' by him, at any time in his lifetime, or before his decease, by assignation, designation, or declaration, under his hand-writ, and under the provisions, restrictions, limitations, and conditions therein to be contained.

"My Lords, In the course of the same year, it appears that he granted a bond, which is printed as No. 3. in the appendix to

Colonel Walter Ker's case, proceeding upon a narrative of those procuratories of resignation ; and by that bond he obliged his heirs-male, as well gotten of his own body as his heirs-male of tailzie and provision whatsomever, to ratify them in favour of the heirs whom he should nominate, and to renew them in case of his death, without having completed his proposed investiture by charter and infeftment.

" My Lords, I ought to have mentioned to you, before I had come so low down in the history of these transactions as the year 1643, that Hary Lord Ker, who was in the year 1640 in life, did, in that year 1640, execute an instrument, to which a good deal of attention seems to be due, and, with reference to which, considerable argument, and, in some respects, weighty argument, as bearing (as far as one can borrow argument from one deed and apply it to another) upon the deed of 1648, was drawn, and addressed to your Lordships from the Bar. That was the bond of tailzie executed by him on the 18th July 1640 ; and that bond of tailzie is to this effect:— He binds and obliges himself and his heirs, to make due and lawful resignation of all and sundry the lands and barony of Primside, comprehending the particular lands mentioned in the infeftment granted to Robert Earl of Roxburghe, Lord Ker of Cessfurd and Caverton, his father, and to himself, in fee thereof, and so of all the town, lands, and Mains of Sprouston, with houses, biggings, mills, and pertinents thereof, wherein he, and Dame Margaret Hay, Lady Ker, his spouse, (who, your Lordships recollect, is mentioned in the deeds of 1644 and 1648), are infeoffed by virtue of their contract of marriage, and also of all the lands of Sprouston called the West End of the Town of Sprouston, and so on, acquired from John Lord Cranstoun, and of the barony of Browndoun, with the pertinents, conquest and acquired from John Earl of Traquair, wherein his father is infeft in liferent, and he in fee, and several other premises, for a new heritable infeftment and seisin to be given to him the said Hary Lord Ker, and to the heirs-male lawfully gotten or to be gotten of his body ; which failing, to Lady Jean Ker, his 'eldest dochter.' Then follow these words, which, in this instrument, are extremely material words, as furnishing, in one way of putting the case, a construction upon similar words in the deed of 1648. Your Lordships recollect, or will be put in mind when I come to state the deed of 1648, that a limitation is contained in that deed, to the eldest daughter, in the singular number, of the late Hary Lord Ker, *without division*, and *their* heirs-male ; and it has been contended below, and it has been insisted upon in judgment, and has been contended here, that those words, '*without division*,' of themselves, go to the length of proving, that the words 'eldest daughter' must be considered as a plural term,—as a term which, though the expression is singular, must be taken to denominate a class of persons. Now, my Lords, it is impossible to say, that the

words, 'Lady Jean Ker' can be taken to express a class of persons; for though the words 'my eldest daughter' may in many cases be taken, I think, in our law, and I think also in the Scotch law, to mean a class of persons, yet when they are prefaced by the express name of an individual, they cannot mean a class of persons. The words here, in this bond 1640, are these: 'Lady Jean Ker, my eldest daughter.' That can mean Lady Jean Ker, and that individual only. And then follow the words '*but division*,' the meaning of which is the same precisely as *without division;* and that does shew this fact, that the words without division may be used, in a Scotch conveyance, with respect to a female taking, without its being the necessary inference from those words *alone*, that the singular term is meant to comprehend a class of persons. On the other hand, it certainly will not follow, if the words '*without division*' are usually applied as words which are to separate the enjoyment amongst persons who are described by a singular term, as, for instance, if the words were 'heirs-female *without division*,' the effect of which I shall have occasion to state to your Lordships presently, it cannot, I say, on the other hand, be contended, that they are words to which no weight whatever is to be ascribed, when you find them, in the deed, following a description which *may* either mean one individual, or *may* mean a class of individuals.

My Lords, There is another clause in this instrument, which it is necessary, in the history of the transactions of this family, to point out to your Lordships, as that upon which argument has likewise been offered to you, though I do not find that it was submitted to the Court below, which certainly is a passage of some importance. There are two passages, indeed; but there is one passage in this, which certainly is a passage of great importance: 'In caice it shall 'happen the said Lady Jeane, my eldest daughter, and failzing of 'her be decease, the said Lady Anna, her sister;' her sisters Margaret and Sophia are not mentioned in this instrument, 'to suc'ceed to the lands, baronies, and utheris above specified, be virtue 'of this present bond of tailzie and resignation, and infeftment fol'lowing thereupon; then, and in that caise, it is speciallie provydit, 'that my said daughter sua succeeding, sall be halden and obleist 'to marry and take ane husband of honorable and lawful descent, '(be the advice of her maist honorable friends), who sall assume 'and tak to him the sirname of Ker, and carry and bear the arms 'of the hous of Cessfurd, and the bairns' (perhaps your Lordships do not know that that means children) 'to be procreate of the said 'marriage sall continue in the samyn sirname of Ker, and beir the 'arms of the said hous of Cessfurd in all tyme thereafter; or in 'caice my said daughter sua succeeding sall happen to marry ane hus'band of greater quality, be advice of her saids honorable friends, 'sua that he may not take the said sirname and arms, than, and in 'that caice, the *second son* procreate of the said marriage sall suc-

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'ceed to the lands, baronies, and utheris speciallie and generally 'above mentionat, and be providit thereto, who sall take upon him 'the said sirname of Ker, and carry and bear the arms of the said 'hous of Cessfurd, and he and his heirs sall continue in the same 'sirname and arms in all time thereafter.'

"My Lords, I presume to call your Lordships attention to this passage, because I think it cannot escape your observation, that it is extremely possible, judicially, to put a plural signification upon the singular term, which here occurs. The case put there, your Lordships see, is that of this Lady marrying a husband of greater quality, the consequence of which would be, that her eldest son would take the name and arms of that husband of greater quality, and not the name and the arms of the person who executes this bond. He then goes on to say, that the *second son* procreate of the said marriage 'shall succeed to his lands, baronies, and utheris, and bear 'the name and arms of the hous of Cessfurd, and shall so continue.'

"Now, my Lords, I think it would be a very narrow construction of this, to say, that these words, '*second son*,' can mean nobody but the son of that marriage who is *second born*, that is to say, that if there were four sons of that marriage, and the individual actually second born should happen to die, the third son would not be the second son within the meaning of this; or if the third son had died, that the fourth son would not have been the second son within the meaning of this; and if it could be said, as it can be, I think, that the third son was an individual who might become the second son in a certain event, it would be difficult applying these rules to a Scotch instrument, to say that this singular term, *eldest dochter*, even in this ancient instrument in 1640, might not, in given events, be a term sufficiently available to describe a class of persons taken successively, or a class of persons taken in this sense, that in one event one would take, in another event another would take, and in another event a third would take.

"The deed then proceeds to state, that if it should happen that the said Lady Jane his daughter, and failing of her, Lady Anna, her sister, also his daughter, or any of them who should happen to succeed to these lands, baronies, and so on, by virtue of that tailzie, to fail in doing or fulfilling the premises, then it is specially provided, that the infeftment, and that present bond made thereanent, so far as concerns her part thereof, should be null, and of no avail from thenceforth, as if she were naturally deceased, and the next person provided to the lands and others aforesaid by virtue of that present bond of tailzie, should succeed thereto; and his said daughter and her heirs so failing, shall be holden and obliged to denude themselves of the right of the lands, baronies, and others, to and in favour of the *next person* provided thereto by this present tailzie. Here is also a singular expression, 'the next person provided thereto by this pre- 'sent tailzie,' which would not mean, your Lordships observe, the

person who, at the instant of executing this tailzie, was the next person provided thereto, but the person who, at the time that tailzie took place, was the next person provided thereto, and who would, under this instrument, have a right to take the benefit meant in the case of a failure of the daughters and their heirs-male, to be given to the next person then provided thereto; but here also is, in a sense, a singular term, describing more persons than one, though eventually describing but one person.

"My Lords, Having stated to your Lordships the effect of the bond of 1640, I return to what I was before about to mention to you, the charter of 1644. I give it the name of charter, though perhaps it would be called with as much propriety a deed of designation, nomination, and tailzie. In this, it is necessary to point your Lordships attention to the circumstance, that, towards the close of it, there is a clause, which, for want of a better word to apply to it, I would describe as a power of revocation; and, notwithstanding what has been argued at your Lordships Bar with respect to this instrument, that, on the one hand, it has been said, that it is an absolute nullity, that it is altogether revoked; and, on the other, it has been insisted, that it is still an existing instrument,—that it has been carefully kept in the charter-chest,—that it was found with the other muniments and documents of the title; it does, I confess, appear to me to be an instrument, that, whatever might be its effect between 1644 and 1648, it is in this sense a revoked instrument,—that it is an instrument which, except in a very limited way, which I shall hope to point out to your Lordships distinctly by and by, cannot affect the limitations contained in the deed of 1648, or the limitations contained in the subsequent instruments which regulate this title. At the same time, this deed of 1644, in my apprehension, is a deed which is not to be altogether overlooked by your Lordships, when you are endeavouring to collect, not what the author of the deed meant to do, but what is the meaning of words in an instrument of conveyance, which an individual has actually used, when he has used the same words in both instruments. I cannot, for instance, with reference to the deed of 1648, contend, consistently with any notions I have of law or of evidence, that because the author of the deed of 1644 expressly created a succession among the daughters of Hary Lord Ker, by express and technical limitations, that therefore he intended to do the same thing in the deed of 1648. I must, according to my notions of law and of evidence, find in the deed of 1648 itself, that he has done it; and I can never infer, I think, rationally, from a deed executed in 1648, which, *ex concessu*, was meant as a deed to bring about some alteration, that because he intended a particular provision by the deed of 1644, and because you collect from the deed of 1644, that according to that intention to create particular limitations, he did actually create them, you are therefore to infer he did the same thing in 1648, unless, upon look-

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ing into that instrument of 1648, you find he did actually so do. But I take it to be equally clear, that there may be more ways than one of doing the same thing. I apprehend, that if, upon looking into two instruments, you find the same expressions, you may form an opinion, that they have the same meaning in each. It seems to me to be a legitimate purpose, to look at different instruments, to see how, in the language of conveyancing, singular terms are employed to describe a plurality of persons; and I think that you may legitimately reason in the same way from the deed of 1644 to 1648, as I took the liberty, in a short word, to do, from the bond of 1640 upon the words 'but division,' with reference to the term 'without division' in the deed of 1648.

"I ought to state to your Lordships what was the state of the family of this Earl of Roxburghe in the year 1648; and it is necessary to do so, with a view to call back to your Lordships recollection the reasoning which has been offered on both sides; on the one side, the reasoning holding forth the eldest daughter of Hary Lord Ker as the *persona delecta* of the Earl of Roxburghe in 1648; on the other, the reasoning which has aimed at representing as a gross improbability the supposition, that the Earl of Roxburghe could mean to give exclusively to his eldest daughter, without giving to his younger daughters, that which he had not given exclusively to his eldest daughter marrying a Drummond, but had given to all his daughters, if they married particular persons pointed out to them; it is, I say, necessary to call back your recollection to the state of the family at this time: because on referring to the state of the family, your Lordships will see, that there was great ground for that which was urged; I mean, that the provision made by the charters of 1644 and 1648, with reference to the actual state of the Earl's family, is a provision in itself so whimsical, that it is difficult to argue at all from any supposition that any persons were his *personæ delectæ;* and that there is as good ground for arguing, as they have argued, that he has overlooked the three younger daughters of his son Hary Lord Ker, as that he should overlook the children of other younger branches of his family.

"In the year 1648, it appears that Hary Lord Ker was dead. His father, the first Earl of Roxburghe, had been twice married. He first married Mary, the daughter of Sir William Maitland, and by that marriage he had one son and three daughters,—William, the Master of Roxburghe, who died without issue,—Lady Jane Ker, who married the second Earl of Perth, and had issue,—Lady Mary Ker, who married Henry Lord Dudhope, by whom she had issue a son,—and Lady Isabella Ker, who married, first, to Halyburton of Pitcur, by whom she had no child, and, secondly, to James Earl of Southesk, by whom she had children. Lady Jane Ker, who had married John the second Earl of Perth, had issue, Henry Lord Drummond, who died without issue,—James, who was afterwards

Earl of Perth, who had several sons and daughters,—his third son, John Drummond, had issue,—his fourth son was Sir William Drummond;—and she had also two daughters, Lady Jane Drummond, who married John, the third Earl of Wigton, by whom she had six sons and two daughters, and Lady Lilias, who was married to James Earl of Tullibardine, by whom she had issue. My Lords, Lady Jane Drummond, who married the Earl of Wigton, had issue, John Lord Fleming, who was the fourth Earl of Wigton, and who married Lady Anna Ker, second daughter of Hary Lord Ker,—Robert Fleming, Henry Fleming, James Fleming, William Fleming, and Charles Fleming. This is the state of his family by his first wife.—The following was the state of his family by his second wife. Hary Lord Ker was dead. Hary Lord Ker had left behind him, Lady Jane, Lady Anna, Lady Margaret, and Lady Sophia Ker.

" In this state of the family of the Earl of Roxburghe, he executes the deed of 1648; and in executing that deed he passes over his eldest daughter Lady Jane Ker herself: he does not pass her over absolutely, because he makes a provision for some of her issue; but with respect to any personal provision for her own individual benefit, he passes her over. His next eldest daughter by his first marriage, Lady Mary Ker, he takes no manner of notice of;—his own still younger daughter by his first marriage, Lady Isabella Ker, he takes no notice of: so that, looking to this instrument of 1648 as a provision for the family, it appears that he makes no provision for Lady Jane Ker, the eldest. He does not limit the estate to her, but he does, in the manner I shall mention, limit the estate to one of her sons, (4th son, Sir Wm. Drummond,) and he passes over, in making this provision for the family of the eldest daughter, he passes over his own youngest daughters altogether, and takes no manner of notice of them. His first limitation is to Sir William Drummond, who was, upon the pedigree I have stated to your Lordships, fourth son of the Earl of Perth, passing over the three eldest sons. After Sir William Drummond, he proceeds to take as his second substitute Robert Fleming, who was the second son of the eldest daughter of Lady Jane Ker. He passes over, therefore, the eldest daughter of Lady Jane Ker herself, but makes a similar provision for one of her children that he had made for Sir William Drummond, one of the children of Lady Jane Ker, and he then makes his third substitute Henry Fleming, his fourth James Fleming, his fifth William Fleming, and his sixth Charles Fleming, passing over again both his grand-daughters, Lady Jane Drummond, afterwards Lady Wigton, and the Lady, afterwards Lady Tullibardine; so that in the line, your Lordships observe, which descended from his first wife, he makes no provision for his own first daughter, though he does for the descendant of that daughter; he passes over his own younger daughters, and, when the descent goes on further from him, he passes over three sons of Lady Jane Ker, his eldest daughter, he passes over the first son of Lord

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Wigton, and then he proceeds to limit the estates to the second and other sons of Lord Wigton, passing over his youngest grand-daughters, the daughters of Lady Jane Ker; from which it is argued, and I take notice of the circumstance, in order that the parties may be satisfied that I have noticed it, that, if he could pass by his own younger daughters, and his own younger grand-daughters by his first marriage, and could give a preference to the descendants of the eldest grand-daughter by the first marriage, it could hardly be predicated of him, that, with respect to the grand-daughters of the second marriage, he could not mean to make the same sort of provision, and pass over the three youngest of those grand-daughters.

"My Lords, This deed of 1644 contains some passages which I think ought to be pointed out to your Lordships attention; not, I say, as evidence that he who made the deed in 1648 meant the same thing as he meant by the deed of 1644, when his purpose in 1648 was to revoke the deed in 1644, and to make other provisions; but with reference to ascertaining what is the legal meaning of the language which is used. After making these provisions as to the Flemings marrying his daughters, and after making the provisions, which your Lordships will recollect, naming the third daughter as if she was the second daughter, and the second as if she was the third, he proceeds to notice the case of the four younger sons of the Flemings, the elder not succeeding under the limitation, by not observing the conditions, and then he says, 'Thaine, and in ather of thease 'caices, we have designet, nominate, and appoynted, and by thir 'pntts, designes, nominattes, and appointes.' Now, I beg your Lordships attention to these words, 'the immediat next eldest lawll 'sonnes,' in the plural number, 'of the saides Johne Lord Flemyng 'and Dame Jeane Drummond his Lady, being immediatlie next in 'birthe to their eldest sone, and are ilk ane of them, *successivè* after 'uyres, to be the persounes wha sall succeed to us in our said estate, 'landes, baronnies, and uyres above spect, they always mareing and 'taking to yr lawll spouses the eldest lawll dochter of the said Lord 'Ker, our sonne, being on lyffe, and unmarried for the tyme, and 'they and yr airis-maill forsaid of the said marriage keepand, per- 'formand, and fulfilland the haill remanent conditiounes of this pnt 'nomination.'

"My Lords, The words which I have read to your Lordships constitute a description of persons which must admit of construction, because they require construction. It is absolutely impossible to give them the effect they have in common parlance, this is to 'the 'immediat next eldest lawll sonnes of the saidis Johne Lord Flem- 'yng and Dame Jeane Drummond, his Ladie, being immediatlie 'next in birthe to their eldest sonne.' Why, a sixth son, in the language of common parlance, could not be said to be next in birth to their eldest son; but he might become next in birth to their eldest son by the failure of his intermediate brothers; and these words,

at the moment of the execution of this deed, might describe one person, and at the time that they would be to be acted upon as a limitation taking effect, they might describe an entirely different person; and this shows therefore that you must get at the meaning of the words, by construing each word with reference to every other word, and by construing the whole with reference to the context in which the words occur, 'they always mareing and taking to yr lawll spousez 'the eldest lawll dochter of the said Lord Ker, our sonne.' Now the eldest daughter of Lord Ker, in common parlance, would mean Lady Jane Ker; but that the eldest daughter of the said Lord Ker, our son, may mean at one time Lady Jane Ker, under the effect of this instrument, at another time Lady Margaret Ker, and at another Lady Anna Ker, is clear by the words which follow here, which are, 'being on lyffe and unmarried for the tyme;' and the question, therefore, under any other instrument would be, whether the words, 'eldest lawll dochter of the said Lord Ker,' being proved in this context to be words not necessarily, and in every point and period of time describing the same ascertained individual, the question in every other conveyance would be, whether there are words in it to show that the terms, 'eldest lawful daughter of Lord Ker,' would necessarily mean a class of persons, taking them together with the context, as clearly as the words, 'being on lyffe and unmarried for 'the tyme,' prove such a meaning; for there is no contending that those are the only words in the language capable of giving such a construction to the words which precede them.

"So again, my Lords, it is necessary to ascertain the construction to be given to the words in this clause, 'their airis-maill,' and 'thir 'airis-maill foresaid of the said mareadge, keipand, performand, and 'fulfilland, the haill remanent conditionnes of the pnt nominatioun.' Now it is stated as a proposition generally true, as it undoubtedly is, that the words heirs-male do not mean heirs-male of the body; I mean do not mean heirs-male of the body in Scotland;—still, if they are heirs-male of the marriage, they may mean heirs-male of the body: and if the question were to arise therefore upon this instrument, I am satisfied that your Lordships could be driven by no precedent necessarily to say, that these words, 'heirs-male,' meant heirs-male, not merely of the body, but heirs-male generally, when the author of this deed has said that they mean heirs-male of the marriage.

"Then follow these words: 'And falzeing of all the before-'namit persons, be deceis or not-performance of the foresd condi-'tiounes; in that caise we have designit, and, be thir pntts, designes 'the said Lady Jeane, Margaret, Anna, and Sophia Kers, our oyes, 'and falzing of the first, the next immediate eldest of the sds doch-'ters *successivè* after uyres, and yr airis-maill lawlie to be gottine of 'yr bodies, to be the personne wha sall succeed to us in our sds 'landes, barronnies, erledom, and uyres above wrn.' Here, your

Lordships observe, is an express limitation, that the daughters are to take *successivè;* and I mark that as I go along, because the insertion of such an express limitation in this instrument (1644), and of such a limitation as that which is to be found in the deed of 1648, are the two facts which must be put together, when you come to reason what is the effect of that obscure passage in the subsequent deed of 1648; but I cannot pass this over without saying, that if the word *successivè* had not stood part of this sentence, I should have held it indisputably clear, that the meaning was exactly the same: for if it had stood, 'and falzeing of the first, the next immediate eldest of 'the sds dochters after uyres, and yr airis-maill lawlie to be gottine 'of yr bodies, to be the personne wha sall succeed to us in our sds 'landes, baronnies, erledom, and uyres above wrn,' I think it must have been indisputably clear, that that would have created a succession without the word *successivè*. And I have to call your Lordships attention here to the singular word '*personne;*' for it cannot be doubted, that that word, in the consideration of what might be the necessary actual application of it, when an application of it was called for, with reference to a person to succeed, might be applied to a person at that time, to whom it would not be applicable at the time the instrument speaks, that is, at the time of its execution, as describing a person who, in a future event, might be the person to whom only it could be applied, and to whom, therefore, necessarily it must be applied.

"My Lords, This goes on to say, 'they always mareing, and 'taking to yr lawll spouss, ane gentilman of the name of Ker, of 'lawll and honoll descent.' Your Lordships observe that as the singular term person, in the former part, must mean persons, so the plural term here must mean they and each of them. It must be singular and plural. 'They always mareing and taking to yr lawll 'spouss ane gentilman of the name of Ker, of lawll and honoll de-'scent; and yr sds husband and yr airis forsds, taking, keiping, and 'retaining the said surname of Ker and arms of the sd Hous of 'Roxburghe allenarlie, in all time yrafter; as also performand the 'remanent conditiounes of this pntt nominatioun: and falzeing also 'of all the sds personnes, be deceis or not-performance, as sd is; in 'that case, we have designit, and, by thir pntts, designes and ap-'poyntes our nearest and lawll air-maill qtsumever, being ane gentil-'man of the name of Ker, of lawll and honoll descent, and the heirs-'maill lawlie to be gottine of his body.' Your Lordships will permit me to observe, that here the Ladies were required to take a gentleman of the name of Ker in marriage. That was not the case in the deed of 1648. The person who was to take under this last limitation was to be a gentleman of the name of Ker, entitled, as I understand, lawfully entitled to the name of Ker, of lawful and honourable descent, which is not the case in the deed of 1648.

"Then, my Lords, there is another clause, which it is necessary

also to call your Lordships attention to, and that is a clause with reference to the portions. "In caise it sall happine, the said Sir 'William Drummond, or any others of the persons either particu- 'larlie or generally before namit, and their airis-maill forsd lawlie 'to be gottine of yr bodies, being married as sd is, or ony of them, 'to succeid to us in the said estate and living, be virtue of thir 'pntts, that thane and in that caise, the samyne persone sua suc- ceeding, and their spouses,' (There the word person clearly must mean, not an individual who could be described at that time, but individuals who were to succeed one after another, and who might therefore be said, though described by a singular term, with great propriety to be a person who might have their spouses), 'to be joyned 'in mareadge with them; and their airis-maill forsades sall be 'haldine and obleist to content and pay to the remanent dochteris 'before namitt of the said umql Hary Lord Ker, the several soumes 'of money after spectt, ilk ane of them for yr awne pairts, as is 'after divydit; give thaire be only ane of them, to content and pay 'to the said dochter the soume of forty thousand merkis, usual 'money of this realme; and give there be only twa of them on lyffe, 'to content and pay to the eldest the soume of threttie thousand 'merkis,' (Your Lordships will recollect these portions are enlarged in the deed of 1648), 'and to the youngest, the soume of twenty-five 'thousand merkis, money foirsaid; and give they be all thrie on 'lyffe, to content and pay to the eldest the soume of threttie thou- 'sand merkis, usual money forsd; to the second, the soume of 'twenty-five thousand merkis, money foresaid; and to the youngest, 'the soume of twenty-five thousand merkis, money foresaid; and 'that sua soon as they sall be of the age of sexteine years: Provid- 'ing that, in caice it sall happine that any of the sdes dochteris,' (which might be one of them; for though there were three, that might describe either two or one,) 'to depart this lyffe befoir they 'be of the age forsd.' (Now, if one daughter died, you would be obliged to construe that word as if it were she; and if two daughters died, you would be obliged to construe any of the said daughters as meaning either of the said daughters. That is another passage that tends to shew, that a plural word is sometimes used, which must be applied to a single person), 'or zitt before they be 'married; in that caice,' (This I would also draw your Lordships attention to), 'the portioun of the sd dochter sua deceisand sall re- 'return to our sd air, and nawayes fall to the rest of the sdes sisteris, 'yr airis nor exers.' Now there also the singular term portion, and the singular term daughter, might, by events, be necessarily construed to mean portions and daughters; and the plural term sisters, their heirs and successors, might, by the course of events, be made to define one and one only.

"My Lords, I have nothing further to observe upon this, except calling your Lordships attention again, in a short word, to that which

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I have termed the power of revocation, and which is in these words: 'But prejudyce always to us, at any time during our lyffe 'time, to discharge, reforme, alter, or renew thir pntts as we sall think 'expedient.'

"My Lords, the next instrument which it is necessary to take notice of in the course of these transactions, is the charter in 1646, and that charter, it is necessary to observe upon. The lands were granted to him, and to the heirs male of his body, with remainder, 'heredibus suis vel assignatis quibuscunque, in ejus optione, desig-'nandis, nominandis, vel constituendis per ipsum, aliquo tempore in 'vita sua, vel ante ejus decessum, per assignationem, designationem, 'nominationem, seu declarationem, sub sua subscriptione.' From this I infer, that as early as 1646, and therefore earlier than 1648, the Earl had made up his mind, that the regulating instrument of his title should not be that deed of 1646, because your Lordships observe, that he alludes clearly to some instrument thereafter to be executed.

"My Lords, In 1648, he executed that deed or charter upon which the controversy has principally turned at your Lordships Bar: and it is necessary, in order that this case may be fully understood, and with clearness, to lay before you the principles which govern the judgment of the individual who addresses your Lordships, first to state the effect of that charter.—The person first called is the same Sir William Drummond, as 'youngest lawful sone to Johne Earl of 'Perth, and the aires maill lawfully to be gottine of his body, with 'his spouse after mentionat.' Here, my Lords, is the first alteration to which it will be necessary for your Lordships to advert, that the heirs-male of Sir William Drummond who are to take under the deed of 1648, were to be the heirs-male of the body of Sir William by his spouse after mentioned, which is repeatedly after mentioned; and it is material to notice that, because it has been intimated, that under the deed of 1644 there might be heirs-male of Sir William Drummond who might take, who would not necessarily be his heirs-male by any of the daughters of Hary Lord Ker. Perhaps that will admit of more doubt than seems to have been thought to belong to that question; but under this deed of 1648, that no other heirs-male could take under the effect of this limitation, is abundantly clear. He proceeds then to limit the estates to the second lawful son of John Lord Fleming and Dame Jean Drummond, his Lady, and the heirs-male of his body; then to the third son, and then to the fourth lawful son of John Lord Fleming and his Lady. And here your Lordships will allow me to call your attention to the manner in which he calls, in this tailzie, the younger Flemings: 'I nominate, 'declare, and constitute the next immediate eldest lawful sons of the 'said John Lord Fleming, procreate or to be procreate betwixt him 'and the said Dame Jeane Drummond, his Lady, and the airis-male

'lawfully to be gotten of their bodies with their spouses *respectivè* 'after nominate.'

"Now, my Lords, although it be perfectly clear, that the institute here mentioned, as the youngest lawful son of John Earl of Perth, could not, by any possibility, mean any person but Sir William Drummond, because it is a description of Sir William Drummond, he being also described, *eo nomine*, Sir William Drummond, and that the second lawful son of Lord Fleming could mean no body but Robert Fleming, for the same reason, because he is named, and so that the third and the fourth lawful son could mean only those individuals who are named by their Christian and sirnames; yet, my Lords, would it be difficult or impossible to say, that where such a general term, as the next immediate eldest lawful sons, is found, and which is not limited in its construction by the actual use of those words which constitute name and sirname, and where the purpose was to create a succession, that that term could mean others than the fifth son, and that it did mean the sixth, seventh, eighth, ninth, or tenth? Here construction is not only admissible, but no effect whatever can be given to the deed, unless you do admit it, because this is without a single word expressive of the idea of succession; this is a limitation to the next immediate eldest lawful sons of the said John Lord Fleming, to the whole of them described as sons by the plural term, and to the heirs-male lawfully to be begotten of their bodies. I presume it cannot be contended, that that was a limitation under which all four of these sons could take at once shares descendible to the heirs-male of their bodies lawfully begotten. Why, then, if all the sons are not so to take, how can they take unless *successivè*; and if they take *successivè*, by what term are they so to take, there being no such term as *successivè* in the instrument, unless it is by virtue of these terms which form the whole description? the meaning of the whole being put together, and that meaning being collected from the context, and the whole of the context in which those words occur. These therefore are extremely material words in this deed of 1648, as shewing what it is that the author of this deed of 1648 means, when he connects plural terms with singular terms, and singular terms with plural terms. It cannot be denied, I presume, that you may, from the construction of each and every word, see what is the proper construction to be put upon the whole of the words.

"There then follows this clause, to which I would call your Lordships attention: 'And also providing, that the said Sir William 'Drummond, and failing of him by decease, or in case of his marriage, 'or not observing of the conditions above and after mentioned, the 'next person,' in the singular number, 'havand right for the time 'to succeed.' I call your Lordships attention to the words 'to succeed.' Here is *person* in the singular number connected with the idea of succession, as expressed in the terms 'havand right for the

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'time to succeed, as said is, sall marry and take,' to what? to *his* lawful spouse? No: it is 'sall marry and take to *their* lawful 'spouse.' Then, my Lords, I say, if you were to ask me at the time this instrument is executed, who is the next person having a right for the time to succeed, I should reply, that it is the person named in the settlement who is next to succeed; but if you asked me who that means at the time a former substitution fails, that person who was next to succeed at the time of the execution of the deed might not be the person who was then next to succeed; and the question is, Whether it is not matter of necessary construction, in order to carry into effect the conditions and restrictions of this deed, that you should say that the singular term, the next person, is meant to describe a plurality of persons taking certainly individually when they do take, but a plurality of persons under a singular phrase, and is not that demonstrated by the plural pronoun their, as coupled with these words, the next person and their spouses?

"My Lords, I know it has been said, the meaning would have been exactly the same, if it had been the next person, and his spouse: the meaning would have been the same; but still the singular term, *the next person*, and the singular term, *his*, would have described, in two events, very different persons. They, therefore, would be terms apt enough to describe more persons than one, according as they were used in their connection: the individual who was to be taken to be their lawful spouse, was Lady Jane Ker, eldest daughter of Hary Lord Ker. I press upon your Lordships attention this phrase, to satisfy the parties, that you have not forgotten, that a great deal of stress was laid upon this expression; that in this very deed, upon which has arisen this discussion, Lady Jane Ker is expressly described as being the eldest lawful daughter of Hary Lord Ker, Lady Anna Ker is here stated to be the second daughter of Hary Lord Ker, who, in the deed of 1644, had been stated to be third daughter of Robert, and Lady Margaret is put in her proper place.

"There then follows a clause, upon which a great deal of argument has been used, as to taking the name of Ker, and bearing the arms of Roxburghe: 'In caice of failzie, or that they refuis or forbere to assume and tak upon them the said surname of Ker, and 'carry and bear the said arms of the house of Roxburghe, in that 'caice the person failzien, and the airis of thair body, sall amit and 'tyne the benefit of the tailzie and succession.' There is another part to which I would call your Lordships attention. 'In that 'caice, the person or air of tailzie sua failzien,'—but that I may pass over; and that brings me to the particular clause in this instrument upon which the question mainly arises: 'And qlkis all failzeing be decease, or be not observing of the provisions, restrictions, 'and conditions above written, the right of the said estate,' in reference to which, as your Lordships know, there is a great deal of con-

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test, whether it will pass the dignities, as well as the lands, 'the 'right of the said estate, sall pertain and belong to the eldest doch-'ter of the said Hary Lord Ker, without division, and yr heirs-male, 'she always mareing or being maried to ane gentilman of honorable 'and lawful descent, wha sall perform the conditions above and 'under-written;' and then follow these words: 'Qlkis all fail-'zing, and yr sds airis-male, to our nearest and lawful airis-male 'qtsomever.'

States the claims of the competing parties.

"My Lords, The question between these parties arises principally upon this clause. Sir James Innes Ker says, that these words, 'the eldest daughter of Hary Lord Ker, without division, and their heirs-male,' mean the daughters in succession; and that as Margaret, on the failure of the former daughter, became, in a sense, eldest daughter, he, descending from her, as the heir-male of her body, is entitled to these estates and these dignities. He contends further, that the words their heirs-male do not mean heirs-male whatsover, or heirs-male in the general sense, but that the context shews that they mean heirs-male of the body. On the other hand, Colonel Walter Ker insists, that these words, eldest daughter, are descriptive of Lady Jean Ker, described, in the former part of the deed, as eldest lawful daughter of Hary Lord Ker: and he further contends, that the words, their heirs-male, do not mean heirs-male of the body, but heirs-male generally; and that therefore, whether this created an estate in the eldest daughter only, or created an estate to be taken by the successive daughters, yet no third daughter can take in preference to the first and second, until heirs-male general of the first and second have failed, and he states himself to be the heir-male general of Lady Jean Ker, as well as the heir-male general of Robert the first Earl of Roxburghe, and of Hary Lord Ker; and that therefore, upon that construction, he is entitled to succeed as such.

"Mr. Bellenden Ker, on the other hand, cannot agree with either of them. He says, together with Colonel Walter Ker, that eldest daughter means Lady Jean Ker; but he says, together with Sir James Innes Ker, that heirs-male does not mean heirs-male generally, but heirs-male of the body; so that, upon one point, he contends with Sir James Innes Ker, and on the other point, with Colonel Walter Ker. My Lords, It is further insisted, upon the part of Mr. John Bellenden Ker, as against both these other competitors, that this clause really is not a clause which creates heirs of tailzie; they call it in the argument a devolution-clause, a clause of return, and a great variety of other names: but Mr. John Bellenden Ker insists, that the individuals here described, however the description may suit, are not individuals whose rights and interests are protected as heirs of tailzie.

"I would now call your Lordships' attention to the words, 'qlkis all 'failzeing, and yr sds aires-male;' there are two constructions which

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have been put upon these words. Upon the part of Sir James Innes Ker, it is contended, that the words, 'qlkis all failzeing, and yr sds 'aires-maill,' mean, all which daughters failing, and their heirs-male. On the other hand, it has been contended by other parties, that that is not so; that 'which all failing' does not mean, which daughters all failing, but which substitutes all failing; and that if the eldest daughter, or other daughters, and their heirs-male have failed, that lets in the claim of lawful heirs male whatsoever.

Construction of the words used in the old Retours.

"My Lords, Before I part with this, your Lordships will give me leave to remark, that we have had a great deal of argument upon the Latin translation. Now I think I do not presume too much when I say, that I should think the Court of Session in Scotland were just as good interpreters of these Scotch words as the Latin translator of a charter; and that to put it at the highest, you can only look at his translation as a judicial opinion what those Scotch words meant. In the first retour, as I understand the case, the word *their*, which stands in the original, is construed *earum*. If that be a right construction, *earum* must, of necessity, mean the heirs of the daughters. *Ejus* could not describe daughters; *earum* could not describe males: therefore, if the translator is right in making it *earum*, his opinion is, that the words, their heirs-male, mean the heirs male of females, and of more than one female; but if we are to take the authority of the same translator, and put him upon the Bench in the Court of Session for this purpose, when he came to construe the words, which all failing, and their said heirs-male, he construes this word, not *earum*, but *eorum*. Now it is impossible that that can mean the daughters: it may mean the daughters and their heirs-male, because *eorum*, which is a masculine term, may include both, or it may mean all the former substitutes and their heirs-male. My Lords, in some other of the instruments, which we see afterwards, you find this word is construed by the word *ejus*, which I think would make no great difference; but this word *their* has, in point of fact, admitted of all these different translations, which are just so many constructions put by the men of business of the parties upon the instrument now before your Lordships.

Observation as to "Heirs-male."

"My Lords, I cannot part with this, without another observation, with respect to those who contend, that these words, 'which all 'failing, and their said heirs-male,' mean, not the heirs-male of all the daughters, but the heirs-male of all the substitutes. It is impossible for them, consistently with that, to contend, that heirs-male *may not* mean heirs-male of the body, because the heirs-male of the former substitutes are all heirs-male of the body; and therefore, when they construe these words, they must say, that as far as they are applicable to the former substitutes, they mean heirs-male of the body; and that as far as they are applicable to heirs of the daughters, they mean heirs-male generally; and if they do that, they ad-

mit, that heirs-male is a flexible term, and may mean both heirs-male generally and heirs-male of the body.

"Your Lordships will permit me now to point out that clause in which the portions are given. I should first have stated to you a clause, by which he obliges himself and his heirs-male to denude themselves of what have been called the estates acquired, and to convey those estates acquired to his heirs of tailzie, and the heirs of their bodies lawfully begotten. I mark the passage with respect to the portions, because it will require some particular observation. It is in these words: 'And in like manner it is specially provided, 'be express condition hereof, that in case it sall happen the said Sir 'William Drummond, or any otheris, our airis of taillie and provi- 'sion specially or generally before mentionat, or any of them, to 'succeid to us in the said estate and living, be vertue of thir pnts, 'that thane and in that caise the samyne persone' in the singular number 'sua succeiding, and yr spouses to be joined in marreadge 'with ym, and yr aires-maill aforesaid, sall be haldine and obleist to 'content and pay to the remanent dochteris' certain sums. This is another passage in which your Lordships see plural words are connected with singular words, and so connected with singular words as to prove that singular words merely may mean a class of persons; for these words imply a plurality of persons. I would shortly observe to your Lordships, that the portions are enlarged by this deed; and then there are several other passages which afford some observation, but which I cannot state to your Lordships to be observation material enough to justify me in taking up your Lordships' time, by stating the remaining part of this deed.

"My Lords, Having now proceeded to detail to your Lordships the effect of this settlement of 1648, and recollecting that it is my duty to pay attention to the convenience of the House, instead of asking the attention of the House to my convenience, I would in this stage of the business, if your Lordships would give me leave, adjourn the continuation of this matter until the rest of the business of the House is concluded; meaning when that is concluded, if your Lordships will give leave, to proceed further to-night, if there should be time. If, on the other hand, that business should detain your Lordships too long to admit of such proceeding to-night, I then propose to resume the discussion of it at an early hour to-morrow."

Second Day.

Friday, 16*th June* 1809.

"My Lords,

"I proceeded, with your Lordships' indulgence, in the course of yesterday, to the extent of stating to your Lordships the contents, with some observations upon them, of the deed of 1648, with the history of the transactions in this case to that period. I now resume

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the consideration of the subject, after stating to your Lordships, what it has since occurred to me I forgot yesterday, a passage in the deed executed by Robert Earl of Roxburghe in 1643, which is a passage material to be pointed out to your attention, because it shows, that at a period so early as that, (and indeed many instruments of an earlier period shew it), there was a known distinction, generally speaking, between the description of heirs-male of the body of a person, and a person's heirs-male. The passage to which I allude is the obligatory clause in the deed of the 7th of November 1643, where the Earl states, 'Therefoir wit ye us to be bund and obleist, 'likeas we, be thir presents, binds and obleises us and our airis-'male, als weil gottin of our awin bodie, as our airis-male, taillie, 'and provisioune whatsumever, to ratify and approve the particular 'letters of prory of resignatioune rexive above spect, maid be us, for 'resignatioune of the lands, baronies, and utheris *respectivè* above 'written, of the daitts and contents above mentionat, in all and 'sundry heids and conditions thereof, and binds and obleises us, and 'our saids heirs-male, als weil gottin of our awin bodie, as airis-'male, tailzie, and provision whatsomever, to renew the samen 'prories in favor of the saidis airis-male to be gottin of our bodie, 'and the airis of taillie specified in the saidis prories of resignation, 'after the forms and tenors thereof.' I need not detain your Lordships by reading other passages in the same instrument, in which the same form of expression and description of heirs occurs.

"My Lords, I would take notice now, that the clause beginning with the words 'eldest daughter and their heirs-male,' in the deed 1648, appears to have been written, as your Lordships have been informed by the fac-simile, which has been laid upon the table, in a blank, which has been supposed to be too small for a clause of substitution of the four daughters, expressed in the same manner as that clause of substitution which appears in the deed of 1644, with reference to which, therefore, it has been conjectured, that Mr. Learmont and Mr. Don, whose names have frequently occurred in these discussions, were trying which could be the best abridger, and who could put the most of the *multum in parvo.* As to this, it is enough for me to say, and I shall trouble your Lordships no further, that I cannot conceive a more dangerous principle to be introduced into judicial construction, than that of giving yourselves permission to suppose that you can judicially construe an instrument with regard to such a circumstance. Indeed in this case, without entering into general considerations, every inference that could be drawn from the circumstance of the vacuity in the parchment being so small, would be done away by what appears in the margin, by an insertion in the margin. I am almost afraid to state such an observation as that; because, if we are to be considering, with reference to any deed, what we are to allow to the difficulty of writing large or writing small, in a blank in parchment to be filled up, and to be attending to the more or less of difficulty that belongs to the compressing a

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larger or a smaller quantity of words into a blank, it appears to me, we give ourselves a liberty which, in judicial matters, it would be the most dangerous thing in the world to take. But as to that deed 1648, this is a circumstance worthy of no judicial consideration whatever, when you see a marginal insertion.

"My Lords, I will now point out to your Lordships the fact, that there was a parliamentary ratification of the charter of 1646, and of the infeftment of 1648; the effect of which parliamentary ratification, your Lordships will recollect, has been discussed a good deal in the Committee of Privileges. It is not necessary to consider it with reference to the estates, and therefore I do not trouble your Lordships with any further observation upon it at this moment.

"My Lords, It appears that the Earl of Roxburghe died in the year 1650. Sir William Drummond, who was the institute in the charter of 1648, made up titles to him by service, as heir of tailzie and provision; and if we could look satisfactorily at instruments which could be stated to be the most contemporaneous with the deed of 1648, and if we could look at those instruments as containing any thing of judicial authority, merely because they happened to be translations of a Scotch deed into Latin, your Lordships would find the word *earum* is probably the oldest and the most contemporaneous construction put upon the words in this clause, 'their' heirs-male; and yet your Lordships will permit me to say, you should not be too certain of that, because I have seen *earum* upon parchment, where I could not be quite sure that it stood so originally.

"My Lords, Upon the death of Robert Earl of Roxburghe, Sir William Drummond made up titles, and Sir William Drummond certainly seems to have been reasonably attentive to the invitation given him to marry Lady Jean Ker; for he does, in compliance with the injunctions of the entail, in 1655 marry that Lady, and to give still greater validity to his title, as it is stated, he obtained a decree of adjudication in implement on the bond granted by Earl Robert in 1643.

"In 1655, your Lordships will recollect, that a bond of marriage was executed between this Sir William Drummond and Lady Jean Ker, and which contains expressions and provisions, to which it is necessary to request your Lordships' attention. It is executed, your Lordships know, upon the 17th, or some other day in May 1655. 'It is appointit, contractit, and finally agreit, betwix the honoble 'parteis undernamit; to wit, betwix ane Noble Earl, William now 'Erle of Roxburghe, Lord Ker of Cessfurd and Cavertoun, on the 'ane pairt, and Lady Jean Ker, eldest lawful dochter to the deceist 'Harie Lord Ker, with advyce and consent of her honoble friends 'and curators under subscryving, and of ane Noble Countess, Dame 'Margaret Hay Countess of Cassills, her mother, and of ane Noble 'Erle, John Erle of Cassills, Lord Kennedie, her spouse, for their 'interest, on the other pairt, in manner, form, and effect, as after

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'follows.' It then recites this charter of the 23d of February 1648 pretty much at length: it recites the intended marriage; and then, in this deed, there are the following provisions. 'It is alwise here-'by provided, that in case there shall happen to be a son of the 'marriage betwixt the said Noble Erle and the said Lady Jean Ker, 'to succeed to the estate of Roxburghe, and living during the lyfe-'times of the said Countess of Cassillis and Countess of Roxburghe '*respectivè* living both together; and failing of a son of the said mar-'riage, in case any other of the said deceased Harie Lord Ker's three 'dochters, viz. Lady Anna, Lady Margaret, or Lady Sophia Kers, 'sall happen to be Countess of Roxburghe, *by marrying of any of* '*the rest of the aires of taillie* who sall succeed to the said estate; in 'these, and ather of these cases, during the joint lyfetimes allenarlie 'of the said two Countesses of Cassillis and Roxburghe together, 'the said Lady Jean Ker sall be secluded, and her liferent-infeftment 'sall be suspended, in so far as concerns the foresaids lands of West 'Sprouston and teinds thereof, and als many of the rents and lands 'of Broxmouth and Pinkertons, and other lands and teinds, lying 'within the said parochin of Dunbar, in her option always what 'pairt of the saids lands and teins within the said parochin of 'Dunbar she shall be secludit fra, as will extend to 5000 merks 'yearlie during the space of the foresaid suspension:—with this 'provision always, that there being a son of this present marriage, 'or that any of the saids uther three sisters above namit sall be 'Countess of Roxburghe, as said is, that then and in that case, the 'said Lady Jean sall be secluded from her lyferent of the saids 'lands and teinds of West Sproustoun, in ather of the saids cases, 'als well after the deceis of both the saids Countesses of Cassillis 'and Roxburghe as during their lyfetimes; so that the said Ladie 'Jean sall have no right nor possession of the saids lands and 'teinds of West Sprouston, if ather there sall be a son of the said 'marriage, or if any of the rest of her said three sisters shall be 'Countess of Roxburghe by marriage, as said is.'

"My Lords, I presume to notice to you these passages, that it may be seen that we have not forgotten what was the course of the argument founded upon this contract of marriage. It was reasoned upon as furnishing this inference, (and I here take leave to observe, that the counsel on both sides have found it extremely difficult to restrain themselves within the boundaries of those principles of law which have been laid down, that you are not to construe one deed by another); but it has, in point of fact, been reasoned, that this is an instrument which tends to shew, that in this year 1655, when this contract of marriage was entered into, the parties to this contract of marriage did not entertain any notion that the three younger sisters could be Countesses of Roxburghe, except by marriage; from which it has been inferred, that therefore they could not be Countesses of Roxburghe by the effect of that limitation to the eldest

daughter and their heirs-male, which is contained in the deed of 1648. Now, to be sure, it would have been very easy, if you had set about executing a marriage-contract like this of 1655, with reference to every event that might have happened, to have provided for every such event. Lady Jean Ker, your Lordships recollect, (and when one is to consider what belongs to an argument founded upon the notion, that these four daughters were the *dilectæ personæ*, it is worthy of observation, that Lady Jean Ker), when she married Sir William Drummond, was not herself, if I understand this instrument of 1648, to be considered as owner of the estate, but Sir William Drummond was to be considered as owner of the estate; and if Lady Jean Ker had died, Sir William Drummond would still have continued owner of the estate, with respect to himself and the heirs-male of his body. But put the case the other way; suppose Lady Jean Ker had married Sir William Drummond, and Sir William Drummond had died without heirs of the marriage, does it appear to have been of necessity, that any of the three others, by marrying the other parties, whose connection with them in marriage was looked to, would have been Countesses of Roxburghe. For unless there was some objection in point of consanguinity known to the Scotch law, which I am not at present aware of, but which there might be; unless it is an absolute certainty, that no Scotch Lady likes a second husband; I have no idea that Lady Jean might not have another husband in a Fleming, and be Countess of Roxburghe by reason of that second marriage, as well as by the first. If the Flemings were so connected with her in consanguinity, that they could not be connected with her after her first marriage, the contrary of that is true.

" There is another observation which has been made, that because the author of this deed thought the other three could be Countesses of Roxburghe only by marriage, they, *ex necessitate*, thought they could be such only by marriage with the Flemings; but there is also a clause in the deed as to the marrying some other person of lawful and honourable descent. There is a third observation to be made upon this deed, that if you can look at it as evidence, it is but evidence; and looking at it as evidence, being but evidence, it amounts to nothing more than the construction which the individual parties to this deed may be said to have put upon the charter of 1648; and they thought it possible that one of those other persons might become Countess of Roxburghe;—they thought it, in the first place, likely the Flemings might not disregard the invitation to a matrimonial connection, which this deed of 1648 held out to them; and they did not look at all the events, or through all the contingencies that might happen, to which the deed of 1648 might apply. If it can be admitted as evidence, it is an instrument which your Lordships undoubtedly, in that view of the subject, ought to consider when you take a full view of the whole subject before you; and it

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is for that reason I have taken the liberty to call your Lordships' attention thus particularly to it.

"My Lords, There was another parliamentary ratification, which, your Lordships will recollect, followed this deed of nomination in 1648, which I think was procured in the year 1661; and it is material also to take notice of another deed, which was a deed of ratification by Sir Walter Ker of Fawdonside, who had at that time become the heir-male of the Kers of Cessfurd, and consequently heir under the ancient investiture. That parliamentary ratification, and that ratification by Sir Walter Ker, will be more material to be considered certainly, in the question upon the dignities, than they are with reference to the contest relative to the estates.

"My Lords, This William second Earl of Roxburghe had two sons by his marriage with Lady Jean Ker; Robert, who succeeded him in 1665, and John, who was afterwards Lord Bellenden. Robert, the third Earl of Roxburghe, is stated to have been succeeded by his sons Robert and John, fourth and fifth Earls of Roxburghe; and all these heirs of entail are stated to have completed their feudal titles to the estates, in the terms of the deed of 1648.

"In 1707, John, who was the fifth Earl of Roxburghe, obtained a patent from the then Queen, (Queen Anne), which your Lordships have printed at length in the appendix to Colonel Walter Ker's case. It is No. 13. in that appendix; and by that deed her Majesty states, 'Facimus, constituimus, creamus, et inauguramus, eundem 'Joannem Comitem de Roxburghe, Ducem de Roxburghe, Mar'cionem de Beaumont et Cessfurd, Comitem de Kelso, Vicecomitem 'de Broxmouth, et Dominum Ker de Cessfurd et Cavertoun; dando, 'concedendo, et conferendo, sicuti nos, per præsentes, damus, con'cedimus, et conferimus, in dict. Joannem Comitem de Roxburghe, 'ejusque hæredes masculos de suo corpore, quibus deficientibus, ali'quos hæredes, titulo et dignitate Comites de Roxburghe, per priora 'diplomata prædecessoribus dict. Joannis Comitis de Roxburghe 'catenus fact. et concess. succedere destinat. dictum titulum, hono'rem, ordinem, gradum, et dignitatem Ducis.' So that these honours were given to him and the heirs-male of his body, with remainder to the heirs of the title to the Earldom of Roxburghe: and, without going further in matter of observation as to the dignities at present, upon this instrument of 1707, I would just observe to your Lordships, that if it can be made out, that the deed of 1648 did not pass the dignities, or if it can be made out that if the deed of 1648 was intended to pass the dignities, yet, by reason of the mode and manner in which the charter was executed, I mean with reference to the sign-manual and the cachet, it did not pass the dignity of Earl of Roxburghe; or if it can be made out, that supposing that deed was not effectual to pass the dignity of Earl of Roxburghe, the parliamentary and other ratifications of this charter are upon any grounds not sufficient to give

validity to the charter of 1648; it will fall to be considered, with reference to this patent of 1707, upon whom the titles granted by the patent of 1707 will actually devolve, not with reference merely to the intention of her Majesty who granted those letters patent of 1707, but with regard to the question of law and fact, who is at this moment entitled to the Earldom of Roxburghe?

"My Lords, In the year 1729, John the first Duke of Roxburghe executed a disposition of his estates. He proceeds, in that disposition, upon the narrative of the deed of nomination and the entail of 1648; and he dispones these estates to Robert Marquis of Beaumont, his only son, and the heirs-male lawfully to be procreated of his body; which failing, to the other heirs of tailzie substituted to them, contained in the tailzie made by the deceased Earl of Roxburghe, his great-grandfather's father, and in his infeftments thereupon, *all which heirs of tailzie are held as therein insert and expressed;* which failing, to him, his heirs and assignees whatsoever. My Lords, I do not at this moment correctly recollect, whether, in that charter of 1729, when the eldest daughter of Hary Lord Ker is mentioned, she is mentioned with the addition of *her* heirs-male.

"In 1740, the Duke of Roxburghe executed another deed of entail of certain lands, but in like manner; and they are disponed 'to 'his son Robert Marquis of Beaumont, and the other heirs-male of 'his own body, and to his brother-german Lieutenant-General 'William Ker, and the heirs-male of his body; whom failing, to 'the other heirs of tailzie substituted to them, contained in the said 'entail of the said estate of Roxburghe, made and granted by the 'said deceased Earl, his great-grandfather's father, and in the infeft-'ments following thereupon; *all which heirs of tailzie are held as 'herein insert and expressed.'* And here, without answering for a correct memory upon the subject, your Lordships will be pleased to suppose, (be the fact as it may), that the limitation is to the eldest daughter of Hary Lord Ker, and her heirs-male.

"In 1741, Robert, second Duke of Roxburghe, succeeded to his father, and he is stated to have completed his investiture, (I am now stating from the case of Colonel Walter Ker), by executing the procuratories contained in the two last mentioned deeds, and by virtue of this, it is represented, that he expeded a charter from the Crown in favour of the heirs named in the entail of 1648. The clause in this charter contained in the substitution in favour of the eldest daughter of Hary Lord Ker is conceived in the following terms: 'Et quibus omnibus deficien.' per decessum, aut per non observan-'tiam, seu præstationem, restrictionum et conditionum supra script. 'jus dict. status et patrimonii per dict. literas talliæ declaratur, ca-'dere, devolvere, et pertinere ad filiam natu maximam quondam 'Henrici Domini Ker, filii Roberti primi Comitis de Roxburghe, 'absque divisione, et ad *ejus hœredes* masculos, illa omni modo ob-'ligata nubere, seu nupta esse, generoso viro præclari et legitimi

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'stemmatis, qui omnes conditiones suprascript. perimplebit; quibus 'omnibus deficientibus, ad præfati quondam Roberti primi Comitis 'de Roxburghe propinquiores et legitimos hæredes masculos quos-'cunque, et per præsentes providetur et declaratur, quod eadem iis 'cadent et devolvent conformiter.'

"In the year 1747, Robert, the second Duke of Roxburghe, executed another entail of his whole estates; and in this deed the lands contained in the charter of 1741 are disponed by the Duke, with a reservation of his own liferent-right, 'to John Marquis of Beaumont, 'his eldest son, and the heirs-male of his body; which failing, to 'the other heirs-male of his own body; which failing, to the other 'heirs of tailzie substitute to them by the nomination, designation, 'and tailzie made and granted by the deceased Robert Earl of Rox-'burghe, my great-grandfather's grandfather, bearing date the 23d 'of February 1648 years, and by the infeftments following there-'upon, (*all which heirs of tailzie are held as herein insert and ex-'pressed*); which all failing, to me, my heirs and assignees whatso-'ever.' Then, my Lords, follows this clause, which calls for your Lordships' particular attention: 'And failing of them all by death, 'or not observing of the provisions, conditions, and restrictions above 'written, the right of the said estate was by the said tailzie declar-'ed to fall, pertain, and belong to the eldest daughter of Henry Lord 'Ker, son to the said deceased Robert Earl of Roxburghe, without 'division, *and to her heirs-male*, she always marrying, or being 'married to a gentleman of honorable and lawful descent, who shall 'perform the conditions above written; which all failing, and their 'saids heirs-male, to the said deceased Robert Earl of Roxburghe 'his nearest and lawful heirs-male whatsoever; and it is hereby 'provided and declared, that the same shall fall and devolve to them 'accordingly.'

"My Lords, I have troubled your Lordships, by stating with so much of particularity and detail these last charters, concluding with this of 1747, under which a feudal title was made up by special service and infeftment, I think, by John the third Duke of Roxburghe, for the purpose of drawing your Lordships attention to what has been contended in some degree in the Court below, perhaps in a greater degree than I am aware of from the information I have received from the papers,—to what has been contended also at your Lordships Bar,—that you are to look at this charter as the present investiture of the estate; and it is therefore argued, that whatever was the effect of the charter of 1648, if the charter of 1648, properly construed, gave to all the daughters *seriatim*, or in any other way in which all the daughters could take, and their heirs-male, whatever those words mean, could take; yet this charter limiting to the eldest daughter and her heirs-male, the effect of this charter, and the subsequent possession, is to oust the title altogether of the three younger daughters and their heirs-male, whether these words 'heirs-

male' are to be taken to mean heirs-male of the body, or heirs-male generally. My Lords, I shall offer to your Lordships my humble judgment, that it is impossible to maintain that. The intention of the author of this charter, and all these charters, appears to me to have been declared in the body of the charters to be, not to alter the destination of the entails. There is an express declaration in each and every of them: it is enough that there is an express declaration in the last of them, that all the heirs of tailzie of the deed of 1648 are to be taken as if they were therein inserted. There is therefore an express declaration upon the face of each instrument itself, that it was not the intention of the author of it, that the eldest daughter should take in any other way under those instruments, or that any other interpretation was to be given by them to the charter of 1648 than what belonged to the charter of 1648. I have a considerable inclination of opinion, that if, instead of the plural term '*their*' (although a very weighty term) in the charter of 1648, the singular term '*her*' had been inserted, it might have been so inserted without considerable prejudice to what I shall submit to your Lordships is the true meaning of that deed. I am perfectly clear, that this charter of 1747, (and so of the others), referring thus to the charter of 1648, does in effect maintain it; and though in general you cannot construe one deed by another, yet where one thus expressly refers to another, the other is, as it were, incorporated into it, by the effect of that express reference, and the deed here professing to treat all the heirs of tailzie in the deed of 1648 as if they were therein inserted, you must construe the expressions in the deed of 1747, and in these intermediate instruments between 1648 and 1747, by reference to the charter of 1648. I do not mean to deny, that if you can look at these charters as evidence, (if they can be said to carry about with them the legitimate character of testimony as to the meaning of another deed), they may not be said to amount to some testimony, that you are not to give a plural interpretation to this term in the charter of 1648; but if notwithstanding you shall give them the character of legitimate testimony, you are authorised and required, upon the whole matter, to say that the legitimate meaning of the deed of 1648, in the clause in question, is to embrace a plurality of persons, in that case it appears to me that it is impossible to say that by the effect of this subsequent charter and prescriptive possession, the right of these heirs of tailzie is destroyed, who are to be taken as insert in this subsequent charter.—I shall certainly trouble your Lordships no further in what I have to offer to your consideration upon this point.

"My Lords, I understand the third Duke of Roxburghe died without issue in March 1804, and upon his death, and the consequent failure of the male line of Robert the third Earl of Roxburghe, the succession opened to William Lord Bellenden, the grandson of John Lord Bellenden, second son of William second Earl of Rox-

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burghe, and only remaining male descendant of the marriage between Earl William, formerly Sir William Drummond, and Lady Jean Ker, the eldest daughter of Hary Lord Ker. It has been stated to your Lordships as matter of fact, that the line of Fleming had for a considerable time been extinct.

"This last Duke of Roxburghe executed several instruments (the particular nature of which I do not trouble your Lordships with stating at this moment) previous to his death, which happened on the 22d of October 1805, and which are the instruments aimed at in the actions of reduction. By these instruments, different in their nature and contents,—under the effect of these instruments, Mr. Bellenden Ker, (who appears to be a relation of this very honourable family) and his trustees claimed the estates.

"My Lords, After the death of the Duke of Roxburghe, Colonel Walter Ker, who conceived himself to be entitled, by the failure of the prior substitutes, (and I would here put your Lordships, in a short word, in mind, that Colonel Walter Ker insists, that Lady Jane Ker was the only daughter who took under the clause I have so often referred to; and that he farther insists, that the heirs-male of Lady Jane Ker, who are called under that limitation, are heirs-male general), proposed to enter into possession of the estate as heir of tailzie; and his intention being resisted, the papers represent to your Lordships, that a petition was presented to the Sheriff-depute of Roxburghshire, for the purpose of obtaining judicial authority to enforce his claim; and to this petition answers were put in on the part of Mr. Bellenden Ker and the trustees. Whilst these proceedings were going on before the Sheriff, and as it has been represented, before he had pronounced a judgment, a petition was presented to the Court of Session by Sir James Norcliffe Innes, in which he stated, that he was the heir-male of the body of his great-grandmother Lady Margaret, the third daughter of Hary Lord Ker; that he was in that character entitled to succeed to the honours and the estates of the family; and he founded his title on the clause of destination in the entail of 1648, in favour of the heirs-male of the eldest daughter of Hary Lord Ker, under his sense of these words, 'eldest daughter, &c.'; he called upon the Court to award sequestration of the estate till there should be an end of the competition; and, after an answer put in by Mr. Bellenden Ker and his trustees, the proceedings before the Sheriff having been removed into the Court of Session, interlocutors were pronounced, which sequestrated the estates in the hands of the Court, and appointed a judicial factor to manage them —an officer, I presume, in the nature of a receiver in other courts of equity, to manage the estates, and receive the rents, for the purpose of handing over the rents and profits of the estates, collected in the mean time, to that hand, which *ab initio* should be declared to have been entitled. Appeals have been entered by both parties against this interlocutor and against this sequestration.

"My Lords, Besides these proceedings, Colonel Ker took the usual measures for obtaining a service as heir of tailzie to the late Duke of Roxburghe, having purchased, as your Lordships know he must do, brieves from his Majesty's Chancery in Scotland, directed to certain officers, known by the name of the Macers of the Court of Session, for serving him the nearest and lawful heir of tailzie and provision in special to William Ker, the last Duke of Roxburghe. Sir James Innes also purchased brieves for serving himself heir of tailzie and provision; and, in consequence of that, a proceeding took place in the Court of Session in Scotland, which I understand to be usually denominated a competition of brieves. The other proceedings, which are usual in cases of this nature, then took place. The Court of Session appointed, as Assessors to the Macers, four of their own number, thereby giving to the Macers the most respectable assistance they could receive. In this competition between Colonel Walter Ker on the one hand, and Sir James Innes on the other, Mr. Bellenden Ker and his trustees interposed, and insisted to have a title and interest to be heard as parties in the services. They qualified their title and interest, as I understand it, thus: They said, that they had infeftments or deeds which gave them a title to the possession of, and interests in the estates, the title to the inheritance of which was in question between the two competitors in these proceedings: And if Mr. Bellenden Ker and his trustees could make out, either that neither of these gentlemen were heirs of tailzie, of that one of them might be, and the other was not; they had an interest, in the *first* place, to displace them both, because then they might have no body to contend with in the actions of reduction; or they had an interest to displace one or other of them, because then they would not have so many persons to contend with in the actions of reduction: And the Court of Session were of opinion, as your Lordships will find, by an interlocutor, which is likewise the subject of appeal, that Mr. John Bellenden Ker, Mr. Henry Gawler, and Mr. John Seton Karr, had a title to appear in the services of Brigadier-General Ker and Sir James Norcliffe Innes, and to be heard for their interest. My Lords, There is a second interlocutor which asserts the same thing, that they have a title to appear; and finds also, that the points of law, with respect to the construction of the tailzie and settlements of the estate of Roxburghe, must in the first place be determined; and they recommend to the Macers, with their assistants, to hear counsel for the parties, and to proceed otherwise in the cause as to them should seem proper.

"My Lords, Upon this proceeding your Lordships will permit me to repeat the observation which fell from one of your Lordships as well as from myself, that it appeared to us, who are not so habitually sitting in a Court of Session as the Learned Judges below, to be a very singular species of proceeding; that it was a proceeding for which there was no analogy in the Courts in England; because,

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without establishing that these deeds of Mr. John Bellenden Ker were good; without establishing that Colonel Walter Ker was the respectable individual in point of family whom he represents himself to be; without establishing that Sir James Innes Ker was the respectable individual in point of family whom he represents himself to be; the Court proceeds to give a judicial opinion upon the points of law, though it might turn out that not one of the parties before them had any right whatever to call upon them for it; and this has struck your Lordships, I know very much, in the case of the Peerages, so much so, that I protest I do not know at this moment how to get over it, as a thing quite inconsistent with all our judicial usages and habits, to come to a determination upon a point of law, till we are quite sure, that, in fact, we have some persons before us, who have a right to call for that judicial opinion; and it would certainly be a singular transaction in any court of justice, if, after having declared doctrinal matter in point of law, when you go to try the facts, it would turn out that none of the individuals before you had any right to call for your opinion in point of doctrine; and if you should ultimately happen to have before you hereafter other persons really interested in the question, who should be able to persuade you that your present law was wrong, and to prevail upon you to reverse, as between proper parties, those legal adjudications which you had perhaps been led to form, because you came to them in the absence of the parties really interested in duly laying the case before your Lordships. I mean this as general observation only. I do not mean to say, that it will apply to the conduct of the parties in the case before your Lordships. I am persuaded that some one or other of them have the interest or character here assumed, and that they really have given your Lordships as much information as ever was given in any case, and the fullest possible information, I believe, which can be given upon this case.

As to the Reduction.

"My Lords, While these competitions were thus depending, actions of reduction, improbation, and declarator were severally brought, at the instance of Sir James Innes Ker, and also, as I understand, of Colonel Walter Ker, for annulling the conveyances granted by the late Duke of Roxburghe to Mr. Bellenden Ker, and to his Grace's trustees, and on the 13th, (tho' signed on the 15th) of January 1807, the Court of Session pronounced this interlocutor, 'that the estates of Roxburghe were held by the late William Duke 'of Roxburghe under an entail, which contains an effectual prohi'bition against altering the order of succession.' There your Lordships also perceive, that you have a judicial declaration, which, if it should happen to turn out, that the Court of Session had not, and that your Lordships have not, upon the appeal respecting the estates, persons before you, who, being able to prove their propinquity, would have a right to contest, in these actions of reduction, with Mr. Bellenden Ker, in the result of the matter it might stand thus,

that here might be a declaration upon record against Mr. Bellenden Ker, at the suit of persons who, in such event, might turn out to have no right at all to call for any such reduction; and I mark the circumstance, because, however we may deal with it, it is right that at least it should appear our attention was called to it.

"My Lords, There is another passage in the interlocutor of the 15th of January 1807, 'that the persons called to the succession 'under that branch of the destination, beginning with the eldest 'daughter of Hary Lord Ker, are heirs of tailzie under the said en-'tail.' My Lords, If they were not heirs of tailzie under the entail, it has been intimated to your Lordships in argument, that they could have no title to reduce the deeds, which had been granted to Mr. Bellenden Ker and his trustees; that their brieves being sued out of Chancery for the purpose of having themselves declared to be heirs of tailzie under that entail, it was convenient, and it has been stated to be not only convenient, but, according to the usage of the Court of Session, to come to a decision upon such a point of law before they give the parties the trouble, or expose them to the necessity of proving their propinquity; because, if they called upon them first to undergo that necessity and that expence, and if, that after all they should be of opinion that neither of them were heirs of tailzie upon the construction of the clause, which each of them insists is the clause which furnishes the question of construction in that case, after proving their propinquity, upon reading that clause, it might turn out that they had given the trouble, and subjected to the expence of trying the question of propinquity, persons, with reference to whom it was quite immaterial what was the decision upon it. That question, however, whether they are heirs of tailzie, as a preliminary question of law, stands upon quite a different footing, or, at least, may be represented to stand upon a different footing, from the other questions of law embodied in the first finding of these interlocutors; for it is one thing to say, that the Court has determined, (Mr. Bellenden Ker standing here), that those persons shall make out that the persons called to the succession in the clause in question are heirs of tailzie, before they establish their propinquity, as they allege it, and another thing to say, *a priori*, that there is a doctrine of law, which will cut down Mr. Ker's deeds; when it may turn out, that in the question of the propinquity of these gentlemen (supposing persons called to be heirs of tailzie) the propinquity of neither might be proved, and in that case no application against Mr. Bellenden Ker could be made at their instance, of the doctrine of law which would be found in the first part of this interlocutor.

"My Lords, This interlocutor, consisting of these two parts, was again brought before the Court of Session; and they affirmed the interlocutor, in their language, they adhered to their interlocucutor, by another of the 27th of June 1807.

"In the competition of brieves, the case was reported to the Court

of Session; and the Court directed the parties to argue it in memorials. It resolved itself into two questions. The first occurred between the appellants and respondents, upon the construction of the entail. The appellants contended, That under the second clause of destination in all the investitures, (by the second clause is meant that clause respecting the eldest daughter and their heirs-male), the succession had devolved on the heir-male general of Lady Jean Ker, the eldest daughter of Hary Lord Ker; the respondents, That under the same clause, it had devolved on the heir-male of the body of Lady Margaret Ker, his third daughter. As I had occasion to state to your Lordships yesterday, Mr. Bellenden Ker insisted with Colonel Walter Ker, that the only daughter described in this destination was the eldest daughter; but he disagreed, and necessarily disagreed, with Colonel Walter Ker, in the idea, that the term heirs-male meant the heirs-male generally; because, if the eldest daughter was called, with her heirs-male generally, then Colonel Walter Ker, stating himself to be the heir-male generally, would have a right to succeed, if he can make out that character: therefore, Mr. Bellenden Ker contended, that heirs-male did not mean heirs-male general, but heirs-male of her body; and that of consequence, therefore, if the eldest daughter and the heirs-male of her body only were heirs of tailzie, and there was a failure of those heirs-male, the entail had opened to the clause which, as he insisted, gave the late Duke of Roxburghe a title to make such deeds as those under which Mr. Bellenden Ker claimed.

"My Lords, on the 6th and 10th of March 1807, the Court of Session were pleased to pronounce this interlocutor: 'The Lords 'having advised the mutual memorials given in by the parties in this 'cause, in obedience to the interlocutor of the 18th day of February '1806, writings produced, and having heard counsel for the parties 'in their own presence; they remit to the Macers, with this instruc-'tion, that they prefer the claimant Sir James Norcliffe Innes, heir-'male of the body of Lady Margaret Ker, in the foresaid competi-'tion of brieves relative to the estates and honours of the family of 'Roxburghe; and to dismiss the brieve at the instance of Brigadier-'General Ker.'

"Your Lordships will not be surprised that a reclaiming petition was presented against this interlocutor; because, if the Court of Session were right in supposing, that the destination included Margaret the third daughter, and the Court of Session were right in supposing that the term heirs-male meant heirs-male of the body, this interlocutor assumes in its terms, without any proof whatever, that Sir James Norcliffe Innes is heir-male of the body, and therefore prefers the claim of Sir James Norcliffe Innes, as heir-male of the body of Lady Margaret Ker; and having done this, without proof of his sustaining the character of heir-male of Lady Margaret Ker, they go on to dismiss the brieve at the instance of Brigadier-

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General Ker. Upon reconsidering that interlocutor, they pronounced a second, upon the 7th and 8th of July 1807, in these words: 'That they prefer the heir-male of the body of Lady Margaret Ker, 'in the foresaid competition of brieves relative to the estates of the 'family of Roxburghe, on his proving his propinquity; and in that 'event,' (not absolutely, as in the former interlocutor), 'and in that 'event, to dismiss the brieve at the instance of Brigadier-General 'Ker; and, with these explanations, they refuse the desire of the 'petition, and adhere to the interlocutor reclaimed against.'

"My Lords, With respect to the language of this interlocutor, I do not mean the substance of it, that is another way of viewing the case, they prefer the heir-male of the body of Lady Margaret Ker, on his proving his propinquity. Whom do they mean by that? Is it Sir James Innes, asserting himself to be the heir-male of the body? Or is this a declaration, intended to convey this as a doctrine of law, that if it turns out that nobody before them is heir-male of the body of Lady Margaret Ker, yet that this shall be an assertion in judgment for the benefit of any body who may in future time come before them, making himself out to be heir-male of the body of Lady Margaret Ker. With my very great respect for that Court, with reference to whom I cannot help saying, that I never saw a body of judicial men who appeared to be more earnest in their attention to a subject than they have been to this; and therefore, with the most respectful deference to them, I cannot help saying, that if this is a just doctrine of law, I entertain a doubt whether that doctrine of law is rightly expressed, in all the circumstances of this case; and whether they should not have said, that they preferred the claim of Sir James Innes Ker, if he made himself out, by proof of propinquity, to be the heir-male of the body of Lady Margaret Ker; and that the heirs-male of the bodies of her elder sisters had failed. That, however, is a small observation upon the interlocutor. At the same time, I mention it, as I am desirous not to omit any thing that occurred to me in the course of the hearing of this cause.

"My Lords, Having stated to your Lordships my humble opinion with respect to the effect of the charter of 1747, and the subsequent possession, as founding the title upon prescription, connected with that charter, your Lordships will permit me to mention, what I have passed over in the historical account of these transactions, and which certainly I ought to have called your Lordships' attention to, I mean the instrument of release and renunciation on the part of Lady Margaret Ker, (I think upon her marriage,) which has been contended at your Lordships' Bar to be an instrument effectual to put an end to her claim altogether, if she had a claim under the deed of 1648. My Lords, If the true meaning of the deed of 1648 be that which Sir James Innes Ker has contended for, it appears to me, and I state it without any hesitation or difficulty to your Lordships, to be impossible to set up that instrument as a bar to the claim of these

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estates. It must operate to the extent in which it was intended it should operate; and in any view of the subject, as it appears to me, it never can be set up as an instrument effectual as a plea in bar to the present claim.

"Having given your Lordships my opinion upon that, before I enter more particularly upon the consideration of the meaning of the clause, 'eldest daughter, and her heirs-male,' there is another point upon which it is necessary that I should, with your Lordships' leave, express the opinion which I entertain upon it; because it is a point which must be disposed of before we can very well agitate usefully, I mean the question, Whether the persons who claim under that destination are or are not heirs of tailzie? And *assuming* for the moment, (your Lordships will be kind enough to mark the words), *assuming* for the moment, that all the rights of the heirs of tailzie are guarded by clauses irritant, resolutive, and prohibitory, sufficient to prevent an alteration of the order of succession, upon the point, Whether the persons named in that destination are such heirs of tailzie as are entitled to the benefit of those clauses so understood to prohibit alteration of succession? My Lords, the opinion which I have formed, has been an opinion which I can venture to represent to your Lordships as having undergone no change, (I do not say it is one bit the better for that); but as having undergone no change from the first moment that I read this instrument. I take it to be immaterial, to what part of a settlement or disposition of this nature, in what order or manner, except as to the priority of taking as heirs of tailzie, that persons described are inserted. I take it, that the true question is, upon the whole matter and contents of the deed, Whether the individuals named in a part of it, are meant and intended to have the same benefit of the clauses, provisions, conditions, and restrictions, which, it appears clear upon the face of the instrument, the persons mentioned in other parts of the instrument are designed to have? and the question, Whether these persons are heirs of tailzie? depends entirely, in my humble judgment, upon the question, Whether the estate was meant to be protected with the same anxiety expressed in the same clauses, or by reference to the same clauses, as the estates given to Drummonds and Flemings marrying the daughter of Hary Lord Ker? It appears to me to be sufficient to say, 'Read the deed;' read it over and over again; and that is the conclusion to which you will come, in my humble judgment,—that is most undoubtedly the conclusion I have come to, that they are heirs of tailzie,—that the eldest daughter and her heirs-male whatever is meant by that expression, whether it is an expression describing her only, and describing her heirs-male generally or heirs-male of the body;—in the one case, she and her heirs-male are heirs of tailzie, in the other, she and the heirs-male of her body are such:—that if, on the other hand, it is meant to describe all the daughters *seriatim*, and their heirs-male generally, if that be the

import of the word, or the heirs-male of their bodies, if that be the construction of the words, all the daughters and their heirs-male, as those words are to be understood, are heirs of tailzie.

"My Lords, If you shall be disposed to adopt that reasoning, we come next to consider, who is that heir? or who are those heirs of tailzie that are mentioned in this clause of destination? and it becomes necessary for me here to read that clause once more to your Lordships. But before I do so, I wish, if your Lordships would permit me, to request you always to recollect, that when you are construing such a clause as this, you are applying yourselves to the determination of a question which may depend upon principles entirely different from those which would belong to the consideration of the question, if is was a pure dry destination to heirs-male, or a pure dry destination to A. and his heirs-male, without more: That you are applying yourselves to the consideration of a question which arises upon terms quite different, both in common parlance and in legal language, from those I have last mentioned, which arises, not out of a pure short dry limitation, described in strict legal terms, connected with an unquestionable designation of an individual, and an individual only, but that you are applying yourselves to the consideration of the question which arises upon a clause, consisting of a great many expressions, a great many obscure expressions, and a great many expressions which consist of terms unquestionably flexible, which consist of terms flexible in common parlance, flexible in those instances which may be produced from the language of the law: That in such a case, therefore, your Lordships are to put the whole together; you are to see what belongs to each and every part of the terms used, and you are not to decide what would belong to any particular part, if it stood by itself unconnected with the rest; but you are to decide upon what is the meaning of each word, regard and reference being had to all the context;—and I venture to go the length of saying, that if there has been any where an opinion that this clause cannot be construed but with reference to the words which form the clause itself, I venture humbly so far to differ from that, as to say, I apprehend it may at least be construed with reference to every thing to be found within the four corners of that deed in which the clause is found.

"My Lords, Having stated this, your Lordships will be pleased to allow me to read this clause once more: 'And qlkis all failzeing 'be decease, or be not observing of the provisions, restrictions, and 'conditions above written, the right of the said estates sall pertain 'and belong to the eldest dochter of the said Hary Lord Ker, with- 'out division, and YR heirs-male, she always mareing or being 'married to ane gentilman of lawll and honourl descent, wha sall 'perform the conditions above and under written; qlkis all failze- 'ing, and yr sds airis-male, to our nearest and lawful airis-male 'qtsomever.'

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"My Lords, The first expression which occurs here is the 'eldest 'daughter;' and there can be no doubt, that, generally speaking, we should say, that was a destination to an individual; it is impossible to deny, that in the former part of this deed, where Lady Jean Ker is mentioned as the eldest daughter of Hary Lord Ker, it was so applied; it is impossible to deny that:—But, My Lords, on the other hand, you must consider, that the words 'the eldest 'daughter' may admit of a very different construction, according as the context may require, or as the whole words of the deed may require. Take it, for instance, as it stands in our own law: I need not point out to your Lordships what the expression 'younger 'children' *may* mean. I need not point out to your Lordships what the first born son of a person *may* mean with reference to the context. I need not point out how often your Lordships are driven, by the context, and by the different parts of the instrument, to say that a person is the eldest son who is not the eldest born son; and these words, 'the eldest daughter,' may at least admit of all these differences of exposition, and perhaps many more: Eldest born,—eldest at the date of the settlement,—eldest at the death of the author of the settlement,—eldest at the time the succession opens,—or the eldest according to the series in which they are brought up, the third to be the second, or the second to be the first.

"My Lords, I am very ready to admit, that if there had been this sort of destination in the deed, 'to the eldest daughter and her 'heirs-male, with remainder to the youngest daughter and her heirs-'male,' I should not have known how, by any construction, you could have brought in by argument and inference the second and the third daughter, and their heirs-male; and supposing there had been a limitation to the youngest daughter, it would have been a very difficult thing, I do not say altogether impossible, upon the context of the deed, to make the youngest a general term, sufficient to describe the daughter becoming from time to time the youngest. I think I could draw a deed upon my own conception of such a thing as that, to give the words 'youngest daughter' that effect; but it cannot be said generally they would have that effect: on the contrary, they would in general have no such effect. So as to the words 'second 'son,' it is quite familiar to an English lawyer, and it seems to be so to the Scotch conveyancers, that he may be the second born son, or he may be the son who, being the third born, becomes the second within the meaning of that instrument: so that it is the context, contents, and plan of the deed that always decide it.

"The next phrase that occurs is, 'eldest daughter of the said Hary 'Lord Ker without division.' Now, upon the words 'without divi-'sion' I lay no further stress than this, that they are to have such an effect given to them as is due to them, being found in this place, and in this context, and in this deed; and I do admit, that the words 'without division' being used, because it has been proved that they

have in point of fact been used in this very case, without our being therefore entitled to say that a plurality of persons was intended by singular words, where the words 'without division' are applied; yet it must be admitted, on the other hand, that the words 'without 'division,' are words familiarly used with reference to a singular term, plural and collective in its meaning, as heir-female, for instance; and therefore the true way of considering these words 'without 'division,' is neither to give them too much meaning in the construction of the sentence, nor too little meaning in the construction of the sentence.

"So again, another observation has been made. It is said, if the eldest daughter was meant, the author of this instrument would have said, the 'said' eldest daughter. I think by some a great deal too much weight has been given to the want of that word 'said,' and that a great deal too little has been attributed by others to the want of it. The absence of the word in this clause, which is here to be interpreted, must have some weight.

"My Lords, It has likewise been said, and said with some weight, if it had been the intention of the author of this instrument to give this to Lady Jean Ker, why would not he have said Lady Jean Ker? Why does he say the eldest daughter? If the writer was pinched for room in this blank, to be sure the shortest way possible of expressing himself would have been to say, I mean to give this to Lady Jean Ker, and her heirs-male; but if it was meant to give it to Lady Jean Ker and her heirs-male, why use all this circumlocution and involved phrase? His meaning being supposed to be this, having to write within a cramped space, it is wonderful that he should not take the shortest mode of writing, but should adopt the most round-about way of doing it. That is an observation that deserves some weight; but I do not apprehend it deserves all the weight that has been given to it.

"My Lords, The next expression we have is a very material one, '*their* heirs male.' Now upon that it has been argued, that the word *their* is an error, and you must read *her*; and it has been argued, unquestionably argued with great effect, that if you will only substitute the word *her* instead of the word *their*, the sentence will all read very well,—that it will then read,—'The right of the said 'estate sall appertain and belong to the eldest daughter of the said 'Hary Lord Ker without division, and her aires-male, she always 'mareing, or being married to ane gentilman (not in the plural num- 'ber) of honourl and lawl descent, who sall perform the conditions 'above and under written.'—And it is stated very truly, provided we were at liberty, in judicial construction, to act upon such a statement.—You want to correct the antecedent 'eldest daughter' by the pronoun 'their.' Now, say the other side, it is much more reasonable that we should correct the pronoun by the antecedent, and that it is much more reasonable, is evident from this, that the rest of the sentence will then be consistent, if you correct the

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pronoun by the antecedent eldest daughter, for that that will agree with the term as to the marriage, ' *she* always mareing,' that you can correct the word ' their' by the words ' eldest ' daughter;' but that you cannot correct the eldest daughter by the word ' *their*,' because eldest daughter is exactly the expression it ought to be. So again, as to the singular expression ' a ' gentilman,' that if you do not correct the pronoun ' their' by the words ' eldest daughter,' and by the subsequent expression ' *she*,' instead of these words ' ane gentleman of honourable and lawful ' descent,' you must read it ' so many gentlemen of honourable and ' lawful descent.—And so, my Lords, it might again be put in another way. Suppose they were to give an interest in an estate to a son and *her* heirs, or to a daughter and *his* heirs, to be sure you will say you must correct the pronoun by the antecedent, and not the antecedent by the pronoun—you will say, it must be a son and his heirs, and in the latter clause, a daughter and her heirs. My Lords, I admit all this, but this is never done but in a case of necessity. You cannot reject a phrase, except where it is absolutely necessary that you should reject it; and you cannot so correct it, unless there is an absolute and indispensable necessity that you should so correct it. If you can give a consistent meaning to the words forming the phraseology of a deed, I say that your Lordships are not at liberty to alter one syllable of it. You must take the deed as it is; you must make a consistent construction of it as it is. If you can make a consistent construction of it as it is, and making a consistent construction of it as it is, if you can give effect to all the words, I say then you are bound, by every judicial rule I ever heard of in my life, to say that the author of a deed meant to use every one word and syllable that he has used. Then, my Lords, I am bound to this, that I cannot suppose there is any mistake,—I dare not suppose it,—my duty will not permit me to suppose it, if I can give a consistent meaning to all the words as they are,—and I dare not suppose that any of these words were written by mistake, if a sensible meaning can be given to the whole of this sentence with the word ' *their* ' standing a part of it. That is my answer to the suggestion about error, that you cannot lightly infer that there is an error in transcribing a deed, or that you are to read *their* as if it were written *her*. I say, if you are driven to it by necessity, the necessity will justify it; but if it is not necessary, it is the most unjustifiable proceeding which can be taken in judgment.

" It is said, however, that it is of necessity, because the word ' eldest daughter' is just as much a singular term—is just as descriptive of no more than one individual, as, in the case I have put, of the second son and her heirs, or of the daughter and his heirs, the words son and daughter are. That I deny, because I have stated to your Lordships the different senses which this word may have in common parlance, and the different meanings it may have in instruments. I say, eldest daughter is an expression which, without the aid

of construction drawn from the other parts of this instrument, might be represented perhaps as describing a class of persons; but in a deed where I find singular words describing classes of persons—where I find plural words describing individuals, I refer your Lordships to the clauses about taking the name and arms—to the clauses about the portions—to the small but important observations, as they appear to my mind, which, in passing through the contents of this deed yesterday, I offered to your Lordships' attention—when I find plural and singular terms are applied over and over again throughout this deed in the way in which they are, am I at liberty to say, that I am under such a necessity, such an invincible necessity, of considering the words 'eldest daughter' as meaning an individual, as to justify me in proceeding by a rule of construction, the last in construing instruments to be adopted—never to be adopted but in the case of inevitable necessity—to suppose that the word '*their*,' which the author of the deed has inserted in the deed, is not the word he meant to have inserted in the deed?—My Lords, I cannot do it.

"But then it is said, that the word '*their*' may be considered as applying to different individuals named or described in this very clause; that the word '*their*' may mean, for instance, the heirs of the eldest daughter, and the gentleman of honour whom she shall marry. With respect to this supposition, there are different observations to be made to your Lordships. If the word '*their*' has been properly rendered into either the Latin word '*earum*' or '*ejus*,' this cannot be the meaning of the word '*their*.'

"If the proper translation was '*eorum*,' and the limitation is to the Lady and the husband she shall marry, and their heirs-male, does Colonel Ker with prudence contend for that? If it be so, then what do the words 'their heirs-male' mean? Must they not mean in that case, heirs-male of the body, heirs-male of the marriage.—I point out to your Lordships also, the vast change which you must make in the position of words to adopt this construction. But the words 'heirs-male' are stated in argument, to apply to Lady Jane Ker, the daughter of Lord Hary Ker, and Hary Lord Ker. It appears to me, however, that the father is named here for no other reason than to identify the daughter; and that the father should be here named to identify the daughter, when the daughter herself might have been identified, by using her name of Lady Jane Ker, instead of the words 'eldest daughter,' is not an immaterial circumstance, perhaps, to be attended to in construing the clause. There is another way also of considering this; because there might be different persons in different events, the heirs-male of the one and of the other, and then, who are the heirs-male meant? So that it appears to me next to impossible that the word 'their' can be applied in the way in which it has been contended, even though you do not give much effect to the word *earum* occurring in a very early part of the instrument

"My Lords, The clause proceeds thus:—'She always mareing,

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'or being married to ane gentilman of honourl and lawful descent, 'who sall perform the conditions above and underwritten.'—Upon this it is said, that these are singular terms. My Lords, they are singular terms; but they are to be construed consistently with the plural terms occurring before, and the singular expression capable of a plural meaning occurring before—and then the question will be, Whether she, that is, the eldest daughter for the time being, or the eldest daughter *de tempore in tempus* coming in by substitution, is not to be taken as meant. I take it, therefore, my Lords, the true question upon this is, Are you not to take every word here as the word intended to be used by the author of the deed? If you are to take every word here as the word intended to be used by the author of the deed, the question then is, Are you not at liberty to construe the words of the clause? It is impossible to say that this clause is a clause composed of terms which each and every of them having a meaning which, by the law, you are bound to attribute to them. My Lords, I do not mean to say by that, that when you find out what the meaning of each and every of the terms used is, you are not bound to attribute that meaning to them; you certainly are bound to attribute that meaning to them; but you are not in this state that you must say, whatever may be the persuasion of your own mind as to the meaning of each of these words, the law has put an inflexible construction upon these words. It is a very different question as to the construction of the words 'heirs-male.' It cannot be said, with reference to this branch of the argument, that the law has put a construction upon the words of this clause, which prevents you from putting upon them the construction which you are convinced is their real meaning. Besides that, if they have no fixed meaning, neither have they an obvious meaning; for taking the words as they stand, if I may be permitted to use such an expression in this place, they are nonsense. They are words, however, of which, by construction, you must make sense, out of which, by construction, you must create a meaning; and you must make sense of the words as they stand, if that can be done, for that is the rule of all law. You are driven to construction; and being driven to construction, I say you are not to construe this clause upon the observation made upon the want of the words 'Lady Jean Ker'—upon the observation upon the word 'said' alone—upon the observation upon the words 'without division' alone—upon the observation upon the words 'their heirs-male' alone—upon the observation upon the words 'she 'always marrying' alone—upon the observation upon the words 'a 'gentleman of honourable and lawful descent' alone: But you are to look for the meaning of the words in the aggregate of the observations arising out of each, and every, and all of those words, and putting together the whole of the observations, to say what is most probably the intention of the author of the deed, regard being had to every observation which can be made reasonably upon all and

each of the words of the author of the deed. And, my Lords, I go further, and I say, that, in my opinion, you are fully at liberty to look to every part of this deed; and I say, that elsewhere in this deed you find words which unquestionably create a succession in their legal effect, which, as to their obvious meaning, have no such effect; but which, in their legal construction, you must hold to create such succession;—that you find in this deed, in many parts of it, singular terms, yet unquestionably showing themselves by their context, to have a plural meaning, and to describe classes of persons; that you find singular terms unquestionably meaning plural things;—that you find in this deed plural terms which must necessarily mean individual and singular things. You are to construe this deed, therefore, as the language of the author of the deed, and the language, which, *uno flatu*, the author of the deed has spoken. You must collect from his style and manner of language, taking the whole of it together, what he meant by every part of that instrument which contains his language.

"My Lords, I have no inclination to deal with other questions which have been submitted to your attention. It has been said, that your Lordships are not to look at the deed of 1644—this has been said by those by whom, nevertheless, your Lordships have been called upon to look at all the deeds prior to 1643—and by whom your Lordships have been called upon to look at all the procuratories of resignation, and all the charters prior and subsequent to 1648; and if you have been called upon at the Bar, to do that with a view to say, that, because in those other charters the authors of them meant to make particular destinations, therefore they must have meant, in this charter of 1648, to make the same destinations. My Lords, I am ready to admit, that that is a mode of proceeding which I cannot reconcile to any principles of law which I have been taught. It is for that reason I here state to your Lordships, that I can give no weight at all to the arguments I have heard from the Bar, that it was not the intention of the author of the deed of 1648, to alter the destination of this deed of 1644. I cannot read the deed of 1644, and the deed of 1648, without seeing that he did mean to alter in some respects the destination of his property; and when I apply my mind to the question—did he mean to alter the destination of his property among his grand-daughters, failing the institute and the substitutes? My Lords, I do not look to the deed of 1644 to teach me what he meant to do by the deed of 1648 in this respect. I look at the deed of 1644 to see what he has done in this respect in the deed of 1648; having regard to the whole of that deed, and informing myself no otherwise from the deed of 1644 than I should do from a charter in any other family, that is, looking to it, as an instrument to teach me what was the Scotch law-language in deeds of that period.

"That the deed of 1644 had some very material passages in it in

this view, I think your Lordships could not but observe, when I gave you the detail of it yesterday. I think your Lordships cannot but have observed, that I have given very little weight too to a great deal of argument we have heard at the Bar, as to the predilection which the author of this deed is supposed to have had for his grand-daughters over the heirs male general, for the three younger grand-daughters as well as the eldest grand-daughter, and the predilection which he is supposed to have had for the younger grand-daughters over the heirs of any description. My Lords, if you look to the effect of this instrument, all that you can say about it in this respect is, that having provided destinations of his estates to the four daughters of Hary Lord Ker, marrying these favourite persons the institute and substitutes, in the order in which he had so provided for them, it is probable that, if these marriages never took effect at all, he should intend that there should be the same provision for these daughters, *seriatim*, not marrying an honourably descended Drummond, or an honourably descended Fleming, but a lawfully and honourably descended gentleman of any other name. One cannot imagine why he should have had the fancy of going through this substitution, in case of their marrying those favourite individuals, and why he should not have had the same fancy, to go through the same substitution, if it should turn out, that these gentlemen, the Drummonds and the Flemings, did not find these Ladies to their taste, but left these Ladies to marry other gentlemen of honourable and lawful descent ;—why he should mean to exclude his second, and third, and fourth grand-daughters in that case,—it is very difficult to conjecture that that should be his meaning ; but, my Lords, if the deed clearly expresses it, you must give effect to it. You cannot fancy for him, you cannot insert destinations he has not inserted ; and when you recollect how he has passed over the youngest daughters of some, and the grand-daughters of others, it is impossible to deny that there is a great deal of argument upon matter of probability, to be submitted to your Lordships' consideration on both sides.

" Then, my Lords, your Lordships have heard it argued, Why can you possibly suppose there are four substitutions in so short a clause as this ? My answer is, I can suppose four substitutions in a much shorter clause. If you ask me, Can I suppose, that if there were four substitutions, they would be expressed in this way ? My answer to that is, that inexperienced a Scotch Lawyer as I am in conveyancing terms, I think I could have drawn a much better deed than this in reference to this destination. But I think, if your Lordships differ from me in this part of the case, I should be entitled to ask you, on the other hand, Can you suppose, that if the author of this deed meant simply Lady Jean Ker and her heirs-male, he would have used all the words you find there ? If that had been my meaning, I would have drawn a much better deed than this is,

with a view to effectuate that intention. But, my Lords, I do not go upon these grounds. Without entering into the question, of how much more, or how much less of weight belongs to all these probable reasonings; without entering into the question, of how much more, or how much less of weight,—whether any, and if any, what degree of weight, is to be given to the prior charters,—the charter of 1644, —to the subsequent charters looked at as evidence;—without reference to the question, Whether, if they can be looked at as evidence, they do more or less establish the propositions which each side has endeavoured to maintain upon them:—My Lords, without entering into any thing but the construction, the best construction that can be made of this instrument of 1648 itself;—attending to every word of that instrument which can furnish a fair argument to say that the eldest daughter means only Lady Jean Ker;—attending to every provision in, and to every word of that instrument which shews that the word 'eldest daughter,' (a term capable of meaning, and in common parlance meaning neither more nor less than the eldest-born daughter,) was to be applied, sometimes to one individual and sometimes to another, and more than one individual,—which shows that the singular word *person* was sometimes to be applied to one individual, and sometimes to another, and more than one individual:—attending to every provision and word which shews the meaning of the words, 'her,' 'them,' 'their,' 'person,' 'portion,' 'daughter,' and all the plural and singular senses in which they occur; and attending to the whole of the phrase of this clause,—to every word of this clause as the very word which the author of this deed meant to insert in his deed, because he has inserted it, and upon this great leading principle, that in judgment you never can (unless you are justified by unavoidable necessity) reason upon the supposition that the man has made a mistake, by inserting in a deed the word which he has inserted in it; admitting, that where you are driven by absolute necessity to do that, you must do it. Attending to the whole and every part of this deed of 1648 itself, after the most anxious and attentive consideration, and on the deliberate consideration which I have given to this deed, I offer to your Lordships my humble opinion upon this first point of the cause, that the words, 'eldest lawful daughter, and their heirs-male,' mean (whatever be the meaning of the words 'their heirs-male,') the daughters *successivè et seriatim;* and that if the heirs-male, according to the true interpretation of this deed, of Lady Jean Ker have failed,—if the heirs-male of Lady Anna, the second daughter, according to the true interpretation of this deed, have failed,—then that the heirs-male of Lady Margaret, according to the true interpretation of these words 'heirs-male,' are entitled as heirs of tailzie under this deed. My Lords, I wish to be understood here: I say, if they have failed. I observe, that in the Court below, and in many of the papers, they have had another way of considering this, and that is,

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that a daughter could not become the eldest daughter, unless her eldest sister died in her lifetime. That is not my idea of the true meaning of this instrument. If it is a *seriatim* substitution, as I think it is, in my view of the case, it is immaterial whether the eldest sister died before the younger or not; the eldest *debito tempore,* or *de tempore in tempus,* by herself, and in her heirs-male, that is, in the series in which she and they were called, would, in my opinion, be entitled to take the succession.

" Having offered to your Lordships my humble judgment upon this one point, your Lordships will permit me now to say, that I have very studiously hitherto refrained from saying one syllable indicative of any judgment I have formed with respect to the words ' heirs-male.' Whether the words might be understood to mean, heirs-male generally, or heirs-male of the body. I have done so for this reason principally, that though undoubtedly as long as I shall live to remember this cause, if I shall have made a mistake in the part of it that I have discussed, and your Lordships shall act under my mistake, to the longest time I shall live to remember this cause, from the moment I am convinced of my mistake, I shall deeply regret it, considering the important interests here at stake ; yet I am aware, that of this branch of the cause it may be said, it is but mistake which affects this particular case, and that it is important principally to the parties only ; but with respect to the other question, I have been anxious to keep it distinct, for this reason, that the decision upon that is to affect not this case alone ;—that it is a decision to which your Lordships cannot come, without considering it upon its principle,—without considering it with reference to precedents,—without considering it with reference to its consequences,—without considering it with reference to all the ways in which it may affect, and most deeply affect, landed titles and titles of honour. My Lords, I have formed an opinion upon it, and that opinion I shall take a very early opportunity of delivering to your Lordships; but I look upon that part of the case as so extremely important, that I have been anxious, as far as my mode of reasoning would enable me to keep them distinct, to take care not to confound one point with the other ; that with a view to come to the right conclusion upon that second point, your Lordships may find yourselves in possession of observations so laid before you upon the first point, that you might be able to apply them in the consideration of this case to that point only.—I shall now, with deference to your Lordships, humbly propose, that having given my opinion upon this first point, in the course of this afternoon, you should adjourn the further consideration of this case ; and if your Lordships will have the condescension to grant to the individual who now addresses you that request, I should hope you will not feel yourselves unwilling to permit me to proceed upon the consideration of the next branch of the cause on Monday at eleven."

Third Day.

Monday, 19*th June* 1809.

" My Lords,

" On the last day on which your Lordships met for the consideration of this cause, I submitted to your Lordships, as my humble opinion, that the persons described in the clause in the deed of 1648, commencing with the words ' which all failing, to the eldest daughter and ' their heirs-male,' were to be considered as heirs of tailzie. I also stated to your Lordships, that it did not appear to me that it would be possible to hold, that, under the effect of the instruments subsequent to the year 1648, connected with possession upon any ground of prescription, the investitures of the estate were changed from those which stood as the regulating rule of the succession in 1648. I likewise stated to your Lordships, that, in my judgment, the deed of renunciation and appointment upon the marriage of Lady Margaret did not destroy the title which Sir James Innes now insists upon, if Lady Margaret ever had a title ; and I further added an opinion which I had formed, and which, upon reconsidering it since I last had the honour of addressing your Lordships, I have not found reason to change, but which, I might, I think, be justified in saying, I hold more firmly than I did even then, that the destination to the eldest daughter, connected with such a context as that in which it occurs,—occurring in such a deed as that in which we find it,—I do not mean a deed as partaking more or less of a testamentary nature, but a deed, such in its contents, such in its expressions, and such in its objects, as this deed of 1648,—that the singular term ' eldest daughter,' connected with the plural pronoun ' their' heirs-male, and the other terms of the clause, did constitute a *seriatim* substitution of the four daughters of Hary Lord Ker, and their heirs-male, of some species. My Lords, I have only to add to that, (which, it may be proper for me shortly to intimate, although, for reasons I before alluded to, it is impossible for your Lordships to come to any decision upon the question of dignities), that, giving as pointed an attention as I could to what has been stated from the Bar, with reference to the effect of this charter of 1648, as intended to pass the Earldom of Roxburghe, and to what has been stated at the Bar as to its efficacy or inefficacy in passing that Earldom, regard being had to the seal by which it is supposed to be authorised, and to the other circumstances which formed the topics of argument upon this head at your Lordships' Bar ; it occurs to me, that it may not be unfit that I should state to your Lordships, that my opinion upon that question which we last discussed, as well as upon that which we are this day met to discuss, would be precisely the same,

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whether the honour does or does not pass by the deed of 1648. That it was intended to pass, is certainly the opinion of the individual who now addresses you; but whether it did or did not pass, whether it was or was not intended to pass, would not, in the judgment of that individual, much affect, not materially affect, the decision of the questions with respect to these estates.

Import of "Heirs-male" used in the deed.

"My Lords, The question now presenting itself to our consideration, I would put very shortly thus: Whether the words 'heirs-male,' in the clause to which we have so often had reference, mean, in the intention of the author of this deed, as that intention is to be collected from the context and the other parts of the same instrument, for so I would put the case to your Lordships, whether these words 'heirs-male' mean heirs-male general? or whether they mean 'heirs-male of the body' of the person or persons to whom they refer? And, my Lords, having stated it to your Lordships as my opinion, that there is a succession of substitutes among these daughters, the question, as put by me at least to your Lordships, must be, Whether these daughters *successivè*, and their heirs-male, mean a description of persons, heirs of tailzie, and their heirs-male general, or the heirs-male of their bodies? and that question arises amongst daughters designed, in my view of the subject, to take one after another in that species of succession.

"I need not tell your Lordships, that the law of Scotland, as to descent, is very different from the law of England. It is therefore not my intention to trouble your Lordships with any observations upon the rules of English law with reference to the interpretation of deeds and papers. I apprehend it is hardly safe to do that. This case must be decided by Scotch law, as well as we can collect it, as applicable to dispositions of this kind, to take effect after the death of the author. We are to apply Scotch rules as to deeds or wills, which, your Lordships know, are very different from our rules; and, in that view of the case, I lay out of it all consideration of the much agitated case of Perrin *versus* Blake, and some other cases which happened in England when your Lordships and I were young; because it does not appear to me that we can borrow much of useful argument from them.

4 Burr, 2579.

"My Lords, this question is to be decided by discussing it upon principles, by discussing it with reference to the cases which have been determined, and by endeavouring to apply, as well as we can, the principles resulting out of general doctrines, and the principles to be gathered from the cases which have been decided, and bear upon the same points, applying, as well as we can, those principles, to assist us in the construction of this instrument.

"My Lords, I shall begin with the cases first; because, if it be true that the case of Hay of Linplum has fixed this as a rule of law, as I see some of the judges in the Court below seem to have thought that the words 'heirs-male,' occurring in such a destination as this,

I repeat the words, 'occurring in such a destination as this,' had that precise, fixed, technical meaning, which no intention, however clearly expressed, could control, which no intention, however clearly manifested, can separate from the words, it is in vain we look beyond the cases; and it is in vain we look to doctrines; for if there be a solemn decision in this House which governs the present case, upon the ground upon which I am now putting it, *cœdit quœstio.* It would be mis-spending time to discuss the matter further.

The Linplum Case.

"My Lords, Till I looked back to the date of the case of Hay *versus* Hay, and found there the name of the person who is now addressing your Lordships, as having been counsel in it, I acknowledge to your Lordships, that I had totally forgotten the case,—that I knew no more of it when it was mentioned at the Bar, than if I had never been employed as counsel in it. I have two apologies to make for that to your Lordships; one, that I have lived many years since that case; and the other, to assure your Lordships, that I am not surprised that so much matter as has been pressed into my head since, should have pressed out of my head the matter which was then in it. I have, however, my Lords, the papers in that case before me; and the question is, Whether it be possible to maintain, first, that this was *necessarily* the opinion of the House of Lords when it decided that case? Secondly, If this was not *necessarily* the opinion of the House of Lords when it decided that case, whether the House went upon any other principle, than that it thought itself bound, in that case, to say, that it was the intention of the author of that deed, that the heirs-male generally of Alexander Hay should take; or that it was not the clear manifest intention that they should not take. My Lords, Before I state to your Lordships the deed itself which was construed in the Linplum case, you will permit me to say, that the question, Who are meant by a destination? has been considered with more or less of laxity by different Judges in the Courts below. Some of them seem to have been of opinion, that entails, which are *strictissimi juris*, are so with respect to the fetters only. Others have thought, that they were *strictissimi juris* with respect to the construction of the words which were meant to describe the persons intended to take under the destinations: and it has been put, and well put to us, that it is, in a sense, a question of fetters; because it is necessary for every person put under fetters to be able to collect in a deed, whom the fetters attach upon, and by whom those fetters can be enforced; and I think I may therefore, in a sense, venture to state to your Lordships, that the construction adopted ought to be the clear and fair construction of the words.

"My Lords, The Linplum case arose upon a settlement, with reference to which, I should not do justice to the present case, if I did not state, that, like this Roxburghe case, it was a regular entail;—like this Roxburghe case, it was not to take effect till after the entailer's death;—like this Roxburghe case, the question discussed and decid-

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ed in it was a question of competition between heirs,—it involved nothing with respect to creditors or onerous purchasers: there was not therefore that distinction in it, which, your Lordships recollect, we have heard much of at the Bar;—it was upon the construction of a clause, relating to a destination—it was upon the construction of a clause, upon which the question depended, On whom, and in favour of whom, the fetters were imposed?—it was upon a construction of a deed, in which it is undeniably true, that there were strong circumstances to infer an intention, in the use of the words 'heirs-male,' to limit to 'heirs-male of the body' of the party. It is indisputably true, too, that it was a case in which subsequent substitutions included the very individuals who would fall under the description of heirs-male of Alexander Hay. It was a case, too, in which it must be admitted, that a very useless but anxious attempt was made to separate the Linplum property, in certain events which might take place, from the Tweeddale property, from the Drummelzier property, from the Roxburghe property. It was a case, in which it must be indisputably admitted too, that the phraseology of the deed furnished, in different instances, and in numerous instances, both the words 'heirs-male,' 'heirs-male of the body,' and the words 'heirs-male whatsoever.' It was a case too in which, in certain events, the supposable intention of the author of the deed, I say the supposable intention of the author of the deed, (for though, in the construction of instruments, we are, judicially speaking, to suppose, that every granter foresaw all the events to which his words can be applied, yet, in point of fact, we know that is not the case), that the supposable intention of the entailer would be defeated. All these circumstances may, I think, be predicated of that Linplum case; and it is fit that your Lordships, with a view to determine what weight is due to my opinion, should be informed, that I am aware that all those circumstances may be predicated of that case.

"Having stated so much, your Lordships will now permit me to state to you the substance of the deed in that case. It was made by Sir Robert Hay of Linplum; and he disponed to himself, and to his sister Lady Margaret Hay in liferent, and to the second son to be procreated of the body of the Most Honourable John Marquis of Tweeddale, and the lawful heirs-male of his body, in fee. And I stop here a moment to observe, that this case was open to precisely the same observations as have been made upon the Roxburghe case; that there are express limitations, in four or more instances, prior to the destination to Alexander Hay, to persons, and 'the heirs-male 'of their bodies begotten,' in terms; then to the third lawful son, and to the heirs-male of his body; and so on, to all the Marquis's younger sons, one after another; and failing all his lawful sons, and the lawful heirs of their body, to the Right Honourable Lord Charles Hay, brother-german of the Marquis, and the heirs-male to be procreated of his body; whom failing, to the Right Honourable

Lord George Hay, another brother-german of the Marquis, and the lawful heirs-male to be procreated of his body; whom failing, to Alexander Hay, second son to Alexander Hay of Drummelzier, Esq.; and his lawful 'heirs-male.' My Lords, This second son had an elder brother of the name of William, and he had either three or four younger brothers; and I press upon your Lordships' attention that circumstance, that he had three or four younger brothers; 'whom failing, to the Honourable John Hay of Belton, Esq.; and his lawful heirs-male.' He had also a younger brother; 'whom 'failing, to the Honourable John Hay of Lawfield, Esq.; and his 'lawful heirs-male.' I think I am correct when I say there was a younger brother of him also; 'whom failing, to Lord Robert Ker, 'second lawful son to the Duke of Roxburghe, and his lawful heirs-'male; whom failing, to the heirs-female lawfully to be procreate of 'the bodies of the several persons above mentioned, one after the 'other, beginning with the heirs-female to be procreate of the body 'of the said John Marquis of Tweeddale, and observing the same 'order and course of succession above written, the eldest heir-female 'failing heirs-male, always secluding the rest, and succeeding with-'out division; and that whenever, and as oft soever as the succes-'sion, upon the failure of heirs-male, shall happen to fall or devolve 'to heirs-female; whom failing, to my own nearest lawful heirs and 'assignees whomsoever.'

"Your Lordships therefore perceive, that the destination was of this sort: It was a destination to the second and other sons, and the heirs-male of their bodies, of the Marquis of Tweeddale;—it was a destination to Lord Charles Hay, and the heirs-male of his body;—it was a destination to Lord George Hay, and the heirs-male of his body;—it was a destination to the second son only of Alexander Hay of Drummelzier, and his heirs-male;—it was a destination to Hay of Belton himself, and his heirs-male;—it was a destination to Hay of Lawfield himself, and his heirs-male;—it was a destination to the second son of the then Duke of Roxburghe, and his heirs-male; —and then it was a destination to the heirs-female of the bodies of the several persons above mentioned, and the heirs procreated of their bodies. Your Lordships will be good enough to keep in mind the variegating, (if I may so express myself), the variegating nature of these respective destinations.

"My Lords, He proceeded to bind and oblige his heirs to infeoff all these persons, Mrs. Margaret Hay, his sister, in liferent, and the second son of the Marquis of Tweeddale in fee, and on failure of them, the other substitutes and heirs of tailzie above specified; and then he goes to that part of the instrument which contains an obligation to resign. He repeats in that again the same limitations; and then he proceeds to state himself thus: 'With this express pro-'vision, that the said second lawful son to be procreate of the said 'Marquis of Tweeddale, and the heirs-male of his body, and also the

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'whole heirs of entail before mentioned, succeeding in the right of 'the said lands, annualrents, and others, shall be obliged to assume, 'and constantly to retain, use, and bear, the surname and designa- 'tion of Hay of Linplum, and use the arms and coat-armorial of 'this family, as their own surname, designation, and coat-armorial 'in all time coming. And it is hereby farther provided and declared, 'that it shall not be leisome nor lawful to the said second son to 'be procreate of the said Marquis, or the lawful 'heirs-male of his,' '(that is, the lawful heirs-male of his body), nor to any of the said 'heirs of tailzie, nor their descendants, to alter that destination.' I will not trouble your Lordships by going through all the prohibitory, resolutive, and irritant clauses: the first material expression that occurs here to be laid hold of, by way of applying it as a context, constructive of the clauses of destination, which I need not tell your Lordships are the clauses most material to be looked at in these cases, is this: 'It shall not be leisome nor lawful to the said 'second son to be procreate of the said Marquis, nor the lawful heirs- 'male of his.' My Lords, No man can deny, that the words, 'lawful heirs male of his,' there mean, 'heirs-male of the body,' because these his lawful heirs-male who were to take were heirs-male of the body; and therefore this is an instance of itself, not how fit it may be in general cases, or in most cases, or in any particular case other than this, to say that the words 'lawful heirs-male' will admit of a construction, which gives to them the same meaning as if the words had been 'lawful heirs-male of the body;' but it proves this truth undeniably, that there *may* be some cases in which 'lawful heirs-male' must mean 'lawful heirs-male of the body;' for here they cannot mean any thing else. 'Nor to any of the said 'heirs of tailzie, nor their descendants:' It was observed upon these words, 'their descendants,' that these words were material to show that the author of this deed meant *throughout* 'heirs-male of the 'body,' because none but heirs-male of the body can be descendants. It was answered on the other side, that the word, at any rate, was but surplusage; that the words 'heirs of tailzie,' would include all heirs of tailzie, whether descendants or not; and that the words 'their descendants' were most clearly used, not in their strict proper sense, because descendants would not only include heirs-male of the body, but heirs-female of the body; and the question upon the whole instrument was, Whether 'lawful heirs-male,' 'lawful heirs 'of his,' 'lawful heirs of his body,' 'heirs of tailzie,' 'or descend- 'ants,' were not, each and every one of them, meant, *referendo singula singulis*, to describe the heirs of tailzie, whether heirs-male general or heirs-male of the body, as the whole of the respective clauses of destination pointed them out, as being heirs-male general, or heirs-male of the body. In another part, the expression is, 'lawful heirs- 'male aforesaid,' which *may* mean both species of heirs-male. It is

to be observed, that the word 'descendants' occurs, I think, five or six different times in the instrument.

"My Lords, There was then a clause which was thought to be material. After describing the several cases and acts in which and by which this tailzie might be prejudiced, it says, 'Then and in 'that case, every one of the facts and deeds to be done in contra- 'vention hereof by the said second lawful son to be procreate of the 'said John Marquis of Tweeddale, or his 'heirs-male' aforesaid.' There your Lordships see, that the words 'heirs-male' apply to those who are, in the beginning of the deed, expressly described as heirs-male of the body lawfully begotten. In the passage I have last read, there are no such words as 'of the body lawfully begotten;' but there is a context which must help you to the construction of the words 'heirs-male' in the clause I have pointed out, regard being had to the clause destining to heirs-male. This simple word 'afore- 'said' is, as the word 'said' is in many instances, as the words 'herein before provided,' 'herein before nominated,' are in many instances, explanatory words of context, this word of context going to make out what heirs-male are intended in the description to which the word is annexed. 'And further, the said second lawful son to be procreate of the said Marquis of Tweeddale, and his 'heirs afore- 'said:' There, your Lordships observe the word 'male' is dropped, as well as the words, 'of the body,' and the word 'aforesaid' must be understood as the context to the word 'heirs,' including in it a description amounting to precisely the same as if the word 'male' had been inserted, and as if the words 'lawfully begotten of their bodies,' had also been inserted.

There was then a clause, my Lords, which is a very material one. 'If it shall happen that the right of the subjects hereby entailed 'shall devolve to the said second lawful son of the Marquis of Tweed- 'dale before his existence, then it shall be lawful to the said Lord 'Charles Hay, or to the nearest heir of entail in being at the time, 'to establish titles in his person to the lands and others therein 'mentioned, and to enjoy the rents and profits thereof, until the first 'Martinmas or Whitsunday inclusive following the birth of the 'said Marquis's second son; and then the said Lord Charles, or 'nearest heir aforesaid, shall be obliged to denude himself in favour 'of the said Marquis's second son, in the same manner as is here pro- 'vided if the said Lord Charles Hay had succeeded upon a contra- 'vention of an heir of entail.' The professed object, your Lordships observe, of this deed is, that the Tweeddale estate and the Linplum estate should not come together; and at the same time the express object is, that the Linplum estate should go to the second son of the Marquis, whether he was come into being at the time the succession opened to him or not; and I think I may venture to repeat the observation with which I troubled your Lordships on Saturday, that nobody can doubt that these words 'second son' must mean second

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son for the time being, and that it is a singular term, including all persons who might answer that description.

"My Lords, We learn that the events that happened were these: Sir Robert Hay died without issue in 1751. I ought to have mentioned, because it is a circumstance taken notice of, and for that reason only I ought to mention it, as I really do not think there is any weight in it, that he had executed a settlement of his personal estate in favour of the same series of heirs, which was only another proof of his determination to use the same destinations. He died without issue in 1751; and John, then Marquis of Tweeddale, having but one son, the succession devolved upon Lord Charles Hay, the Marquis's immediate younger brother, and the first substitute in the aforesaid deed of entail, failing younger sons of Marquis John. Lord Charles also having died without issue, the succession next opened to Lord George Hay, the youngest brother of the Marquis. The Marquis of Tweeddale left issue an only son, an infant, who died in 1770, when the dignity and estate of Tweeddale devolved upon Lord George Hay, the late Marquis, (who was such at the time this case occurred). Alexander Hay, the second son of Alexander Hay of Drummelzier, and the next *nominatim* substitute in Sir Robert Hay's deed of entail, having died before this period without issue, the respondent, Robert Hay of Drummelzier, who was one of his younger brothers, insisted, that, as heir-male of his brother the deceased Alexander, heir-male of him, though not heir of his body, he was entitled to the estate; he brought an action for the purpose of trying that question; and having brought that action, it was determined by the Court of Session, and I think afterwards by your Lordships, that the Marquis was entitled to keep these estates till he should have a second son of fourteen years; and the estate of Linplum was accordingly held by the Marquis till his death in 1787. Upon that the respondent renewed his claim, and there was an adverse competition for the estate. The appellant was Miss Frances Hay, who was the only child of the marriage of William Hay and the deceased Lady Catherine Hay. She insisted, she had a title to the estates under the effect of that clause of destination which I have stated to your Lordships, relating to females who were to take; and the question which was actually agitated and decided in that cause was, Whether the brother of Alexander, as the heir-male of Alexander, was entitled to the estate? or, whether the limitation to the heir-male of Alexander meant a limitation to the heirs-male of his body? If it did, his brother, not being the heir-male of his body, could not take, and then the substitution of the female line had opened.

"My Lords, The Court of Session were of opinion that Alexander's brother was entitled, and that this instrument was so to be construed. They did not form that opinion either upon the notion, that the terms were altogether inflexible, or upon the notion, that

there was nothing in the deed to show that it was not the intention of the author of the deed, that those words were to have in construction what, it was admitted on all hands, was their obvious meaning, and their *prima facie* meaning. They seem to have relied also upon a case of Baillie *versus* Tennant, which does not appear to me to have had much application to the subject that came before your Lordships in the Linplum case, when it was argued at this Bar. I cannot charge my recollection with the matter of fact by whom the Linplum case was argued on all sides. I think it was argued by Mr. Wight and Mr. Tait, both gentlemen whom your Lordships recollect to have been very considerable in their profession. I speak from a full persuasion upon memory, when I say, it was very ably argued by the late President of the Court of Session ; and I had the honour of giving him my very feeble assistance upon that occasion. I observe that, in his situation as Lord President, he makes upon the present occasion an observation, to the accuracy of which I can bear a good deal of testimony, I mean from my own individual experience, that we professional men are sometimes extremely discontented with decisions which, after a lapse of some few years, perhaps, we can subdue our obstinacy so far, as to admit them to have been quite right. I believe we were both out of humour with the decision, perhaps not very reasonably.

" My Lords, The whole argument was before your Lordships in the papers laid upon your table, signed by Mr. Wight and Mr. Tait; and it does appear to me to be so material to lay the whole of that argument before your Lordships again, with some comments upon it, with a view to the right decision of this case, that I am sure your Lordships will spare me as much time as shall be necessary for that purpose. My Lords, if it had been true that the Noble Lord who then sat upon the wool-sack, and any other Noble Lords then present in the House, deemed it to be clear in the law of Scotland, that these words 'heirs-male' occurring in such a deed as this Linplum charter, looking at the clause in which it occurred—looking at all the expressions of the instrument—that they necessarily, imperatively, and inflexibly must mean 'heirs-male general ;' to be sure they suffered Mr. Tait, Mr. Wight, Sir Ilay Campbell, and myself to be guilty of a great deal of impertinence, for it was argued at much length—your Lordships will, I think, see by the cases, that the case turned upon this,—that the words 'heirs-male' had a *prima facie* obvious fixed meaning, not to be torn from them, except upon what might be stated to be declaration plain of intention, and, to use Lord Hobart's phrase, declaration plain, or absolutely necessary implication.

" Your Lordships will see, from the printed cases, that the argument went upon the question, Whether the intention was sufficiently manifested to destroy the general meaning of the words? When I say it went upon the question, whether the intention was sufficient-

ly manifested, I do not mean to say the other question was not discussed—far from it;—but that the decision did not necessarily establish that principle of inflexibility, which has been contended for at your Lordships' Bar, I think myself fully entitled to assert. I am confident that, if it had been the intention of this House to have asserted a great principle of that kind, your Lordships would have found it embodied in the judgment; and if you do not find it embodied in the judgment, and the case will admit of a consideration not necessarily establishing so large a principle as that, your Lordships will hardly infer, that the case meant for ever to establish that as a principle, and an inflexible rule of law. I am sure I need not remind your Lordships of the caution with which you proceed as to laying down principles to regulate cases—not laying them down unnecessarily—not forbearing to express them when you mean to establish them ;—you do it with care in English appeals—but with respect to Scotch causes, I never saw any one sit upon that woolsack who did not think that he was called upon to act very carefully and cautiously, and clearly, in laying down general principles, or acting upon general principles not expressed in judgment, that should regulate questions of Scotch title. As to the principles upon which these deeds are to be construed,—if the author of such a deed said —' I give to John and his heirs-male';—and in the next line he should say—' I mean by the words ' heirs-male,' ' the heirs-male of ' the body,' it would be difficult, upon any doctrine or any principle that I have heard of, to say, he did not effectually destine to ' heirs-' male of the body.' So the nature of the subject purchased may affect the construction of such words. If a man, having landed estate, purchases an accessory subject, whatever the words are by which he takes that subject to his heirs, you have been told it will go to that series of heirs to whom the other property is destined. A great many cases have been put in argument which go the length of contending, that where a man by a deed limits to A and the heirs-male of his body, and then to B and ' his heirs-male,' with remainder to his own lawful and nearest heirs-male whatsoever, and then, by another deed of even date, expresses himself to have limited to B, and the heirs-male of his body,—the effect of the latter deed will give a construction to the words ' heirs-male' in the former. Those cases were put, as cases in which it might be well contended, that the author of the deed had given explanation enough of his deed to authorise the Court to say, that that intent expressed in such words, though in another deed, could be legally carried into effect. My opinion upon that I do not state; but I have expressed an opinion, that a declaration plain in the same deed, notwithstanding any thing I have heard urged to the contrary, may have such an effect. My Lords, those who were to answer Sir Ilay Campbell and myself, I must say answered us upon paper a little better than we answered them,—they gave an answer to what was observed by us upon a

very famous passage, quoted from Sir Thomas Craig : it was quoted too repeatedly in this case. ' He puts the case, of an entail made ' to A, *et hæredibus ex ejus corpore masculis ;* and then to B, *et hæ- ' redibus ex ejus corpore masculis ;* and then to C, *et ejus hæredibus ' masculis ; quibus omnibus deficientibus, hæredibus dicti Titii, sive ' primæ personæ masculis quibuscunque.*' It was contended upon the text of that author, that he meant precisely the same species of heirs under the words ' *hæredibus masculis*' of C, as he did under the words ' *hæredibus ex ejus corpore masculis* ' with respect to A and B ; and this instrument of Linplum having been executed about 1748, we contended on our part, that the expressions ' heirs-male' of Alexander really meant the same heirs as Craig meant, though it was said that there was a great deal more of nicety and attention to technical phrases in modern conveyances than there was in ancient deeds or ancient writers. I cannot take upon myself here to say to your Lordships how that is in point of fact ; and indeed I think it would be a very dangerous thing to attempt to state, if I knew more of the fact, what stress your Lordships ought to lay upon such a fact in construing this Roxburghe deed. One thing is quite clear, that all the old investitures of *this* estate, from fourteen hundred and odd, had most technical limitations to the heirs-male of the body. It is consistent with that fact, that both expressions might be used to signify the same description of persons; but it is a clear fact, that those who so describe the heirs-male of the body, knew technically how to do it, not only in 1648, but for at least two centuries before, as appears from the settlements of this family.

" Your Lordships will find, in the printed case of the respondent in the Linplum cause, that we were told, that a single observation might be sufficient to strip the appellant of the aid she endeavoured to draw from Sir Thomas Craig; for if, according to the ideas that were in his times entertained of tailzied succession, ' heirs of the ' body' could only be called in such a settlement, *then, no doubt, the two terms of heirs-male, and heirs-male of the body, must, in respect to deeds of that sort, have been synonymous ;* and this admission is far from an immaterial one. It goes a long way to admit a case in which ' heirs-male' would be flexible in construction ; but it was observed that very different ideas were now entertained ; and that the distinction between ' heirs-male ' and ' heirs-male of the ' body' was as well understood, and as generally known as that between heirs and heirs-male. But, my Lords, ' heirs,' by context, may mean ' heirs-male.' We insisted, that the act of 1685 itself furnished an instance of the flexibility, not perhaps of the term ' heirs-male,' but of that term ' heirs ;' and that that was furnished by the clause which, your Lordships will recollect, forms a part of it : ' That if the said provisions and irritant clauses shall not be re- ' peated in the rights and conveyances whereby any of the heirs of ' tailzie shall bruik or enjoy the tailzied estate, the said omission

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'shall import a contravention of the irritant and resolutive clauses 'against the person and 'his heirs' who shall omit to insert the 'same, whereby the said estate shall *ipso facto* fall, accresce, and be 'devolved to the next heir of tailzie.'

"To this it was answered, and very properly answered, that the word 'heirs' there, is of itself a more flexible term, as it certainly is, than 'heir-male,' if heir-male be a flexible term; and that the word 'heir' must receive its construction from the context; and as to the effect of any entail which was to be registered, if it was an entail to A and the heirs-male of his body, and then to B and the heirs-male of his body, and then to C and his heirs-male, and then to D and his heirs-male whatsoever—then the word 'heir' in the statute would suit and accommodate itself, *referendo singula singulis*, to the sense in which it was necessary to understand it, regard being had to the different series of heirs through whom, from the heirs of tailzie, the estate was to pass; and the worth of the observation on our part certainly was not considerable.

"My Lords, It was further stated in the printed case, that in that proceeding which was had when the Marquis of Tweeddale was declared to be entitled to the estate till he had a second son of fourteen, the Lord Ordinary's interlocutor found, 'That the deeds of entail upon which the question in debate arose, were not devised 'upon any regular or uniform plan, and so must be taken as Sir 'Robert or his writer had chosen to express them.' Now, that is the principle of the decision which my Lord Ordinary had embodied in his interlocutor. Is that the language of a man who was prepared to say, that if there was a regular and uniform plan in the instrument, in construing the words of the instrument, he would pay no attention to it? Is it the language of a Judge, who had before him a settled, inflexible, unbending rule of law, known to him and his brethren, which could not be affected by any plan or form of instrument, however regular or uniform? No, my Lords, the *ratio decidendi*, as far as his judgment goes, is directly the contrary. The respondent then further said, that if the intention was to prevail over the words, the appellant's claim to the succession, taken upon the question of intention, was ill founded; for she would be obliged to make out, that the author of this deed intended, having given an estate to the second, and other sons of the Tweeddale family, and the heirs-male of their bodies,—having passed over the father and the elder brother of Alexander Hay, and given an estate to him and his heirs-male, Alexander, the second son, having a third, fourth, and fifth brother, three or four younger brothers, it is not material how many,—that it was the intention of the author of the deed, although they might take as his heirs-male, to pass them all over,—to pass every one over, though he had not substituted them *eo nomine*, as he had substituted the third, fourth, fifth, and sixth, and other sons, in the preceding destinations; and that he not only

meant to pass over them, and to let in before them Hay of Belton, and his lawful heirs-male, and Hay of Lawfield, and his lawful heirs-male, and Lord Robert Ker, the second son of the Duke of Roxburghe, and his lawful heirs-male; but with a priority to the younger brother of Hay of Belton, to let in Hay of Lawfield, and his heirs-male, and with a priority to the younger brother of Hay of Lawfield to let in Lord Robert Ker, the son of the Duke of Roxburghe, and his heirs-male generally; and to let in the whole females who were to succeed, with a priority to the younger brothers of Alexander Hay of Drummelzier, Hay of Belton, and Hay of Lawfield.

"My Lords, I beg your Lordships' attention to a reason which was then stated, and which was much relied upon at that time, which has a very strong bearing upon the present case. In the construction of instruments, it is one thing, by construction, to include persons who may be intended to be included, though not named, and another thing, by construction, to endeavour to exclude those who might not be intended to be excluded. In the case of Hay of Drummelzier, this House adopted a construction, which imputed to the author of the deed, the intention which it was natural the author of that deed should have, which did not exclude the younger brothers of Alexander, which did not exclude the younger brothers of Hay of Belton, which did not exclude the younger brother of Hay of Lawfield. Your Lordships will pause, I think, before you look upon that as an authority binding you to a construction, which certainly does not *absolutely* exclude the heirs-male of the bodies of Lady Jane Ker's three younger sisters, but which in fact leaves them little chance of ever taking the estates beneficially.

"My Lords, Did the counsel who argued that case of Linplum suppose, that if there had been a substitution of Alexander's brothers one after another, the decision would necessarily have been the same upon the words 'his heirs-male.' Mark, my Lords, their expression as to this point. 'To suppose that Sir Robert Hay intended to prefer to the younger sons of Hay of Drummelzier, not only Hay of Belton, Hay of Lawfield, and Lord Robert Ker, but even the heirs-female of their bodies, and, in like manner, to prefer Lord Robert Ker, and the heirs-female of his body, to the younger brother of Hay of Belton, who still exists, and the younger brother of Hay of Lawfield, who then existed, is altogether improbable;' whereas, upon the footing of his meaning to prefer all the younger sons of the family of Drummelzier, in their order, to the other families of Belton and Lawfield, &c. your Lordships will perceive an obvious and satisfactory reason for the difference observed between the younger sons and brothers of the Marquis of Tweeddale, and the other substitutes. *The former were called separately and* seriatim: *it would therefore have been absurd to call their heirs-male general;* and it sufficed to call only the heirs-male of their bodies. But in the other substitutions, *where only one of a family*

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was named, it was necessary to call their heirs-male general; which, of course, failing male issue, would carry the estate to their brothers. It is no doubt true, that, by so doing, the succession might have been carried beyond the brothers. It certainly might; and that prompts me to state to your Lordships now, that, which may have an effect upon this case. It is certainly very true, that although William, the elder brother of Alexander Hay of Drummelzier, was excluded, as far as express nomination of others could exclude, from this settlement; and although it is equally true, that the father of Alexander Hay was also excluded; and though it was also true, that the Marquis of Tweeddale was not intended to take; and equally true, that William Hay was not intended to take; those persons who were not intended to take, in certain events, might become the heirs-male of Alexander of Drummelzier, the second son. Admitting that to be so, the argument proceeded to contend, that there certainly was a strong ground for saying, that 'lawful 'heirs-male' here meant 'heirs-male of the body;' but as to this, we were told that we must take the whole of the instrument together; and if we find stronger, or as strong grounds, on the other hand, for saying, that it was the intention of the author of the deed to use these terms 'lawful heirs-male' in their general sense, we will interpret them in their general sense. The sons of the Marquis of Tweeddale have been called *eo nomine*, with the lawful heirs-male of their bodies. It might undoubtedly, by possibility, have happened, that they should all have failed before the author of this deed, and that Alexander himself might have died;—that his younger brothers might have died;—and then that, contrary to the expectation of the author of the deed, his elder brother, William, might have taken. But you cannot, because you see, that the execution of the intention of the author of the deed might operate a surprise in some cases which may happen, you cannot therefore say, you will refuse to execute his intention in a case in which he has plainly stated his intention. You cannot refuse to execute his general intention plainly stated, because his expressions, in some possible or particular events, may be suspected by you to go beyond what he thought they might actually reach. The true question upon the instrument in the Linplum case was this, Whether it was made so clear, by reasoning upon the fact, that persons excluded as substitutes would be included as heirs,—by reasoning upon the word 'descendants,'—and by reasoning upon the other topics that led to all the material observations, whether it was made so clear that he meant to exclude all the younger brothers of Alexander of Drummelzier,—whether it was made so clear that he meant to exclude Hay of Belton's younger brother, and Hay of Lawfield's younger brother, that you would venture to exclude them, by narrowing the terms, and the sense of the terms, under which they *might* be included, and, *prima facie*, were to be taken to be *intended* to be included.

"My Lords, I admit, that it is a dangerous rule of construction of instruments, which construes them by reasoning upon events as improbable, which the author of this deed has himself provided for. —I will put your Lordships in mind of the arguments at the Bar, as to the utter improbability of the author of this deed of 1648 having in his meaning any person but the eldest daughter. It was urged, that he, offering these four young Ladies to Drummonds and Flemings, could not think it possible that they should not come together; —that it was quite absurd to suppose that he could imagine, that some or other of them should not marry some one or other of these Ladies, and have issue-male of their bodies;—that therefore he could have actually meant nothing more than a sort of verbal compliment, in this destination, to the eldest daughter. I need not enlarge upon that; but your Lordships will remember the amazing number of cases that were put, upon the improbability that any man, possessed of his understanding, should suppose, that the author of the deed could have looked at them as possible cases; yet I shall satisfy your Lordships hereafter, from the express words of the deed, that all these improbable things are not only contemplated by the author of the deed of 1648, but are, *totidem verbis*, described and provided for in that deed.

"My Lords, There was then an admission, on all sides, in the Linplum case, that 'heirs-male' might mean heirs-male of the body in a particular clause of the Linplum deed. The deed provides, 'That it shall not be leisome nor lawful to the second son to be 'procreate of the said Marquis, or the lawful heirs-male of his,' nor 'to any of the said heirs of tailzie, nor their descendants, to alter, innovate, or change the destination. To this part of it, it was answered truly, that heirs of tailzie would take in both the person who was named as the heir, and every species of heir, who from him was to derive title to the estate. But there is also this clause, that when the second son of the Marquis of Tweeddale, Hay of Drummelzier, or Duke of Roxburghe, comes to the age of fourteen, that then the right to the lands and others foresaid shall fall and devolve to his said second son, and to 'his heirs-male,'—'and so on as often as 'the same case happens.' Now, when your Lordships recollect, that the second son of the Marquis of Tweeddale was to take 'to 'him, and his heirs-male of his body lawfully begotten;' and when you recollect, that the second son of Hay of Drummelzier was to take 'to himself and his heirs-male,' without the words, 'of his body 'lawfully begotten,' and that the second son of the Duke of Roxburghe was to take to him, and 'his heirs-male,' without one word of whose body they were to be procreate; I beg leave to ask, whether you are not compelled by the context to say, that 'heirs-male' of the second son of the Marquis of Tweeddale means 'heirs-male of the body;'—that 'heirs-male' of the second son of Hay of Drummelzier means 'heirs-male general;'—and that the 'heirs-

male' of the second son of the Duke of Roxburghe means ' heirs-' male general' also ;—that they are flexible terms, therefore, bending in construction, the very same words signifying different species of heirs-male, by referring to different destinations for the meaning of the words, as they apply to each ;—this Linplum deed itself, therefore, (the case which has been supposed to establish inflexibly the sense of the words), proving that they are flexible terms ?

" That incontestably proves the same point which I observed to follow from another passage, that ' heirs-male' may be used in an instrument to signify heirs-male of the body,' in respect to one, and ' heirs-male in general' as to another person ; but clearly, that the words *may* mean heirs-male of the body. When I say that they *may* so mean, I do not say they *must* so mean ; that is quite a different thing. Heirs-male here, in the clause cited, must mean ' heirs-male of the body,' as applied to one person, and not ' heirs-' male of the body,' as applied to another ; and the flexibility of the term cannot be more clearly proved than by such an observation as this. There is precisely the same thing to be observed, if you will look back to the bond of tailzie by Hary Lord Ker, on the 18th of July 1640, where it is said, ' The second son procreate of the mar-' riage shall succeed to the lands, baronies, and others specially and ' generally mentioned, and be provided thereto, who shall take upon ' him the sirname of Ker, and carry and bear the name and arms of ' the hous of Cessfurd ; and that he and ' his heirs' (that is, such heirs as were to take,) ' shall continue to bear the said sirname and ' arms.'

" My Lords, With respect to this case of Linplum, I take it to have established merely this, which I think it does not need any case to establish, that the heirs-male may mean, and generally do mean, heirs-male general ;—that in construing a deed in which there is a question as to the true intent of the author of that deed, you are to adhere to that as the intent which is the *prima facie* obvious meaning of those words, unless you are, by fair reasoning,—by strong argument,—by that which amounts to necessary implication or declaration plain, driven out of the obvious meaning, and unless you can satisfy yourself, that the author of the deed did not intend that such should be taken to be the meaning of the words he has used, and unless you collect, (I think I may safely add that, and I abstain from going further), that that is not the meaning of the language of the author of the deed, from what the author of that deed has himself, by the deed, told you is the meaning of his language.

" My Lords, Having gone through this case, your Lordships will permit me to say, it is not, in my opinion, a case which proves, that the word ' heirs-male' is necessarily, in every deed in which it occurs, an inflexible invariable term. Previous decisions do not, at least none which have been cited to us, seem to have amounted to a de-

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termination that the term was so inflexible. The case of Baillie *versus* Tennant, upon which the judges seemed to have placed great reliance in the Court of Session, arose under a will, or an instrument in the nature of a will, made by a person of the name of William Walker. It bore date on the 7th May 1752. He says, for the love, favour, and affection I have and bear to my sister and her children after named, upon whom I am resolved to settle my real estate, and to prefer them thereto next after the issue of my own body, in the order of succession, and in the terms, and under the conditions under written, and for divers and sundry causes and considerations me hereunto moving; wit ye me to have given, granted, and disponed, likeas I, with and under the burdens, reservations, and conditions after specified, by the tenor hereof, give, grant, and dispone, to myself in liferent, and to the heirs-male of my body; whom failing, to the heirs-female of my body in fee; whom failing, to my sister Isabel Walker, relict of John Tennant of Handaxwood, now spouse to Thomas Baillie of Polkemmet, writer to the signet, in liferent, for her liferent use allenarly, in case she shall happen to survive me, and after her decease, to Alexander Tennant, my nephew, eldest lawful son to my said sister, and procreate betwixt her and the said deceased John Tennant, and *his heirs or assignees, in fee;* whom failing, to William Baillie, eldest lawful son to the said Thomas Baillie, procreated between him and my said sister, his heirs or assignees, also in fee; whom all failing, to my own nearest and lawful heirs and assignees whatsoever.

"Now, my Lords, the question that arose in that case between the parties, arose in consequence of the following circumstances having taken place. After the death of Mr. Walker, Colonel Alexander Tennant, the first substitute, entered into possession. He died without a settlement; and then a competition arose between his sister and heir at law, Mrs. Agnes Tennant, and the next *nominatim* substitute, Mr. William Baillie; the former contending, that the word 'heirs' in Mr. Walker's instrument ought to be taken in its proper and technical sense, to signify heirs general; the latter, that it ought to be restricted, from the presumed will of the maker of the deed, to heirs of the body. The Court of Session thought so; but this House reversed their judgment; and I take it, that what is laid down in that judgment of reversal amounts to neither more nor less than this, that the author of that settlement professed regard to two children after named; that he had made a disposition to the first of them, his heirs and assignees, and failing them, to the other, his heirs and assignees. Your Lordships will take notice, that here is nothing in the terms of this settlement which looks like a succession to be enforced by prohibitory, irritant, and resolutive clauses; nothing of context in the destination itself; nothing of declaration of limited meaning to be found in the other provisions of the deed; nothing but a destination to the first, his heirs and assignees, as dry

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as a destination to Lady Jane Ker and her heirs-male, without more, would be; nothing like a clause describing the person to take, with reference to marriage, or any other of the circumstances which we have heard commented upon in the present case, and in the Linplum case. The case is only this: A person standing in a relation to two individuals, for both of whom he prefesses a regard, executes a settlement, by which he gives to one the whole fee, (I do not pledge myself to accurate expression), and dispones, in the event of his having no heirs, to another: that is the extent of it; and if he does choose to give the estate in terms, which *prima facie* import so large an interest, would it not have been too dangerous to say, that, merely because it would have been a much more reasonable thing in this man, to have limited it over to the sister, than to have suffered it, under the effect of the first destination, to go to a stranger, because he was the heir to the brother, because that would have been more rational? Would it not have been too bold for a Court to have declared it to be his intent, that it should not go to the heir, though he has not made use of a single syllable to manifest plainly that he had formed such an intention? The House of Lords did not think itself at liberty to carry into effect a meaning which the House thought more rational than that which the author of the deed had thought proper to express. The House did not think he had sufficiently expressed that more rational meaning. That this case, in any way of considering it, should be deemed authority for the case of Linplum, to the extent of taking that case of Linplum to amount to a decision, that, in whatever context those words 'heirs-'male' are found, in whatever company they are found, they *shall* mean 'heirs-male general,' and *cannot* mean 'heirs-male of the 'body,' is really a proposition to which I cannot, after considering this a great deal, feel myself able to assent.

Case of Ball *v.* Coutts.

"Your Lordships have had another case also mentioned as bearing upon this subject, which, I own, appears to me to have no manner of relation to it: it is the case of Mrs. Coutts. I think it is stated in General Ker's case. It is represented thus: The niece of Mrs. Coutts had married a Mr. Ball, by whom she had a son named James, She was afterwards, however, compelled to divorce her husband, who went abroad, and had no further connection with her or her friends. Mrs. Coutts executed a settlement, by which she conveyed her property to trustees, for various purposes, and among others, to make payment of the several sums of money under written, which she thereby legated and bequeathed to the respective persons after mentioned, and their heirs, executors, or assignees. She then gave to her grand-nephew the sum of £1800 Sterling; and with respect to this legacy, she afterwards declared, that, in the event of the decease of the said James Robert Coutts, her grand-nephew, before majority or lawful marriage, this sum of £1800 Sterling should return, and pertain and belong, to her own nearest

heirs and assignees whatsoever, absolutely exclusive of his father, and of all his relations by the father's side; and that, during the minority of this grand-nephew, this sum of money, and other effects bequeathed to him, should be under the management and administration of her trustees, and the acceptor or survivor of them, and only the interest arising therefrom, so far as they should judge necessary, bestowed and applied for the use and benefit of her said grand-nephew. She then added a codicil in these words: 'If my 'lovely James Coutts should not come home, what money I left to 'him I leave to be divided amongst my nearest relations: plate, 'and other things, I left to my sister Mrs. Crawford.'

"It turned out, that this nephew, upon his return towards England, was lost at sea, a few days before this old lady died; and then this question arose, Whether, under this will, his father, as his heir-general, I think, was to take this legacy of £1800? Now, of the principles upon which the Court of Session decided, as they did, that the father was to take, I am not able to give your Lordships any account. In this country, your Lordships know, that although you may give a sum of money to the heir or executor of a person who predeceases you, it requires especial words to do it. In the next place, this lady had said, if he did not come home, this sum of £1800 was to go to her own nearest relations. The Court of Session, I suppose, construed the will and codicil thus, or in some such way: that because the lady thought the nephew was living, and to come home, the nearest relations were not to take; but inasmuch as he was dead at that time, they thought that the codicil did not apply to the nephew, who was dead at the time of the codicil being made, but was to be construed with reference to the idea that he was alive at the time; because that idea was supposed to affect the testatrix's mind at the time of making the codicil. They seem further to have held, that the clause as to his attaining the age of majority, or lawful marriage, was a clause not of much effect; and they said, as I understand the case, that that part of the will which gave it to him absolutely, would carry it over to his heirs, executors, and administrators, and that his father could not be excluded. Take this decision in that case to be quite right, how does that case apply to the subject before you? How it should prove, that in no clause, —in no context,—in no deed,—the words 'heirs-male' *can* have a limited signification, it requires a person of infinitely greater powers than those of the person who now addresses you to point out.

Case of the Earl of Ross, and Case of Earl of Dundonald *v.* Marquis of Clydesdale.

"My Lords, There were two cases very much relied upon on the other side, one the case of the Earl of Ross, which, on looking into the terms and language of it, I do not find to justify me in taking up much of your Lordships' time. The other is the case of the Earl of Dundonald *versus* the Marquis of Clydesdale, in reference to the Earl of Dundonald's estate, which proves no more than this, which may be proved in almost every instance you look into that the

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words 'heir-male' *may* signify 'heir-male of the body.' The entail is in these words : 'We John Earl of Dundonald, being fully 'determined, failzieing *heirs-male of our own body*, or '*heirs-male*' 'of any of the descendants of our own body, to settle the succession 'of our estate in one person, and that the same may not be divided 'by the succession of heirs-portioners, do hereby bind and oblige us, 'and our heirs of line, male, tailzie, conquest, and provision, and 'successors whatsoever, *failzieing heirs-male, as said is*, to provide 'and secure heritably, and to make resignation of all and sundry 'lands, lordships, baronies, &c. to and in favour of our eldest lawful 'daughter, Lady Ann Cochrane, and the heirs-male lawfully to be 'procreate of her body ; which failzieing to Lady Susannah Coch- 'rane, and the heirs-male lawfully to be procreate of her body; 'which failzieing to Lady Catherine Cochrane, and the heirs-male 'lawfully to be procreate of her body, our third and youngest lawful 'daughter ; which failzieing, to our other daughters to be procreate 'of our bodies *successivè*, and the heirs-male of their bodies ; which 'failzieing, to our other heirs-male whatsoever ; which all failzieing, 'to our other nearest heirs and assignees whatsoever.'

" Upon the death of Earl John, he was succeeded by Earl William. Earl William being his son, was of course, your Lordships observe, his descendant. He died without issue in 1725 ; and then the Marquis of Clydesdale, the eldest son of Lady Anne Cochrane, on the one side, claimed the estate, and on the other side, Thomas Earl of Dundonald, who was heir-male general of Earl William. Now, if your Lordships will give your attention to a phrase here, I think that it cannot be considered as clear, which has been confidently said, that this narrative part of the deed was necessarily set right by the positive part of the deed, containing the destinations, attending to the circumstances and events in which the destinations were to take place ; and perhaps it will be found, that it will be extremely difficult to support this decision, unless you are to support it by looking to the effect of the context upon these very words 'heirs-male.' Your Lordships will give me your very particular attention to every word of it. 'We John Earl of Dundonald, being 'fully determined, *failzieing heirs-male of our own body, or heirs-'male of any of the descendants of our own body.*' Now, here are the words 'heirs-male of our own body,' used by one who knew how to make use of them, because he has used them, and there follow instantly upon them, or 'heirs-male of any of the descendants of 'our own body.' Well, said Thomas Earl of Dundonald, I am heir-male of William, and William was heir-male and descendant of your own body, and therefore Lady Ann ought not to take. No, said the other party, that is not so ; this is only a narrative of his purpose : when he executes his purpose, the person to whom he gives is Lady Ann Cochrane. But how does he give to Lady Ann Cochrane? he gives to her in this way, 'to settle the succession of

'our estate in one person, and that the samen may not be divided 'by the succession of heirs-portioners, we do hereby bind and oblige 'us, and our heirs of line, male, tailzie, conquest, and provision, and 'successors whatsoever, *failzieing heirs-male, as said is,*' to provide and secure heritably, and to make resignation of 'all and sundry 'lands, lordships, baronies, &c. to and in favour of our eldest lawful 'daughter Lady Ann Cochrane.' Then, might it not be very well said, that the author of this instrument did not himself provide for the daughter till there was such a failure of heirs-male as he mentions. He gives it, 'failzieing heirs-male as aforesaid.' '*Heirs-'male aforesaid,*' may be taken to be 'heirs-male of the body,' or 'heirs-male in general of the descendants of the body;' and if the obvious meaning is to be given to the latter words, which, it is admitted, ought *prima facie* to be given, then why will not those words, '*failzieing heirs-male as aforesaid,*' *reddendo singula singulis*, mean, failing 'heirs-male of his body,' and failing 'heirs-male gene-'ral' of the descendants? I apprehend it is then by taking the whole of the words together, the whole of the deed together, that this is explained; the obligation upon heirs to resign, being an obligation placed upon them only 'failzieing heirs-male as aforesaid. When a decision was made in favour of Lady Ann, it implies, or seems to imply, that the Court of Session did not think these words, 'heirs-male of any of our descendants,' necessarily inflexible.

Limited sense in which the deed 1644 may be looked at.

"I will not trouble your Lordships with going through that case more at length; but I will proceed to beg your Lordships' attention once more to this deed of 1648, which I have so frequently been obliged to trouble your Lordships with hearing stated with a great deal of particularity; but, before I do so, I will refer your Lordships also once more to the deed of 1644; I say not for the purpose of construing the deed of 1648 by the deed of 1644; but your Lordships have a right to look at the deed of 1644 precisely for the same purpose as you look at the deed in the case of Linplum, and the deed in the Dundonald case. You cannot argue from the intention of the person in one deed, that he must have the same intention when he executes another; but you may collect from the phraseology and language of different instruments what is the meaning of language in deeds; and you may learn thus, that in the law-language the same intention is sometimes expressed in the same terms—in terms partly different—or in terms perhaps altogether different.

"My Lords, In that deed of 1644 there are, I think I may venture to state to your Lordships, near ten instances in which the words 'heirs-male' and 'heirs' have not, and cannot have their *prima facie* sense; for they are deprived of that *prima facie* sense by the context in which they occur. I think it is a difficult proposition for any man, who will apply his mind to this subject, to make out, that the author of a Scotch deed of this kind *cannot* say in that deed, that he means by 'heirs-male,' heirs-male of the body. Then

if you can make out that he *can* effectually, in express and direct language, say, that he means 'heirs-male of the body' by the term 'heirs-male,' why may he not sufficiently manifest the same purpose by any other words equal to that effect—by any other context which proves that he meant 'heirs-male of the body,' where the term 'heirs' are followed by the word 'said,'—by the word 'afore-'said,'—by the words 'herein before nominate,'—'herein before 'provided,'—'called to the succession,'—including or omitting in the phrase the word 'male;'—these are all so many instances of the context giving to those words a construction which, without such context, would not belong to them.

"My Lords, There is a passage in this deed of 1644 which I do not remember to have been much observed upon at the Bar; and I presume to ask your Lordships to listen to it, because there is a similar passage in the deed of 1648, each of which appears to me a passage of very considerable weight in the consideration of this case. Your Lordships recollect the manner in which the destinations were made in the deed of 1644, to the Drummonds marrying these ladies —to the Flemings marrying these ladies—and the heirs of those Drummonds and Flemings,—the heirs of their bodies;—and it has been admitted, and I think full as broadly admitted as it could be, and I think more broadly than I should have admitted it if I had argued this case, that, by the deed of 1644, the heirs of the bodies of the Drummonds and the Flemings (if the Ladies Kers had died without issue, after they had once performed the condition by marrying them) by any other wives would have taken—I think that doubtful under the deed of 1644. It is clear, under the deed of 1648 that would not be so. The clause in the deed of 1644 I proceed to read to your Lordships. Allow me, before I read it, again to observe how dangerous a way of proceeding in judgment we should establish, if we were to listen with as much attention as is asked of us, to all those curious, hypothetical, nice, improbable cases that are put at the Bar, that it never could be in the contemplation of the author of these deeds, that the Drummonds and Flemings should have so little taste, as not to attach themselves to these ladies, and that it was not to be supposed that these Flemings, from the second to the tenth sons, should not like a wife among those ladies with a very large fortune—that it could not be in nature, that these ladies themselves should not be so attached to the Drummonds or the Flemings as to marry them—and that it was not to be supposed that these ladies should all die without issue; and that therefore this clause of destination to the eldest daughter was nothing more than a compliment to Lady Jane Ker, to make her, as it were, the conduit pipe through which this estate was to get back to the heirs-male of the author of the investiture.

"My Lords, Let us see, as to all this, what is the opinion of the author of the investiture himself. The clause is as follows: "It is

'heirby expresslie provyded, that in caice it sall happine, ather the 'foresaides personnes nominate and designit to succeed to us, as said 'is, or the personnes above namitt with whom they are appointit to 'matche, all ather to be departit this lyffe, or to be married before 'the said succession fall to them; thane, and in that caice, the per-'sonnes nominate and being on lyffe, *being married to personnes of 'honorl and lawful descent,* to be free of that pairt foresaid of the 'conditioun of the said marriadge, and notwithstanding heir of, to 'succeed to us in manner before exprest, they always keipand, ob-'servand, and fulfilland the remainent conditiounes befoir and after 'spect, and na otherwayes; and in caice it sall happine all the fore-'saides personnes particularlie befoir namitt, appointed to succeed to 'us in manner foresaid, to depairt this lyffe without aires-maill 'lawllie gottin of yr awne bodies on lyffe, they mareing as said is; 'or zitt give they sall all fail in the observing and fulfilling of the 'conditiounes above and after mentionat set down to be performit 'be them.'

"Now, my Lords, your Lordships here see, that the author of this deed of 1644 had got into his head, that that might happen which we have heard of as an impossibility, that these ladies should none of them marry these Drummonds or Flemings; and he says, that then, in the cases he puts, they are not to lose the benefit of this tailzie. But what does he further say upon that? That the gentlemen are to lose the benefit of this tailzie, unless they marry ladies of honourable and lawful descent. He lays upon them precisely the same conditions in this respect, as upon the daughters of Lord Hary Ker afterwards: and although the limitation of 1648 is only a limitation to them and their spouses, and the heirs of their body; yet there is a passage in that deed also, which supposes that none of them may marry any of these daughters, and, in the cases put, provides they shall not lose the benefit of the tailzie, putting it, however, upon them, to marry persons of lawful descent and honourable quality, and in neither deed, if they so marry persons of lawful descent and honourable quality, is there any *express* limitation whatever to their heirs-male, or heirs of their bodies. Yet your Lordships will hardly say, that the intent of this was to make the Drummonds and the Flemings marry ladies of quality and honourable descent, and yet to give no benefit whatever to their heirs; or if any was intended to be given to their heirs, it was not intended for the heirs of the marriage, as the heirs of their bodies; but they could take none, save by implication.

"If your Lordships look at the clause in the deed of 1648, you will find it runs thus: 'And sicklyke it is providit, that in caice it 'sall happen all the foresaides persons to whom our saids aires of 'tailzie *respectivè* are appointit be us to be married to depairt this 'lyffe, or be all married, before the said airis of tailzie *respectivè* sall 'fall to succeed to our said estate, and living.' Here, then, the author of this deed puts this very case, that these Ladies may be all

married before the succession falls, so that a Drummond or a Fleming could not tender their hands to them. 'In that caice, the per-'sonnes and '*airis*' *respectivè* nominate be us in manner foresaid, 'are hereby declarit be us, naways to amit, bot to have and enjoy 'the benefit and right of tailzie and succession, they always mare-'ing persons of honourable quality and lawful birth, and withal 'keipand, observand, and fulfilland the remanent otheris conditions, 'provisions, and restrictions before and after mentionat, and na 'otherwise.'

"Now, is it possible to deny, that the author of this deed contemplated the case, that these Ladies might be all so disposed of that these Gentlemen could not comply with the condition of marrying them? and yet he imposes upon them the condition of marrying persons of honourable condition and quality; and then says, they shall enjoy the benefit of tailzie, the right of succession. I found upon that this observation, that if the author of this deed has given to these Ladies and their heirs-male, however the term is understood, *seriatim*, the benefit of succession, in case they did marry persons of honourable quality and lawful birth, not the specially designated heirs of tailzie; and if the author of this deed has given to these Gentlemen *seriatim* the benefit of tailzie if they could not marry these Ladies, then the author of the deed has in fact contemplated two cases; one, that the Ladies might marry;—the other, that they might not marry, these heirs of tailzie named Drummond and Fleming; and that he did not act upon a presumption, that the eldest daughter would assuredly marry one of these heirs of tailzie. If so, can your Lordships be justified, when you come to interpret this clause of destination, to argue, by assuming, that he never thought that events so improbable might happen, as that the eldest daughter should not, or as that none of these daughters should happen to marry a Drummond or a Fleming; and therefore has not provided for such events. He has expressly described in his deed of 1648 events such as these. In that instrument, he has destined the estate, in case the daughters marry the specially-named heirs of tailzie, to the heirs-male of the bodies of the daughters *seriatim*. Connected with a condition about marriage, he has, in another event, in the same instrument, not in express terms indeed, destined the estates to the daughters *seriatim*, as I think, and their heirs-male, but by a phrase capable of a plural meaning, and demanding construction,—'to the eldest dochter and their heirs-male.' like the limitations in the Linplum case to Alexander Hay of Drummelzier, not expressly naming younger persons, *seriatim*; in which case it was admitted at the Bar, the words 'heirs-male' might be construed 'heirs-male 'of the bodies:' but meaning, as I collect from all his expressions taken together, that the younger sisters should take as substitutes *seriatim*, *though he* does not expressly name them. I ask then, whether all this does not lay a strong probable ground (when you look at all the clauses which affect the Drummonds, the Flemings, and

the Ladies, as to the condition about marrying a person of honourable quality and lawful descent), for saying, you get at a declaration plain, from the whole instrument, that they who were required to marry persons of honourable quality and descent, were required to marry persons of honourable quality and descent, because it was the intent of the author of the deed, that the succession should be to the heirs-male of the marriages,—to heirs-male of the bodies of those married?

"Your Lordships will now permit me to read to you once more this clause: 'The right of the said estate sall pertain and belong to 'the eldest dochter of the said umql Hary Lord Ker, without division, and yr airis-male; she always mareing or being married to 'ane gentilman of honourl and lawful descent, who sall perform the 'conditions above and under written; qlkis all failzing, and yr said 'airis-male, to our nearest and lawful airis-male qtsomever.'

What Heirs-male mean in this case.

"Your Lordships will have the condescension to permit me to consider myself as speaking to you, as confidently of opinion that this means a *seriatim* succession of the daughters. Then, my Lords, if heirs-male may be applied,—if that term may, and must, in some cases, mean heirs-male of the body, the question is, Whether this expression, 'their heirs-male,' in this place, means heirs-male of the body? Now the limitations, failing the limitations to the Drummonds, and failing the limitations to the Flemings, would then stand thus: To Lady Jean Ker and her heirs-male, she marrying a gentleman of honourable and lawful descent;—to Lady Anna Ker and her heirs-male, she marrying a gentleman of the same description;—to Lady Margaret Ker and her heirs-male, she marrying a gentleman of the same description;—and then to Lady Sophia Ker and her heirs-male, she marrying a person of the same description; and failing the heirs-male of all of them, (I beg your Lordships' attention to that expression, because I do not mean to state that that is the expression in the deed;—I will state the expression in the deed presently), and failing the heirs-male of all of them, to the heirs-male whatsoever of the author of this deed, Robert Earl of Roxburghe. My Lords, I do not mean to state to your Lordships, that a man cannot make an instrument, containing a succession among sisters and their heirs-male general. It certainly does not often occur that such are made: but there are such. There are instances to be found, where there were successions between sisters and brothers and their heirs-general. I have not information enough to know, whether those I allude to contained all the matter that furnishes observations upon this clause in our deed of 1648; but my Lords, I mark this, that when you are construing the words of an inaccurately untechnically expressed clause of this sort, one sort of construction *may* belong to such a clause, and another construction may belong to a regular series of limitations, technically, and drily, and precisely expressed in a better-drawn instrument; and there may be

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nothing in the instrument itself to affect the obvious meaning of the limitations so expressed.

"My Lords, The deed 1648, after the destination to the eldest dochter, &c. says, 'which all failing, and their saids heirs-male, to 'my heirs-male whatsoever.' Here the word '*all*' has been contended to mean *all the dochters*. On the other hand, it has been said, that it means *all the persons named in the former destinations*, and *their* saids heirs-male. Be it so, my Lords; but this shows the power of context, and the effect of construing the whole deed together: for then the words 'heirs-male,' by force of the word 'saids,' mean 'heirs-male of the body,' as to the heirs male of the Drummonds and Flemings, whatever they mean as to the heirs-male of the Ladies not marrying Drummonds or Flemings; and therefore 'heirs-male' *may* mean 'heirs-male of the body.'

"My Lords, Is it probable that the author of this instrument, considering what he intended respecting his daughters *respectivè* in one case, and what he meant as to the Drummonds and Flemings *respectivè* in another, is it probable that he meant to say, I give this to you and your heirs-male general,—and afterwards to your sister, and her heirs-male general,—and afterwards to a fourth, and her heirs-male general;—and then to say, if you do not marry a person of such a quality, you shall not have the estate; and if you do marry a person of such a quality, and then do some acts which are prohibited, you shall not keep the estate? What is to be the consequence, if, after so marrying, she contravenes or violates any of the conditions? The consequence is, to take away the estate from her and her heirs-male general, for the purpose of giving it in all probability to the same persons from whom it is taken away, the heirs-male general of the author of the instrument. I beg your Lordships' attention to this, because we have had it argued, that this is not a case of forfeiture, but that it is a case where a Lady is to capacitate herself, by marrying, to take; and therefore it has been said, that as these Ladies might not, none of them might, capacitate themselves to take, by marrying a gentleman of honourable and lawful descent, it is necessary that the heirs-male of the author of the deed should come in as *his* heirs-male under that general destination; because they would not come in under these daughters, as their heirs-male, not capacitating themselves to take. To those who use that argument I answer, it is not only a case of capacitation to take, but it is a case of forfeiture, too, after they had taken. It is very true, that if none of the Ladies married a Drummond or a Fleming, or a person of honourable and lawful descent, none of their heirs-male could take under this destination; and therefore there might be, in that way, a necessity for the destination to the author's heirs-male generally. But put the case on the other hand, that they did every one marry, one a Drummond, a second a Fleming, and a third another Fleming, and so on. Suppose one of them afterwards sold, or

suffered the estate to be subjected to eviction, (I say nothing as to altering the order of succession), To whom is the forfeiture? What is to be the effect of it? Is it understood to be the clear meaning of these words, that the forfeiture is to carry over the estate to those very individuals who would have taken it if there was no forfeiture? If that is so to be argued, I do not say that this circumstance is decisive, but surely it is very much to be attended to.

"But there is another very weighty circumstance distinguishing this from the Linplum case, which I do not recollect having heard taken notice of in the argument in this case, nor do I find it in my notes. I am afraid, therefore, in repeating it, I attribute more weight to it than belongs to it; but having given it the best attention I can, I think there is a great deal of weight belongs to it. In the case of Linplum, the limitation was to Alexander, the second son of Hay of Drummelzier, and his lawful heirs-male. What was the object of the construction, that 'heirs-male' meant 'heirs-male 'general?' To let in his younger brothers, to let in the younger brother of Hay of Belton, and to let in the younger brother of Hay of Lawfield. But what is to be the effect of this construction here? Your Lordships see, it is to be a construction to exclude, I do not say absolutely to exclude, but almost absolutely to exclude, the younger sisters, until there shall be a failure of these heirs-male general of the elder sisters, for whom you look upwards, for whom you look downwards, and on this side and on that side; and in a family numerous and respectable as those Kers of Cessfurd, you never could look in vain for them, in all human probability, if you looked to all eternity. The principle of construction we are in this country familiar with, which endeavours to include and not to exclude, to make gift effectual, and not to deny it, would thus, in all probability, have no effect whatever.

"Then your Lordships will look too at that part of the instrument in which the forfeiture is created; it is to be on the persons failzieing, and the heirs-male of their bodies. I do not say that that, taken by itself, is a circumstance which would weigh very much, because if the words heirs-male, in the subsequent clause, mean heirs-male generally, they are by other words put under the conditions, and the conditions attach upon the heirs-male generally of those substitutes which attach upon the heirs-male of the bodies of the others; yet it is not without its weight, that the author of this deed, meaning to limit to these Ladies and their heirs-male general, and making them take and hold under conditions, should describe them and their heirs-male general, as persons failzieing, and the heirs-male of their bodies,—if this clause is to be construed as affecting them. Further, I cannot help thinking another clause deserves great attention, though I see it has been treated occasionally as amounting to just nothing. It is that with respect to the other landed property. 'And farder, we have sauld and disponit, and be

'thir presents sellis and disponis to our saidis airis of tailzie, successors to our said estate, living, earldom, and lordship foresaid, and 'the aires-maill lawfullie to be gottin of their bodies, always under 'the conditions, restrictions, and provisions above specified, qlk are 'herein halden as exprest, (failzing of aires-maill lawfullie gotten or 'to be gotten of our awin bodie), all and singular utheris lands, heritages, annualrents, milns, woods, fishings, patronages, tacks, and 'rights of teinds, reversions, and utheris heritable rights whatsomever, 'pertaining and belonging to us; and binds and obliges us and our 'airis, als well maille as of line,' (Your Lordships know they might be his heirs-male without being the heirs of the body of those Ladies,) 'failzing of airis-maill of our awin bodie, as said is, to denude 'ourselves of the right thereof, to and in favour of our saidis airis 'of tailzie, successors foresaid, is always under the provisions, restrictions, and conditions above specified, in sik form and manner 'as sall be devysit.'

"Now, my Lords, this clause could mean nothing, if the intention of it was not to provide, that the *other* property was to go with that which had been before conveyed. Then, what is the obligation he fixes? It is, That those who are bound shall denude themselves, for the benefit of his heirs of tailzie, *and the heirs of their bodies.* I have not seen it any where stated, that it was urged by any body, that the heirs-male of the body of those daughters, provided they take in *seriatim* substitution, as I humbly think they do, would not have taken those other subjects; or if there was no substitution among the daughters, that the heir-male of the body of the eldest daughter would not have taken. I see it asserted on one side, that they would, and not denied on the other. Who are the persons upon whom the obligation is fixed,—the heirs-male generally? To denude in favour of whom? The heirs of tailzie, and the heirs-male of their bodies? They are the 'successors as aforesaid.' But then it is said, that the whole weight belonging to this observation may be got rid of by this remark, That the ultimate destination is to 'heirs-male whatsoever.' And if you construe this clause about the *other* property to mean heirs-male of the daughters, and consider heirs-male of the daughters to mean heirs-male of their bodies, you must make the same construction with respect to the heirs-male whatsoever, who are the persons mentioned in the last destination. I do not think so; because with respect to a last destination, where a man says it is to go to all his heirs-male whatsoever, your Lordships know, in the first place, that there is a great deal of difference between the effect of the deed, as to those persons who are named last in it, and those who are named in preceding destinations, as to their obligations, their liabilities to forfeiture, their liabilities to the effect and consequences of contravention. A great many important matters might be mentioned, with reference to which, as to them, there is a great distinction. It is a very easy thing to suppose, that

the author of a deed, in such a clause as this, might mean, that all the former substitutes should be the persons to whom, and to the heirs of whose bodies, the conveyance should be made; and yet that it should not be made to his heirs-male, the last in the destinations, and the heirs-male of their bodies. The expression indeed might go beyond the meaning; but you are to reflect upon all the other observations which arise out of the words of the clause of destination to the daughters in that untechnically expressed destination to them, and which do in no way apply to the pure, dry, technical destination failing them, and which aid you in saying, that in this clause he may, and does mean heirs of the bodies of the daughters; and that in the latter destination the phrase in it alone would not authorise you to say he meant heirs of the bodies of his heirs-male whatsoever. Suppose that all the Drummonds and all the Flemings had been dead before the author of the deed, (a case he supposes in his deeds), the words heirs of the body then, in this clause, in that case, could have no meaning at all, unless you applied them to the daughters; because if all the Drummonds and all the Flemings had been dead, —if all those had been dead before the author of the deed, to whom, and to the heirs of whose bodies there is an express limitation, the consequence of that would have been, that this clause could not have operated then as a clause applying to the heirs of the body of any person, if heirs-male of the daughters does not mean heirs-male of their bodies. It seems, that it is not a wholesome mode of interpreting this instrument to say, that you will deny to the words 'heirs-'male of the body,' in this clause relative to the *other* property, a power of giving a construction to the words 'heirs-male,' as to those persons, the heirs of whose bodies were very probably meant, as appears by all which precedes in the deed, where their heirs are described by the words 'heirs-male;' because you suppose, that you must apply them also to the heirs of the bodies of those who are brought into the deed, perhaps with a view to keep out the *ultimus hæres* of the Crown, by reason that the words *may* reach them, when there is nothing in the preceding parts of the deed to point to an intention, that the heirs-male of *their* bodies should be described under the words 'heirs-male.'

"My Lords, The clause with respect to the provisions for the daughters appears to me also to have some weight. I cannot help stating to your Lordships, that it seems to me to have been the most singular intention in the world, that this person, both with respect to the provisions of these daughters, and with respect to the property in the estate, should be adverting to their marriages, and adverting to the heirs of the marriages, as he does in one place with respect to their provisions, and yet that their heirs-male should not be construed heirs-male of the body in this part of the deed. If he had meant simply, that there should be a limitation to Lady Jane Ker, or Lady Anna, or Lady Margaret, or Lady Sophia, and their

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heirs-male general, what necessity was there for all this, about their marrying a person of honourable descent? Why does he allude thus always constantly to the idea of their marriages? Why does he, in every part of this instrument, allude to the circumstances of their marriages? If one of these Ladies had not married a person of lawful and honourable descent, to be sure she could not have taken,—the heirs of her body would not have taken. But if the first marries a person of lawful and honourable descent, and the second marries also a person of honourable and lawful descent, whom I suppose to be a substitute *seriatim*, is it not a most extraordinary thing, that the author of this deed should have required a marriage of like nature in both cases, and yet, with respect to the marriage in the second instance, that the persons named should have no better chance than what depended upon the utter failure of all heirs-male general of the first taker? In the Linplum case, counsel seem to have admitted, that if there had been a substitution *seriatim et nominatim* of Alexander and his younger brothers, 'heirs-male' of Alexander must have meant heirs-male of his body. If you think there is here substitution among the daughters, here you can apply this,—the admission seems to have been founded upon what must have been supposed to have been the intention.

"My Lords, I do not go through, because you may refer to it in the papers on the table, where you will find it much better expressed, the general reasoning that is to be found upon cases supposed to be probable and improbable on the part of the appellants, and on the part of the respondents. Upon that, your Lordships can inform yourselves better, and more accurately, by reading the cases, than by my detailing the matters to be found in them. But the result of my consideration of this part of the subject is, that I have not been able to satisfy myself, that these words, 'heirs-male,' occurring, not in a dry destination, but occurring in such a context as this, I mean the context of the clause of destination in the deed 1648, occurring in such a deed, where there is such a clause as to *other* property, occurring in a deed containing all *such*, the expressions and provisions which have been noticed, and the general object and plan of which is such as I have represented this of 1648 to be, I have not been able to satisfy myself, that these words must, by an inflexible rule of law, receive the largest construction. I cannot persuade myself, that they may not in legal construction receive a more limited interpretation, from all the considerations to which we have been adverting, provided that that interpretation is made upon grounds which satisfy your Lordships, that this is the declaration plain, and the manifest meaning of the author of the deed.

"My Lords, It is in that view of the subject it appears to me this case is to be treated. For the reasons I have stated, I do not think that the case of Linplum is an authority that binds us to hold, that the 'heirs-male' of the daughters of Hary Lord Ker were call-

ed, if we are satisfied that the 'heirs-male of their bodies' were intended to be called. On the contrary, I think that the case of Linplum, with reference to the principle upon which the words, 'heirs-male' there were held to be 'heirs-male' generally, in order that younger brothers might be included, is a case which ought rather to lead us, instead of in effect excluding the younger daughters by construction, to include the younger daughters as beneficially as the language of this deed, and the author's intent, will allow us to include them. And the decision of this House in that case turned upon this, as I take it, that there was not manifestation enough of the intention of the author of the Linplum deed, to contravene the general and obvious meaning of the words 'heirs-male;'—that there was not manifestation enough, from what appeared in the deed, that the author of the deed did not mean, that the brothers of Alexander of Drummelzier should take,—did not mean that the younger brothers of Hay of Belton and Lawfield should take,—that there was not proof enough of this, from the circumstances, that persons in several instances would be included under the word, 'heirs-male,' to whom the author of the deed had not manifested an intention to give any thing as substitutes,—that the word 'descendants' had been used, and from other circumstances and passages from which argument had been deduced. The House saw, that if they did not give the words their obvious meaning, all the younger brothers of Alexander must have been excluded,—the younger brothers of Hay of Belton must have been excluded,—the younger brothers of Hay of Lawfield must have been excluded;—that Lord Robert Ker, if Alexander had died without heirs of his body,—if John of Belton had died without heirs of his body,—if John of Lawfield had died without heirs of his body, that Lord Robert Ker must have come in before the younger brothers of Alexander of Drummelzier,—must have come in before the younger brother of Hay of Belton,—must have come in before the younger brother of Hay of Lawfield, notwithstanding it was the marked and manifest purpose of the author of the deed, to prefer Alexander of Drummelzier; and it might be his intention, and probably was so, to prefer the younger branches of the Drummelzier family to Hay of Belton,—and to prefer Hay of Belton, and probabl the younger branches of the Belton house, to Hay of Lawfield,—and to prefer all three to Lord Robert Ker. Contrasting the circumstances that would take place in one way of construing the instrument with reference to intention, with the circumstances that would take place in another way of construing the instrument with reference to intention, my apprehension is, that the judgment of your Lordships' House in that case amounted to this, and principally to this, that it was a declaration, that it was more consistent with the intention of the author of the Linplum deed, to give the words 'heirs male' their obvious construction, which would include individuals whom the House thought were probably the objects of the bounty of the author of the deed, and who must have been excluded

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on a different interpretation of the settlement, than it could be shewn to be to interpret the words 'heirs male' in a more limited sense, because consequences would otherwise follow, which might be represented as difficult to be reconciled with the supposed intention of the author of the deed, in possible, not probable cases and events.

His Opinion as to 'Heirs-male' in this case.

"My Lords, Reasoning in the same way, unless I have fallen into a mistake, from which I have not been able to extricate myself, which I have anxiously endeavoured to avoid, by giving as painful an attention to this case as I could give, (not more painful than I know it was my duty to give to it), it does appear to me, to be the plain and manifest intention of the author of this deed, when he used these words 'heirs male,' in the clause as to the daughters, to mean 'heirs male of the body;' and unless there be some rule of law which says, that the author of a deed shall not tell you by the deed itself, that by 'heirs male' he means 'heirs male of the body,' some rule of law which says, that if he uses the words 'heirs male,' though he tells you he means 'heirs-male of the body,' he has bound you to strike out of the instrument, all the explanatory context,—all explanatory provisions,—all the explanatory plan and form of the instrument, as the Lord Ordinary said in the Marquis of Tweeddale's case; unless there be some such rule of law, it does appear to me, that the opinion of the great majority of the Court of Session is the right opinion.

"My Lords, The consequence of all this is, that as far as this applies to the action in the competition of brieves, it appears to me, that this clause created a *serialim* substitution to the four sisters, and the heirs-male of their bodies.

"It appears to me further, that the conveyances subsequent to the year 1648, and prescription, have not destroyed the title created by the destination in that deed. It appears to me, that Lady Margaret did not renounce that title, which, by the effect of this instrument of 1648, Sir James Innes claims as deriving under her; and it appears to me further, that these persons are heirs of tailzie. This view of the subject, I think, will exhaust the subject of the competition of brieves, as far as the opinion of the individual who has the honour of addressing your Lordships is material.

Reduction.

"With respect to the action of reduction, it furnishes a point of much importance in the law of Scotland. It is a point, however, upon which I feel myself very considerably in doubt, whether I ought to express any opinion upon it now in judgment. I have satisfied myself that I ought not now to express a judicial opinion upon it. Your Lordships will suppose I allude to the question of the fetters—to the question, whether there is a prohibition against altering the order of succession? I cannot conceive your Lordships will find yourselves sanctioned by any precedent which the journals of this House would furnish, to place yourselves in this situation, improbable enough to happen, but which is possible to happen, and which, if possible, ought to be contemplated. If it should happen,

that the propinquity neither of Sir James Innes Ker nor of General Ker should be proved, you would have standing upon the journals of this House a judgment upon the fetters in this deed, which would be a judgment that would apply to nobody; a judgment that could be used neither for any body nor against any body: and I have not, on the best consideration I have been able to give this subject, been able to satisfy myself, that the moment is yet come, in which your Lordships should give your opinion judicially upon that. If the propinquity is proved in the brieves, it will then be for your Lordships, having the parties standing before you, to decide that question of fetters, which is a question which does not affect merely the two individuals who are about to establish their propinquity, but affects also, if they do establish it, third persons, whom, should they not establish their propinquity, they are not entitled to contend with.

"My Lords, I forgot to mention the claim on the part of Mr. Bellenden Ker, to be heard as a party in the competition of brieves. My opinion upon that is, that he has properly been made a party to that competition of brieves; and if this were the moment in which a judicial opinion should be given upon the other question of fetters, I might have been disposed to say, that I have not found sufficient reason to differ from the Court of Session upon that. But it is not the time, in my opinion, so to do; and I desire to be understood, as meaning to consider again, and reconsider that question. Your Lordships should not preclude yourselves from reconsidering it, when you are sure you will receive the argument from parties who certainly have an interest in contending the point to be argued, who undoubtedly have an interest in having it well decided, and who necessarily have an interest in what may be finally adjudged.

"With this view of the case, I have to mention also, that I feel it, after a great deal of consideration of the subject, incumbent upon me, not to leave this House at the close of this second session, without recording, in some form, the opinion which I have adopted upon the parts of the case which I have discussed. However unworthy I may be of that attention, it is very possible that your Lordships may be pleased to pay some attention to the opinion I may have formed upon a subject of this kind. If so, I cannot make it consistent with my sense of duty to your Lordships or the parties competing at the Bar, not to put your Lordships in possession of it. But I hesitate as to going farther now, because I am giving an opinion of an individual on a question of mighty interest to the parties at the Bar;—I am giving an opinion upon a question of infinite interest to the titles both to Peerages and lands in the law of Scotland;—I am giving an opinion in a case, where, though I happen upon these points to agree with a great majority of the Court of Session, I am very well aware that individual judges, entitled to the highest possible respect from such a person as I am, have held a different opinion, and have not only held a different opinion, but have

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held such opinion in a degree that has led them to consider and represent my way of viewing this case, as a way of viewing it dangerous to Scotch law. I am further giving it in the absence of a Noble Lord, who, during the whole of the hearing respecting the estates, attended that hearing; with reference to whom I have infinite satisfaction in saying, that he considered it most diligently—that he considered it most attentively—that he considered it most impartially—that he considered it most learnedly; and I do not think I ought to press your Lordships to take a step now, that would preclude that Noble Lord (if, on a farther consideration of the subject, he should think right so to do) from stating to your Lordships his sentiments (whatever they may be) upon the subject. The course, therefore, that I have determined to take is this: I am sorry it may not be so satisfactory to the parties as I wish it should be; but I am bound to take care that I do not inadvertently do wrong to any parties. The object I have in view is, to propose to your Lordships certain findings, in which what I have stated would be embodied; and offering them in the form of motions to your Lordships' House, you will easily find a way to take them into future consideration, if it should be found necessary. I have only to state with respect to myself, that if it should happen that a different opinion should be entertained by any body, I shall do that, which, if I continue to live, I know it will be my duty to do; I shall give the utmost attention to any reasons which can be assigned by any of your Lordships for holding a different opinion; but I should feel that I did not act so fairly and candidly as I ought to do, if I did not assure your Lordships, that the motions which I shall submit this day or to-morrow, contain, with respect to myself, my opinions upon these points of law, which I believe I shall not be able to alter. I have repeatedly considered this subject. I have again and again considered the subject. I have considered it under all the anxiety that belongs to the importance of the case; and I am afraid that I must repeat, what I before said to your Lordships, that if I am in an error, it is, with respect to myself, I fear, an invincible error."

Resolutions and Orders of the House of Lords.

I.

" *Die Martis*, 20° *Junii* 1809.

Competition of Brieves.

" Moved, That according to the just and legal construction of the " substitution of the deed 1648, to the eldest dochter of Hary Lord " Ker, without division, and their heirs-male, the several daughters " of Hary Lord Ker, in their order, and the heirs-male of their re- " spective bodies begotten *seriatim*, were called as heirs of tailzie and " provision, to take the estates conveyed by the said deed, in prefer- " ence to the heir-male general of the eldest, or of any other of the said

"daughters; and, therefore, that Sir James Norcliffe Innes, so de- "scribed in the interlocutors of the Court of Session, in case he shall "prove himself to be the heir-male of the body of Lady Margaret "Ker, and that there are no heirs-male existing of the bodies of the "Ladies Jane and Anna Ker, according to the usual course of pro- "ceeding in services, is to be preferred in the competition of brieves "respecting the said estates; and that upon such proof made, the "brieves purchased by Brigadier-General Ker ought to be dismissed.

"Ordered, by the Lords Spiritual and Temporal, in Parliament "assembled, That the said motion be taken into consideration on "the first cause-day in the next session of Parliament.

(Signed) "GEORGE ROSE, *Cler. Parliament*[r]."

II.

"*Die Martis*, 20° *Junii* 1809.

Reduction.

"Moved, That it is premature for this House to determine the ap- "peals in the action of reduction, complaining of the interlocutors "which find, That the estates of Roxburghe were held by the late "William Duke of Roxburghe under an entail, which contains an "effectual prohibition against altering the order of succession, before "the pursuers' title and propinquity be established.

"Ordered, by the Lords Spiritual and Temporal in Parliament "assembled, That the said motion be taken into consideration on the "first cause-day in the next session of Parliament.

(Signed) "GEORGE ROSE, *Cler. Parliament*[r]."

III.

"*Die Mercurii*, 21° *Junii* 1809.

Order for Sir James Innes Ker's Service to proceed.

"Ordered by the Lords Spiritual and Temporal, in Parliament "assembled, That the Lords of Council and Session do, notwith- "standing the pendency of the Appeals in this House, respecting "the Roxburghe Estates, if they shall so think fit, direct the Macers "to proceed, according to the Interlocutor dated the 7th, and signed "the 8th July 1807, (the said Interlocutor being understood by this "House to mean, that Sir James Norcliffe Innes, so described in "the Interlocutors of the Court of Session, is to be preferred in the "competition of Brieves, if he proves, according to the usual course "of proceedings in services, that he is the heir-male of the body of "Lady Margaret Ker, and that there are no heirs-male of the bodies "of Ladies Jean and Anna Ker respectively); but that such pro- "ceedings of the Macers, and all acts, deeds, and proceedings, of "whatever nature, to be made, done, or executed, by any person "or persons, or following thereupon, shall be without prejudice to

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"any person or right, in case, upon determining the Appeals, or any "of them, in any manner relating to the Roxburghe estates, depending in this House, this House should hereafter adjudge, that the "said Sir James Norcliffe Innes ought not to have been so preferred "as aforesaid, or shall, upon determining as aforesaid, or upon any "application made to this House, make any order, adjudication, or "judgment, contrary to, or inconsistent with the effect of such proceedings of the Macers, or such other acts, deeds, or proceedings "as aforesaid, or any of them, in any respect; and that all costs, "charges, and expenses attending, or to be occasioned by the same, "or in relation thereto, or in consequence thereof, or of any of them, "shall be paid as this House shall direct, and that the consideration "thereof shall be reserved.

(Signed) "GEORGE ROSE, *Cler. Parliament*r."

IV.

"*Die Mercurii*, 21° *Junii* 1809.

"Ordered by the Lords Spiritual and Temporal, in Parliament "assembled, That this House proceed generally upon the several "Roxburghe causes, on the first cause-day in the next Session of "Parliament.

(Signed) "GEORGE ROSE, *Cler. Parliament*r."

20th June 1810.

(On the House resuming consideration of the Roxburghe causes in the following Session, after making a few preliminary observations),

THE EARL OF LAUDERDALE said :—

"I am fortunately released from the necessity of entering into any argument on the bearings of the deed 1644, which, I must think, was too much relied on in the Court below. For, with the Noble and learned Lord whom you have heard, I agree in thinking it impossible to travel out of the deed 1648 for the purpose of learning the meaning of the deed 1648; and even if this could be permitted, the deed 1644, which was revoked and set aside by Robert Earl of Roxburghe, appears to me, of all others, the most extraordinary source to which any one could resort for the purpose of collecting his intentions; far less, my Lords, can I regard this deed as a source from which I can infer any thing that can lead my mind to decide on the consequences of that deed of nomination he was empowered to make by the charter 1646, the construction of which is the more immediate question brought by appeal before your Lordships' House; for to me it appears impossible to doubt of the accuracy of that statement made by the learned Lord whose argument you have heard, that the

deed 1644 can only be referred to in this case, in the same manner you would refer to any other deed, to learn the use made of particular expressions in the language of conveyancing; indeed, agreeing as I do with the Noble Lord on this subject, I have only to regret, that there are some passages in the speech he addressed to your Lordships, in which most certainly he does not confine himself to what he has so accurately stated to be the only legitimate use of the deed 1644.

" I have the satisfaction also to think, that it will be unnecessary for me to intrude upon your Lordships with any argument to shew that it is the deed 1648, which must still exclusively regulate the succession to the estates of Roxburghe, as I am ready to avow a perfect coincidence of sentiment with the Noble and Learned Lord whom you have heard, in thinking, that the deed 1648, which is *cited and referred to in all the subsequent investitures* of the family, cannot be superseded by any length of possession on the investiture 1747.

" Possessing also a similarity of opinion with that which has been stated to your Lordships, on the impossibility of giving any weight to the argument in favour of the construction of this deed, as contended for by Mr. Bellenden Ker, it is in my power to save a considerable portion of your Lordships' time, by abstaining from all remarks on this view of the question. It will also be my endeavour, in the course of what I shall have the honour of stating to your Lordships, to economise your time, by cautiously passing over every opinion delivered or hinted at on the question of the reduction, on which your Lordships have also heard counsel at your Bar: because I shall shortly state, before I sit down, the reasons why I must think, and why I conceive, on the principles stated by the Noble and Learned Lord who has addressed you, he must think, that the action of reduction comes by appeal before this House in a shape that renders the remitting of it to the Court of Session unavoidable.

" Having thus, my Lords, enumerated the various branches of this important cause, in which my entertaining similar views with those that have been stated to your Lordships, will render it unnecessary for me to detain you by entering into any details, I have once more to express my most serious regret, that, on the main question, viz. on the disputed clause in the deed 1648, there is hardly any part of the reasoning your Lordships have heard to which I can implicitly subscribe.

" My Lords, The clause which you have so often heard repeated in this House, is to the following effect:—

" And qlkis all failzeing be decease, or be not observing of the provi-
" sions, restrictions, and conditions above written, the right of the
" said estates sall pertain and belong to the eldest dochter of the
" said Hary Lord Ker, without division, and yr heirs-male, she al-
" ways mareing or being married to ane gentilman of lawll and ho-
" nourl descent, wha sall perform the conditions above and under-

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" written ; qlkis all failzeing, and yr sds airis-male, to our nearest " and lawful airis-male qtsomever."

" Before proceeding to the consideration of the very important questions which arise in the construction of this clause, allow me, my Lords, to express, in the strongest manner, my concurrence with the Noble Lord who has already addressed you, in thinking, that if any one has stated, that this clause cannot be construed but with reference to the words which themselves form the clause, he has delivered a most erroneous opinion. With him, my Lords, I agree in the accuracy of the statement, that the clause must be construed with reference to every thing that is to be found within the four corners of the deed in which it is placed; with this limitation, however, that it shall be construed in a manner consistent with those known rules of construction recognised by the law of Scotland, into the details of which I shall have an opportunity of entering in a future part of what I am about to submit to your Lordships. Nay, my Lords, subject to this limitation, I go still farther; for I not only conceive it to be competent to look to every thing within the four corners of the deed, but I think justice requires your Lordships should do so, in every step of the reasoning employed to ascertain what is the legal import of the clause, so far at least as to prevent those who argue upon it, from assuming any thing as proved which proceeds on a partial view of the deed. And this observation, my Lords, leads me to remark, that though I shall follow the order which the learned Lord has pursued, I must thus early express my doubts, (on which I shall hereafter enlarge), how far the frame of the argument he has submitted to your Lordships, has not precluded the Noble Lord himself, after having so properly suggested this rule, from following it, in what he has submitted to you in favour of that construction of this clause for which he has contended.

" For I certainly must feel, that the Noble Lord, by considering in the first instance what is the import of the words 'eldest daughter,' exclusive of the effect the term 'heirs-male' may have on that expression, has violated the rule he has with such justice laid down. And I must also express to your Lordships my doubts, whether the Noble Lord did not again materially violate this rule, when he afterwards proceeded to use the words 'eldest daughter,' in the meaning so imposed upon them, for the purpose of inducing your Lordships to think it necessary to add to the generic term 'heirs-male,' the term of specification 'of the body.' For I do flatter myself, I shall convince your Lordships, that, by considering the clause thus disjointedly, and by excluding from his view circumstances of importance (which are to be found, not only within the four corners of the deed, but within the four corners of the clause), in forming these separate conclusions, the Noble Lord has contrived to acquire the use of an argument on which he has mainly relied, to prove to your Lordships that heirs-male ought to be construed to mean heirs-male of

the body; which, if the whole clause had been considered together, could only operate to induce your Lordships to presume, that eldest daughter was used for the express purpose of denoting Lady Jane Ker.

"My Lords, Having protested thus formally against this line of argument, on the effect of which I shall subsequently enter more at large, it is my intention, as I have stated to your Lordships, to pursue the order adopted in the argument you have heard. It shall, however, be my study cautiously to avoid, in what I have to submit to your Lordships, forming any conclusion, by excluding from my view either any one part of this clause, or any one part of this deed. Whilst I shall be equally cautious never to found any part of my argument upon what I feel myself obliged to ask you, *to have the condescension to admit as proved*, merely because it is consistent with the opinion formed in consequence of such reasoning.

1st Point.—'Eldest daughter.'

"Adopting this order, I have, in the *first* place, to solicit your Lordships' attention to the reasoning on which I am induced to differ with the Noble Lord who has addressed you, on the mode of construing the words 'eldest daughter' in this clause, and to think, that 'eldest daughter' cannot with justice be construed as meaning 'daughters *seriatim et successivè*.' My Lords, On considering the import of the words 'eldest daughter,' standing unconnected with any part of the context, though you have heard it stated that they may admit of many more expositions, it does not occur to me, (barring the technical sense, which in the Committee of Privileges has been imputed to them, of meaning in the eye of the law heir-female), that they can be used as descriptive of daughters in more than the four following situations. *First*, The eldest born daughter.—*Secondly*, The eldest at the time of making the deed.—*Thirdly*, The eldest at the time the succession opens.—*Fourthly*, A daughter who acquires that appellation at a subsequent period, by the death of her eldest sisters during her lifetime.

"In the first case here stated, it cannot escape your Lordships' observation, that a female obtains the title of eldest daughter by birth; whilst in the three last cases, she becomes entitled to it by the predeceasing of one or more of her sisters: And to me, it certainly appears that these are the only two modes by which this appellation can be acquired. For I must submit to your Lordships, that the idea of a lady's being entitled to the appellation of eldest daughter from the death of a nephew, a grandnephew, or a great-grandnephew, must arise out of a meaning imposed upon the words by construction with other words with which they are conjoined, and never can suggest itself to the mind from the simple use of the words themselves.

"My Lords, If I have the good fortune to carry your Lordships along with me in this reasoning, I know you cannot refuse to assent to the inferences I am disposed to draw from it, viz. That in which-

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ever of these four modes a person becomes entitled to the appellation of eldest daughter, it is a definite designation, and applies to the situation of the lady in relation to her other sisters, she acquiring the title at a period of time which is fixed, either by their relative births or their relative deaths. It cannot, however, escape your Lordships, that, according to the sense of this term, as contended for by the respondent Sir James Innes Ker, a younger sister's (for example Lady Margaret Ker's) becoming eldest daughter, depends neither upon the relative births or deaths of any of her sisters. For, supposing the reasoning used by the respondent to be accurate, if the words of the destination had been to the 'eldest daughter, and 'the heirs-male of her body,' Lady Margaret Ker, without any reference to the births or deaths of her sisters, would have become eldest daughter at a different period from that in which she would have attained that appellation, if the destination had been to the 'eldest daughter, and her heirs-male.' And she would have become eldest daughter at a third period of time, if the destination had been to the 'eldest daughter, and the heirs-male or female 'of her body.'

"To those of your Lordships who reflect upon this subject, I cannot help suspecting it will appear, that our habitual familiarity with the laws of primogeniture and succession, give to the word *eldest* the faculty of producing an impression on the mind which in reality it ought not to effect. Eldest daughter, properly speaking, is an expression denoting an individual, just as much as the phrase youngest daughter; and if a destination to the youngest daughter 'of Hary 'Lord Ker, without division, and their heirs-male, she always mar'rying a gentleman of lawful descent,' would not have carried the estate successively to the elder sisters, as the younger sisters, or the heirs-male of the younger sisters failed; neither can the destination to the eldest daughter call to the succession any other person than the individual it denotes.

"To illustrate the absurdity of supposing that the words 'eldest 'daughter' in themselves can describe a series of persons, and to explain the consequences to which this hypothesis would lead, let me, my Lords, suppose, that the destination by Earl Robert had been 'to the eldest daughter of Hary Lord Ker, and the heirs of her 'body, whom failing, to the youngest daughter, and the heirs of her 'body.'

"It is obvious, that such a destination would have called, in the first place, Lady Jane Ker, the eldest daughter of Hary Lord Ker, and her heirs: Secondly, Lady Sophia Ker, the youngest daughter of Hary Lord Ker, and her heirs: Thirdly, That Lady Anna Ker, the second daughter, and Lady Margaret Ker, the third daughter, and their heirs, would have been disinherited. But if the expression 'eldest daughter' could be deemed to convey the meaning annexed to it by the respondents, Lady Sophia, the youngest daughter,

would not find herself called to the succession sooner than if she had never been named; and Lady Anna and Lady Margaret, the second and third daughters, and the heirs of their bodies, would fall to be preferred to their younger sister Lady Sophia, though she was expressly called in preference.

" For though it is obvious, that Lady Sophia might urge her claim on the failure of the heirs of Lady Jane, the eldest sister, stating that the 'youngest' was called upon such failure, she would be at once defeated by Lady Anna's statement, that she, upon the death of Lady Jane and her heirs, had become 'eldest,' and that as such she had a right to be preferred.

" The same plea, my Lords, would secure the preference to Lady Margaret, the third daughter, and her heirs, on the failure of Lady Anna, the second, and her heirs, and this absurd and monstrous consequence would result from the proposition that Lady Sophia, the youngest daughter, though expressly called to the succession, could only take, on the failure of all her three sisters and their heirs, when she would become entitled to the succession as eldest daughter, without deriving any preference from the special terms in which she was called. Indeed, it seems apparent, that the term 'eldest daughter' cannot, in construction, receive the meaning contended for by the respondent, when unaided by any expression with which it may stand connected. Suppose, for example, that a person having three sons, John, James, and Thomas, should destine his estate to his eldest son, and the heirs-male of his body; whom failing, to the heirs-female of his body: if John, the eldest son, had a daughter, and James and Thomas each of them sons; according to the mode of reasoning which imputes to the term eldest daughter, the meaning of daughters *seriatim et successivè*, the heirs-male of all the brothers would come in before the daughter of the eldest son, because, construing the term 'eldest son,' as it is attempted to construe the term 'eldest daughter,' it would have the effect of meaning sons *seriatim et successivè*; and this destination to the eldest son and the heirs-male of his body, whom failing, to the heirs-female of his body, would, according to this reasoning, be understood to be synonymous to a destination to my eldest son, and the heirs-male of his body; whom failing, to my second son, and the heirs-male of his body; whom failing, to my third son, and the heirs-male of his body; whom failing, to the heirs female of my eldest son; whom failing, to the heirs-female of my second son; whom failing, to the heirs-female of my third and youngest son.

" That this, my Lords, is an undeniable consequence of imputing such a meaning to the word eldest, when prefixed to the word son or daughter, is not to be doubted; yet I hardly believe there is any lawyer who will have the smallest hesitation in pronouncing, that a destination to my eldest son, and the heirs-male of his body, whom failing, to the heirs-female of his body, would inevitably carry the

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estates so destined to the heirs-female of that eldest son, on the failure of the heirs-male of his body, in preference to the heirs-male of the second son.

"From all this, my Lords, I must submit to your Lordships, that it seems indisputably to follow, that, without some qualifying expression, the words 'eldest daughter' cannot be deemed to describe a series of persons; they can in truth only denote a person in one of the four situations above stated; and as Lady Margaret, the ancestor of Sir James Innes Ker, never stood in any of these situations, it is impossible to argue that the words 'eldest daughter,' unexplained by the context, could make out the plea of Sir James Innes. It must, however, my Lords, be admitted, that eldest daughter is a phrase, the meaning of which must be gathered from the context; it becomes therefore important, minutely to examine all the expressions with which it is connected, as these may undoubtedly give it a meaning, which it does not naturally possess.

"In the *first* place, The clause calls the eldest daughter of Hary Lord Ker 'without division;' and the respondents have contended, that these words *without division*, denote the four sisters having been called in succession.

"The appellants, on the other hand, have contended, that the words *without division* point out exclusive possession, in opposition to divided possession, and that they would not have been essential either in the event of one daughter being called, or in the event of four daughters being called, though in both cases they would have had accurately the same meaning, and served the same purpose. Indeed, my Lords, the impossibility of giving any influence whatever to the words 'without division,' has been, in my opinion, fully established by the argument your Lordships have already heard from the Noble Lord, in which it was illustrated by a quotation from the bond of tailzie 1640, where there is a destination to Lady Jane Ker, and her heirs-male 'without division,' being one of thousands of instances that might be brought from the records, of these words being used merely for the purpose of expressing an exclusive right to possess, without any reference to a series of persons being called to the succession.

"In the speech your Lordships have already heard, it has also been submitted to you, that the omission of the word *said* before the words eldest daughter, is a circumstance to which some weight is due, though I think the learned Lord, who has addressed you, has not seriously stated it as a ground that can be rested upon with the smallest degree of effect. But in the course of what I shall have the honour of stating to your Lordships, it will be my duty to explain very fully the meaning and effect of the words, saids—aforesaids—and other words of reference, when they occur in deeds of this nature; and I think it will follow, from what I shall then submit to you, without the possibility of dispute, that no weight whatever is due to the omission of the word *said*.

" My Lords, The next expression, or rather word, to be considered in forming a judicial opinion on the meaning of the words eldest daughter, as they are used in this deed, is the plural pronoun *their*, —in the phrase ' their heirs-male.' This, in the outset of the speech which your Lordships have heard, was pointed out to you by the learned Lord as a very material circumstance, though it was stated in one part of the same argument to make no great difference; whilst in another it was submitted to you, that the word *her* might be inserted instead of the word *their*, without great prejudice to the construction for which he contended. The same opinion, I recollect, was also hinted at by the Lord President of the Court of Session, in the very extraordinary speech he addressed to the Court on advising the reclaiming petition. I confess, however, that though I have minutely attended to every thing that has been said or written, either by Counsel or Judge in this cause, I have not yet heard any one attempt at an argument, to shew that the respondent's case would be tenable, if the singular pronoun *her* had been inserted instead of the plural pronoun *their*.

" By the respondent's counsel, it has been argued at the Bar, certainly with great ability, and I think with very considerable effect, that when the plural pronoun *their* is considered as connected with the phrase ' eldest daughter,' it creates the necessity of supposing, that more than one daughter was designated by that expression, and that in truth Robert Earl of Roxburghe must have meant to call his four daughters *successivè et seriatim*.

In the first place, my Lords, it has been remarked to you, and truly remarked, that in various parts of this deed, ' plural words are ' used, describing individuals;' and the inaccuracy here alluded to undoubtedly occurs, not only in many passages of this deed, but in passages of many Scotch deeds that might be referred to. For example, in the clause with regard to the obligation to take the name and arms, it is said, ' That in case of failure, or that they refuse or ' forbear to take upon them the said surname, &c. in that case the ' *person* failing, and the heirs of *their* body.'

" Again, the obligation for provision to the remanent daughters is thus expressed: ' In case it shall happen the said Sir William ' Drummond, or any other heirs of tailzie, to succeed to the estate, ' then and in that case the samen *persone* sua succeeding, and *their* ' spouses to be joined in marriage with *them*, sall pay,' &c.

" The following passage is also to be found in another part of this deed: ' In case it shall happen *any* of the said daughters to depart ' this life before *they* be of the age foresaid, or yet before *they* be ' married, in that case the portion of the *daughter* sae deceisand be- ' fore *their* marriage, as said is, sall return to our said heirs,' &c.

" It does so happen, however, with regard to all these three instances, as well as all other instances cited or referred to in the various deeds, which have on this occasion been submitted to the consideration

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of this House, that the plural word is used in a manner such as to create no effect on the sense of the words with which it is conjoined, as the substitution of the singular instead of the plural pronoun, would make no material difference.

" For instance, my Lords, in the clause in relation to the obligation to take the name and arms, it is obvious, that if the words had been ' the person failing, and the heirs of *his body*,' instead of the ' person failing, and the heirs of *their body*,' it could have made no difference in the meaning which it conveyed.

" Now, my Lords, let me ask how it can with any degree of accuracy be inferred, from the circumstance of finding the plural pronoun conjoined with a singular collective noun, where it can make no difference in the sense, whether it is the singular or the plural pronoun; that where it is conjoined with words in such a manner as to make an alteration in the sense, it is to have the power of changing the meaning which the antecedent would otherwise possess. For my own part, I have not the least hesitation to state to your Lordships, that when in a deed there is a discrepancy between the pronoun and the antecedent, it is the antecedent which must direct the alteration to be made in the pronoun, instead of the pronoun authorizing an alteration of the antecedent."

" It is, however, asserted, which is a proposition I am in nowise disposed to deny, that you are not authorised, in construing a deed, to make any alteration, (I quote the words,) ' unless you are driven ' to it by a case of *necessity*.'

" Agreeing, then, in opinion, that it is a case of necessity that can alone justify this operation, I must most earnestly request your Lordships' attention to the consideration of what must be deemed to constitute a case of necessity. To me, my Lords, it appears, that when the sentence, without an alteration, is nonsense; and when a variety of circumstances, connected with the sentence, combine to point out the particular alteration that ought to take place, this is the case of all others which would justify such a proceeding. Now, in the *first* place, It is without fear or dread I assert to your Lordships, that this clause as it stands is nonsense; because I have the authority of the learned Lord, who preceded me, for saying so. I repeat the words he used in describing it. ' *Taking the words as ' they stand,* if I may be permitted to use such an expression in this ' case, *they are nonsense*.' In the *second* place, I think I have shewn you, that all the circumstances connected with the sentence, combine to demand the same alteration of the pronoun *their* into the pronoun *her*.

" It is, however, stated to your Lordships, that if the construction I contend for should be given to this sentence, it would involve the necessity of an *alteration*; and the argument, to my astonishment, is seriously conducted, as if it could be maintained, that the construction which the learned Lord, who preceded me contends for, does not equally involve the necessity of alteration.

"With all due submission to him, however, I think I might, with the greatest safety, put the accuracy of my opinion at issue, upon the single point, of desiring the learned Lord to express the sense he attributes to the antecedent of the plural pronoun *their*, without altering the expression.

"I know, in the argument the Noble Lord has offered to you, he has distinctly said, that 'eldest daughter *means* daughters *successivè et seriatim*.' Is there, then, any difference betwixt this proposition, and saying, that the term 'eldest daughter' must be *altered* into 'daughters *successivè et seriatim*?' Would it give, in the opinion of that learned Lord, or in the opinion of any of your Lordships who hear me, the least additional force or effect to my argument, if, instead of contending, that in construing the sentence, you must *alter* the plural pronoun *their*, into the singular pronoun *her*, I was to contend that the word *their* must be taken, in construing the sentence, as *meaning* her? I am sure, if this, which I must consider as a ridiculous subterfuge, can have the least effect, I am ready to adopt the phraseology in addressing your Lordships.

"If the learned Lord's argument, therefore, is to be stated as an argument to construe the sentence, by giving the words 'eldest 'daughter,' *the meaning* of 'daughter *seriatim et successivè*,' (as he expresses it), let mine be stated as an argument, for giving to the word *their* the meaning of the word *her*, and then let us go to issue upon that state of the case. On the other hand, if I am to be stated as arguing to your Lordships, that the sentence should be construed, by altering the word *their* into the word *her*, let that learned Lord be also stated as contending, that the sentence should be construed, by altering the words 'eldest daughter' into 'daughters *seriatim et successivè*;' and I express myself equally ready to go to issue upon that state of the question.

"For, so far from disputing the proposition as stated by the learned Lord, 'that if you can give a consistent meaning to the words 'forming the phraseology of a deed, you are not at liberty to alter 'one syllable of it;' I admit it in its fullest extent. Nay, I go a little farther, and I say, that if a case of necessity exists, where a sentence has no consistent meaning without alteration, you are bound judicially to construe it, *so as to make the least possible alteration.*"

"Whatever may be your Lordships' decision, however, in regard to the meaning of the words 'eldest daughter,' I have the satisfaction to reflect, that the effects of it must exclusively operate on the case now under your consideration.—It can neither undermine any principle of law established by decisions, nor give rise to confusion in the tenure of landed property, by the effect it may have on deeds of a similar nature. Far different is the case with the point to which I must next solicit your Lordships' attention; for you cannot decide, that the words 'heirs-male' can be taken to mean 'heirs-

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male of the body,' on the ground of the presumed intention of the author of the deed 1648, without pronouncing a decision more generally interesting to all who have any connection, however remote, with landed property in Scotland, than any that ever resulted from a judgment of your Lordships' House.

2d Point.—'Heirs-male.'

"Here, then, I must solicit your Lordships' attention to an examination of this question so extended, and so minute, that my sense of the serious importance of the subject can alone plead my vindication.—The Noble and learned Lord, in proceeding to discuss this branch of the argument, has stated, that the question presenting itself for your Lordships' consideration may be shortly put thus,—'Whether the words 'heirs-male' in the clause to which we have 'so often had reference, mean, *in the intention of the author of this* '*deed* as that intention is to be collected from the context, and the 'other parts of the same instrument, for so I would put the case to 'your Lordships; whether these words 'heirs-male,' mean heirs-'male general ?—or whether they mean 'heirs-male of the body' of 'the person or persons to whom they refer ?'

"Now, my Lords, before I enter on the discussion of this subject, I must say, that, consistently with the reasoning I am about to submit, I cannot agree with the statement that is here made to you.—For it will be my object to show you that, by the law of Scotland, your Lordships are precluded from considering what was or what was not the intention of the author of the deed, and your view of the question must be confined to the consideration of what intention is expressed by the words used in the dispositive clause of the deed.

"I do, however, perfectly agree with the Noble Lord in what he has stated concerning the importance of the cases that have been relied on. I do in particular completely concur in the opinion he has delivered, that if the case of Hay of Linplum has decided, that the words *heirs-male* occurring in that destination, had a precise fixed technical meaning, which the intention of the entailer, however clearly expressed, was not sufficient to separate from the words, such a decision must imperiously regulate the judgment now to be pronounced.

Linplum Case.

"I am aware, my Lords, that in the speech you have heard, there is a variation in the terms in which this proposition is announced, from those in which I have now expressed it.

"It was on that occasion admitted, that the Linplum case must be conclusive on the subject of the question concerning the meaning of the term 'heirs-male ; if it decided, that the words 'heirs-male,' *occurring in such a destination as this*, (meaning such a destination as that of Robert Earl of Roxburghe's in the year 1648), cannot bend to the intention of the author.

"These two propositions, however, I hold to be the same, and that position is broadly admitted in the speech of the Noble Lord, in the following terms :

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" 'The Linplum case arose upon a settlement, with reference to 'which, I should not do justice to the present case, if I did not 'state, that, like this Roxburghe case, it was a regular entail;—like 'this Roxburghe case, it was not to take effect till after the entailer's 'death;—like this Roxburghe case, the question discussed and de-'cided in it was a question of competition between heirs,—it in-'volved nothing with respect to creditors or onerous purchasers; 'there was not therefore that distinction in it which, your Lordships 'recollect, we have heard much of at the Bar;—it was upon the 'construction of a clause relating to destination;—it was upon the 'construction of a clause, upon which the question depended, on 'whom, and in favours of whom, the fetters were imposed.'

"Under these circumstances of similarity, I think there is no danger of its being disputed, what must be the decision in this case, if the judgment of the Courts below, and that of this House in the case of Linplum, proceeded on the ground, that the term 'heirs-'male' occurring in the clause of destination, could not be controlled by the presumed intention of the author, however clear, so as to give it the legal meaning of the words 'heirs-male of the body.'

"It is, my Lords, this impression of the importance of the cases, and particularly of that of Linplum, which dictates to me, as it did to the Noble Lord, the propriety of adopting an arrangement that leads to canvass the bearings of those cases that have been relied upon, before discussing the general grounds on which I am disposed to rest the propriety of the opinion I am about to deliver to your Lordships concerning the legal effect of the term 'heirs-male' in the clause of Robert Earl of Roxburghe's settlement in the year 1648.

"I shall also follow the arrangement of the speech your Lordships have already heard, by soliciting your attention in the first place to the case of Hay *versus* Hay, usually cited under the denomination of the Linplum Case; the reasoning on which, in the speech of the learned Lord, may be properly examined under two heads."

(Here his Lordship went into an examination of the cases at great length, concluding thus): "That, when I now look back and review what has fallen from the learned Lord, I certainly do feel that no reasonable ground has been stated for giving to the words 'eldest 'daughter,' the meaning of daughters *seriatim et successivè;*'—whilst I try in vain to discover any thing like a tenable ground for maintaining that Earl Robert intended to use the term *heirs-male* as meaning *heirs-male of the body.*"

VISCOUNT MELVILLE (in the Reduction) spoke in substance as follows:—

"My Lords,—

"Two days ago, in a short conversation which took place among your Lordships in the Committee of Privileges, I had occasion to state, that I entertain very great doubts as to a principle of law

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stated in the second Resolution laid last year on the Table of the House by the Noble and Learned Lord on the Woolsack. I am the more anxious to explain the reason of my doubts, because both the Noble and Learned Lord, and the Noble Lord who gave his opinion at length this day upon the whole cause, seemed to concur in the opinion, which I conceive to be erroneous.

"The Resolution states, 'That it is premature for this House to 'determine the appeals in the action of reduction complaining of the 'interlocutors which find, that the estates of Roxburghe were held 'by the late William Duke of Roxburghe under an entail which 'contains an effectual prohibition against altering the order of suc-'cession *before the pursuer's title and propinquity be established.*'

"Now, I conceive, that by the laws and practice of Scotland, it is not necessary for a person taking out such a brieve, to establish his propinquity by a proof, previous to the discussion of the rights of the parties in a competition of brieves. The general principle, and the foundation of the practice which universally takes place on a competition of brieves, is pointed out in the following quotation from Lord Stair, one of the oldest and most respectable authorities with regard to the law and practice of Scotland. His words are, 'The 'brieve and claim are as a libel, against which *any party compear-'ing*, and found *to have an interest*, may propone their exceptions, 'which are many more than those contained in the said last act of 'Parliament 1503, cap. 94.'

Stair's Inst. iii. 5. 33.

"The proposition which I am now contending for has been solemnly recognised by the Court of Session in the very case now be-before your Lordships.

"Sir James Innes and General Ker began their proceedings by severally taking out brieves for serving themselves heirs of entail in special under the deed of 1648. Upon these brieves a competition ensued before the Macers.

"Pending the competition, they severally sued out their actions of reduction. To enable them to obtain *decree* in these actions, it is necessary that one or other of them should be served heir of entail; that is the title upon which alone decree can be granted in their favour. But it is according to the practice of the Court, repeatedly recognised in the House of Lords, to allow such actions of reduction to proceed *pari passu* with such competitions of brieves.

"Mr. Bellenden Ker insisted, that he should be heard for his interest in the competition of brieves. He strenuously contended also, that neither party should be allowed to obtain a service till the merits of the actions of reduction were first of all discussed. In support of his pleas on this subject, he insisted upon several cases decided in the Court of Session and in the House of Lords.

"He was successful upon both points before the Court of service. On the 14th of February 1806, the Court remitted to the Macers with instructions to find, *first*, that Mr. Bellenden Ker, &c. have a

title to appear in the service; and, *second*, that the points of law with respect to the construction of the tailzie and settlements of the estate of Roxburghe must in the first place be determined.

"In a competition of brieves, it is obvious, that neither competitor has a certainty of obtaining a service in his favour. It is obvious, too, that in such a competition points of law and of construction must arise and be decided. These are either decided by the Assessors, or are remitted by them to be decided in the Court of Session.

"It is not necessary to give authorities for this: It is inherent in the very nature of the proceeding. There are often many contending parties in a competition of brieves; and it would render the proceeding endless and inextricable, if it was necessary that every separate competitor should establish his propinquity by a proof, previous to a discussion of the respective rights of the parties.

"The Court, on the suggestions of Mr. Bellenden Ker, having returned to the actions of reduction, the interlocutor of the 13th of January 1807 was pronounced therein, deciding the points of law.

"Various cases bearing upon this were stated by Mr. Bellenden Ker in the Court below. In the case of Don *v.* Don, (Forbes 28th November 1712), there was a competition of brieves, in which points of law came to be discussed. Upon the report of the Assessors, 'The Lords stopped the service till the point of right be summarily 'discussed, and remitted the contending parties to be heard before 'the Lord Ordinary to that effect.'

"The other cases still more closely resembled the present, and were also decided upon appeal.

"The first of these was the *Cassillis* case, 27th February 1760. In that case, the Earl of March took out brieves for serving himself heir of entail in special to the then late Earl of Cassillis; he, also, during the dependence of his brieves, brought an action of reduction-improbation against Sir Thomas Kennedy, as disponee of the said late Earl of Cassillis.

"Sir Thomas Kennedy was admitted for his interest in the service; but the Court proceeded to a judgment in the reduction before it was determined if the pursuer had a title; and in the same interlocutor which decided in favour of Sir Thomas Kennedy in the reduction, they stopped all further procedure in the service. This judgment was affirmed upon appeal.

"So, in the great question between the Duke of Hamilton, and Lord Selkirk, and Mr. Douglas, the same course of proceeding was adopted. Mr. Douglas was disponee under a general disposition executed by the Duke of Douglas, to which he had right by general service. The Duke of Hamilton and Earl of Selkirk took out brieves for serving themselves heirs in special to the deceased Duke of Douglas, and during the dependence of their brieves, brought actions of reduction of the deed, under which Mr. Douglas, the disponee, claimed.

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" The whole proceeded there as in the present case. They went at once to the merits of the reduction, before allowing the services to proceed, and in the same interlocutor which decided in favour of the defender in the reduction, they found that the brieves of the Duke of Hamilton and Earl of Selkirk could not proceed. This interlocutor was affirmed on appeal.

" It is impossible almost to distinguish that case from the present. In it there was a competition of brieves between two competitors, and actions of reduction at their instance against a disponee. The same mode of proceeding which has been adopted in this case was adopted in it.

" It is true, that in these cases of Cassillis and Douglas, the judgments of the Court were in favour of the disponees; but if they had been in favour of the competitors, it would still have remained for them to establish their title by service.

" If your Lordships should adopt the principle suggested in the Resolution, the consequence would be, that after the competition of brieves is completed, the actions of reduction, both as to the existence of the old entails and the *feus*, must be commenced anew. Thus two years more may be spent in the Court below. The causes may then be brought here by appeal, and may be hung up for an indefinite time, perhaps eight or more years, before they come in course for hearing; and all this, though these causes have been fully considered and argued in the Court below, and the appeals in the reduction have been heard for twenty-five days in Session 1808.

" The necessary consequence of this will be, that one competitor will be removed at least. Sir James Innes Ker can have no hope that he should survive this delay. It would render his situation worse than it was before the commencement of these causes.

" It is conceived, that your Lordships will hesitate before you adopt a principle leading to such consequences; and, upon the ground of the principles I have stated, and the authorities to which I have referred, I am confident, that the prematurity alleged in the Resolution upon which I have offered these observations, is not warranted by the law and practice of Scotland, and ought not to influence the proceedings of your Lordships in the further arrangements of this long depending litigation. If there are any points in the questions of reduction upon which your Lordships are disposed to entertain further consideration, it is competent for you to reserve those points to a future opportunity; but there can be no reason, either in justice or in form, for sending back any part of the cause to the Court of Session."

NOTE.—*The Resolution was, upon motion, withdrawn.*

VISCOUNT MELVILLE (in the Competition of Brieves) spoke in substance as follows:—

" My Lords,

" It is not my intention to trouble your Lordships with many

words on the present occasion; but having formed a decided opinion, I feel it a duty, under the circumstances of the present case, to state distinctly what that opinion is.

"I had not the advantage of hearing the long and able pleadings which originally took place at the Bar of this House on the subject of the present competition; but I have carefully perused all the printed pleadings in the Court below, and the cases which have been submitted to your Lordships. I have also studied the elaborate statement of the different points in the case given by the Noble and Learned Lord on the Woolsack at the close of the last Session of Parliament. I have likewise had the benefit of hearing the very able statements which have been urged in the pleadings before the Committee of Privileges, in consequence of the claims recently brought forward by Lady Essex Ker; and I have attentively listened to the very elaborate argument of the Noble Lord who has just sat down. And upon a mature consideration of every topic which has been stated, I must confess to your Lordships, I feel it impossible to resist the conclusion which I formed a considerable time ago, and which is expressed in the first of the resolutions laid upon the table last year as the result of the opinion the Noble Lord on the Woolsack had then formed, after a painful and anxious examination of every deed and every circumstance which had any relation to this important cause. My opinion is, 'That according to the just 'and legal construction of the substitution of the deed 1648, to the 'eldest dochter of Hary Lord Ker, without division, and their heirs-'male, the several daughters of Hary Lord Ker, in their order, and 'the heirs-male of their respective bodies begotten *seriatim*, were 'called, as heirs of tailzie and provision, to take the estates conveyed 'by the said deed, in preference to the heir-male general of the 'eldest, or of any other of the said daughters; and therefore that Sir 'James Norcliffe Innes, so described in the interlocutors of the 'Court of Session, in case he shall prove himself to be the heir-male 'of the body of Lady Margaret Ker, and that there are no heirs-'male existing of the bodies of the Ladies Jane and Anna Ker, ac-'cording to the usual course of proceeding in services, is to be pre-'ferred in the competition of brieves respecting the said estates; 'and that upon such proof made, the brieves purchased by Brigadier-'General Ker ought to be dismissed.'

"All the parties interested in the present competition have very liberally availed themselves of the usual privilege, of resorting to collateral deeds and circumstances in support of the claims which they respectively maintain; and for that purpose, the bond 1640, the charter 1644, the charter 1646, and the marriage-contract 1655, have all in their turn been pressed into the service of the contending parties. In the judgment I have formed upon this case, I have no occasion to enter into any controversy, to what extent it is justifiable, by the fair rules of interpretation, to have recourse to other

deeds, clauses, and circumstances in order to form an ultimate opinion upon the rights of parties: For in truth, according to the view I have of the present cause, I hold myself to be acting upon every legitimate principle of construction, when I contend, that if the clause on which the question confessedly turns, does, without any foreign or collateral aid, admit of a natural construction, expressive of the intention of Robert Earl of Roxburghe as to his succession; that is the construction which ought to be adopted, without having recourse to strained and artificial interpretations, in order to draw out his intention from other deeds or clauses. The clause in the deed 1648, to which I have already referred, does, in my opinion, admit of such a clear and distinct construction, without unnecessarily torturing the meaning of the terms used, or wantonly disregarding any of the words which the maker of the deed has made use of. The term '*eldest dochter*,' is the most important for consideration; and I do not conceive, that it is either a strained or unnatural construction to contend, that the expression of '*eldest daughter*' is susceptible, both in legal construction and common parlance, of being interpreted to mean the eldest daughter at various different periods, *either* at the time when the deed is made, *or* at any time during the life of the maker of the deed, corresponding to the variations in the state and numbers of the females alluded to in the deed, *or* at the time when the succession opens, which is to be regulated by the deed. In the present case, it appears to me to be clear, that the maker of the deed meant by this description to refer to the eldest of the daughters of Hary Lord Ker at any time the succession should open to the heirs called by the substitution in the deed 1648. And it does not appear to me, that, considering the expression made use of, viz. '*their heirs male*,' it is possible to put any other construction on the expression '*eldest daughter*,' without doing a wanton and unnecessary violence to the terms made use of in this material clause. Nor am I in any degree shaken in that opinion by the elaborate argument, and the various cases and illustrations which have been resorted to, to establish the proposition, that heirs-male in legal language means heirs-male in general. I can without difficulty admit the proposition as an abstract and general one; but it is impossible for me to admit, that the expression is to be held of so stubborn a nature, as to be incapable of a limitation to heirs-male of the body, if that construction appear to be more consistent with the general frame of the clause, and the terms used in it. *Their* heirs-male are prominent words in the clause, and are incapable of any rational meaning, if heirs-male is to receive so unlimited a construction as that contended for by General Ker. It is certainly, in every view of the situation of Earl Robert's family, more natural to suppose, that he meant all the daughters of Hary Lord Ker, than that he should, under the then circumstances of the family, exclusively select his eldest grand-daughter, and pass immediately from her to

her heir male in general, overlooking and passing by all the other daughters of Hary Lord Ker. It is not a sound argument to observe, in answer to this, that Earl Robert appears to have been so whimsical in the selection of his heirs from among his descendants that therefore you are to reject the natural and just construction of the leading clause in his settlement, when, without departing from the clause itself, it is capable of a plain and obvious meaning, and a meaning collected without having recourse to any forced or strained construction.

"I shall not longer intrude upon the patience of your Lordships, trusting that, in the few words I have used, I have made the grounds of my opinion sufficiently intelligible."

After their Lordships had spoken, the following judgment was moved by LORD ELDON, and carried:—

20th June 1810.

Judgment in Competition of Brieves.

It was ordered and adjudged, That so much of the interlocutor of the Lords of Session of the 14th Feb. 1806 as contains an instruction to the Macers to find that John Bellenden Ker, Henry Gawler, and John Seton Karr, Esq., had a title to appear and be heard for their interest in the said services, and so much of the said interlocutor of the Court of Macers of the 17th Feb. 1806, as finds, in conformity to the said instruction, be affirmed. And it is declared that, according to the just and legal construction of the substitution of the deed 1648, to the eldest dochter of Hary Lord Ker, without division, and their heirs-male, the several daughters of Hary Lord Ker, in their order, and the heirs-male of their respective bodies begotten *seriatim* were called as heirs of tailzie and provision to take the estates conveyed by the said deed, in preference to the heir-male general of the eldest, or of any other of the said daughters; And it is further ordered and adjudged, That the said interlocutor of the Lords of Session of 6th, signed 10th March 1807, and the said interlocutor of the 7th, signed the 8th July 1807, (the latter interlocutor explaining the former interlocutor of 6th, signed 10th March 1807, and being understood by this House to mean that the said Sir James Innes Ker is to be preferred in the competition of brieves, if he proves, according to the usual course of proceedings in services, that he is the heir-male of the body of Lady Margaret Ker, and that there are no heirs-male of the bodies of Ladies Jean and Anna respectively,) be affirmed, and

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that the said interlocutor of the Lord Ordinary on the Bills of 27th Feb.. 1808, be also affirmed. And it is further ordered, That the said original and cross appeals be dismissed this House.

[The consideration of the appeal in the reduction and declarator was postponed until it was seen that Sir James Norcliffe Innes, in proceeding with his service, succeeded in proving his propinquity as nearest heir-male of Margaret, *third* daughter of Hary Lord Ker, and that Ladies Jane and Anna, and the heirs-male of their bodies respectivè, had failed. This having been done by Sir James, the House of Lords again resumed consideration of the reduction and declarator, and pronounced in it the following judgment.]

House of Lords, 8th June 1811.

Judgment in the action of Reduction.

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

For the Appellants, *Thos. Plumer*, *Wm. Adam*, *Mat. Ross*, *John Clerk*, *James Moncreiff*.

For the Respondents, *David Boyle*, *Sir Samuel Romilly*, *Ad. Rolland*, *Ro. Craigie*, *Archd. Cullen*, *W. Horne*.

[Fac. Coll. vol. xiii. p. 141, et M. 11220; Napier on Prescription, p. 219.]

MRS. JANET DURHAM, and ALEX. WEIR, her Husband, . . } *Appellants;*

MRS. SARAH DURHAM, and MAJOR WILLIAM SHILLINGLAW, her Husband, . } *Respondents.*

House of Lords, 5th March 1811.

SPECIAL SERVICE—HEIR OF LINE, OR HEIR OF PROVISION—LIMITED OR UNLIMITED TITLE—FALSA DEMONSTRATIO—PRESCRIPTION. —An estate was conveyed " to Jean Bruce (wife of Adolphus Durham) " in liferent, and Robert Durham; her eldest son, and the heirs " lawfully to be procreated of his body in fee; which failing, to " the other heirs, male or female, without division, procreated or to " be procreated betwixt the said Adolphus Durham and the said " Jean Bruce; which failing, to the other heirs male or female " without division," of the said Jean Bruce. Charter and infeft-