Appellants' Authorities.—3. Bank. 4. 29.; 3. Ersk. 8. 66.; 3. Stair, 5. 42, 43.; Erskine, Jan. 8. 1736, (No. 1. Elch. Service); Speeches in Douglas cause; Hunter, July 8. 1812, (F. C.); Mack. Ob. p. 114.; 4. Stair, 14. 11.; King's Adv. Feb. 19. 1669, (12,637.); Cunningham, Jan. 13. 1670, (12,637.); Geddes, Feb. 25. 1796, (12,641.) April 6. 1824.

Respondents' Authorities.—3. Stair, 3. 42.; 1. Bank. 1. 62.

SPOTTISWOODE and ROBERTSON—J. RICHARDSON,—Solicitors.

(Ap. Ca. No. 28.)

Mrs ELIZABETH STEWART or RICHARDSON, Appellant.—*Keay—Murray.* No. 22.

Mrs CHRISTIAN STEWART or HAY, and Mrs CHARLOTTE STEWART or ALSTON, Respondents.—*Walker—Tait.*

Service—Clause—Marriage-Contract.—A party having, by an antenuptial contract of marriage, disponed his estate to the heir-male of the marriage, 'and to the heirs and 'assignees whatsoever of the said heir-male, in fee;' whom failing, the heir-male of any subsequent marriage, and the heirs of his body; whom failing, to the heir-female, or eldest daughter of the marriage, and who should always succeed without division; and a son of the marriage having existed, but died without issue, leaving three sisters;—Held, (affirming the decision of the Court of Session), That the three sisters had right to the estate, as heirs-portioners of their brother, and not the eldest without division.

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2D DIVISION.

ON the 10th of February 1766, James Stewart of Urrard, in the county of Perth, on his marriage with Miss Elizabeth Robertson of Tullybelton, entered into a marriage-contract, whereby he provided and disponed 'to and in favours of himself and the said 'Elizabeth Robertson, his promised spouse, and the longest liver 'of them two, in conjunct fee and liferent, with the said Elizabeth 'Robertson, in case she survive him, her liferent use and possession, during all the days of her lifetime, of an annuity of L.1000 'Scots money, free of all public burdens, to be paid to her yearly, 'out of the first, best, and readiest of the rents, maills, and duties 'of the lands and others underwritten, in manner and at the terms 'after-mentioned; and the said whole lands and others under-written, to the heirs-male to be procreate betwixt the said James 'Stewart and Elizabeth Robertson, of this intended marriage, 'and to the heirs and assignees whatsoever of the said heir-male

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'in fee; whom failing, to the heir-male or son to be procreate of 'the body of the said James Stewart of any subsequent marriage, 'and the heirs of his body; whom failing, or if the said heir-male 'to be procreate of the body of the said James Stewart of a subse- 'quent marriage shall exist and afterwards fail by death before he 'is either married or attains to the age of twenty-one years com- 'plete, to the heir-female or eldest daughter to be procreated of 'this intended marriage betwixt the said James Stewart and Eli- 'zabeth Robertson, and the heirs of her body, without division; 'whom failing, to the next eldest daughter of the said intended 'marriage, and the heirs of her body, and so on successively while 'any daughter of the intended marriage exists; the eldest daughter 'existing always to succeed without division, as said is; whom 'failing, to the said James Stewart, his own other nearest heirs 'or assignees whatsomever, heritably and irredeemably, and the 'said daughters or heirs-female who succeed to the said estate 'always marrying a gentleman of the sirname of Stewart, or one 'who shall assume and bear that sirname.' In a subsequent part of the deed it was provided, that 'if a son of this mar- 'riage succeeds to the estate, the said James Stewart does hereby 'secure and provide to the younger children of this marriage 'the portions after-mentioned: viz. If there happens to be one 'younger son or daughter only, he provides him or her in the 'sum of 12,000 merks Scots; if two younger sons or daughters, 'in the sum of 15,000 merks money foresaid; and if three or 'more sons or daughters, in the sum of 18,000 merks Scots; 'and in case an heir-female or daughter of this marriage succeeds 'to the said estate, the younger daughters of the marriage are 'hereby provided and secured to the same portions as are last 'above-mentioned, in the case of a son of the marriage succeed- 'ing: That is, if there is but one younger daughter, she is to 'have 12,000 merks Scots of portion; if two younger daughters, '15,000 merks money foresaid; and if three or more younger 'daughters, 18,000 merks Scots; and if there are two or more 'of the said younger children, their foresaid portions are to be 'divided amongst them by the said James Stewart as he shall 'think proper: and failing of such division, the same to belong 'to them equally; and the said portions are hereby declared 'to the said younger children in full satisfaction to them of all 'they can ask, claim, or crave of the heir succeeding to the estate, 'excepting the father's good-will allenarly; and their aforesaid por- 'tions are to be paid to them as follows: viz. The just and equal

'half thereof, as the said younger children respectively happen 'to be married, or attain to the age of eighteen years; and the 'other just and equal half thereof, at the death of the said 'Elizabeth Robertson, their mother; the said younger children 'being always alimented and educated at the expense of the 'heir who shall succeed to the estate, from and after the father's 'death till the first half of their portions falls due to them res- 'pectively, with annualrent after the several terms of payment, 'during the not-payment: But failing of a son or heir-male 'of this marriage, or if a son or heir-male to be procreated 'of the body of the said James Stewart, of a subsequent mar- 'riage, shall succeed to the aforesaid estate, in that case the 'said James Stewart doth hereby provide, and bind and oblige 'himself, and his said heir, and other representatives succeeding 'to him in his estate real and personal, to satisfy and pay to the 'said daughter or daughters of this marriage, in full of all they can 'claim of the said heir-male of a subsequent marriage, the por- 'tions and sums of money after-mentioned: viz. If there is but 'only one daughter of this marriage, the sum of 12,000 merks 'Scots money; if two daughters,' &c.

Of this marriage there were four sons and four daughters. Mr Stewart died in 1781, and was survived by his wife; so that the contemplated event of a second marriage did not occur. He was succeeded by his eldest son John, who, from his infancy, was in a state of mental imbecility. His younger brothers, and one of his sisters, predeceased him, without issue, and he died also without issue, in September 1818. On this event, a competition arose between his three surviving sisters for the estate;—the eldest, Mrs Elizabeth Stewart, wife of James Richardson, Esq. of Pitfour, contending that she was entitled to succeed, under the destination of the contract of marriage, without division; while her two younger sisters, Mrs Christian, wife of James Hay, Esq. of Seggieden, and Mrs Charlotte, wife of James Alston, Esq. maintained, that they were entitled, as heirs of their brother, to succeed along with her, in the character of heirs-portioners. Each of the parties having taken out brieves to be served in the characters claimed by them, and the question having been discussed before the Macers, where Lords Pitmilly and Cringletie officiated as assessors, it was reported to the Second Division, on informations.

On the part of the two younger sisters it was contended,—

1. That as the lands were destined 'to the heirs-male to be 'procreated betwixt the said James Stewart and Elizabeth Ro-

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'bertson of this intended marriage, and *to the heirs and assignees* '*whatsoever* of the said heir-male, in fee;' and as that heir-male had existed, his heirs whatsoever were entitled to succeed to the estate; and as the two youngest sisters, together with the eldest, were his heirs whatsoever, they had right to the estate as heirs-portioners: That besides, as the estate was provided to the heir-male of the marriage, and his 'heirs and assignees 'whatsoever,' whom failing, the other parties mentioned in the deed, these other parties were merely conditional institutes, who could only take in the event of there having been no heir-male of the marriage; for if there was such an heir-male, then the condition was purified, whereby they were deprived of the benefit of the conditional institution; and as the conveyance was taken to the heirs whatsoever of the heir-male, and every existing person must have heirs whatsoever, it was clear that the condition which must be held to have been contemplated was that of existence of the heir-male, and not of his failure by death without heirs of his body; and therefore the right of the parties so instituted had come to an end. And,

2. That although the term 'heirs whatsoever' had a certain extent of flexibility, so as to point out different heirs under different circumstances, (as, for example, the heir of conquest or heirs-portioners), yet they had not an universal flexibility: that although it was true that the intention of a party was to be given effect to, yet the rule of law was, that that intention was to be explained according to the technical interpretation of the words which he had used, unless there was complete demonstrative evidence that he had made use of them in a sense different from that fixed upon them by law; but that in the present case there was no such evidence, and, on the contrary, it rather appeared that it had been the intention of the contracting parties, that, in the event of the existence of an heir-male, the estate should vest in him and his heirs whatsoever, in preference to the heirs of any other marriage, or the other substitutes.

On the other hand, it was maintained by the eldest sister,—

1. That as this was an unfettered destination, there could be no doubt that the heir-male of the marriage, who existed, and made up titles, had power to dispose of the estate at his own pleasure; but that it was equally clear, that if he executed no deed, disposing of the estate otherwise, the destination of the contract must receive full effect, according to its terms, though still as a simple and unfettered substitution: that it was evidently a destination containing various substitutions of heirs, called

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one after another by the proper terms 'whom failing,' &c.; and that there was not a word in the deed from which the inference could be drawn, that any part of the destination was less a substitution than any other: That the idea of that part of the destination which follows the provision in favour of the heir-male of the marriage, and his heirs or assignees whatsoever, being a conditional institution, and dependent on the event of no heir-male of the marriage existing, was a gratuitous assumption, and contrary to the express terms of substitution employed: That as this was a question of intention in a simple destination, it must be determined by a due consideration, not of one clause only, but of the whole clauses together. But the term 'heirs 'whatsoever' was of a general and flexible nature, capable of being explained or limited in its legal effect by other provisions and declarations of intention in the same deed, as had been found in the case of Roxburghe; and that in the present case it was plain, from the other clauses, that the intention of the contracting parties was, that if the heir-male died without heirs of his body, then the estate should descend to the heir-male of any subsequent marriage, and the heirs of his body, whom failing, to the eldest daughter without division; and that as such was the manifest intention of the parties, the words 'heirs whatsoever' must be construed accordingly; and consequently the estate now opened in favour of the eldest daughter. And,

2. That supposing the above proposition were not well founded, still there was an express clause in the deed, providing that the eldest daughter was 'always to succeed without division.'

The Court, after a hearing in presence, 'remitted to the 'Macers, with instructions to proceed in the service of the three 'sisters of John Stewart as heirs-portioners and of provision to 'the estate of Urrard;' and to this interlocutor they adhered on the 5th of July 1821.*

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* See 1. Shaw and Ball. No. 131. and Fac. Coll. where it is said, that 'the Judges 'were not unanimous. *Lord Glenlee* held, that the proper signification of the term 'heirs whatsoever was controlled by the subsequent branches of the destination, and the 'clause of provisions to the younger children, since there seemed a manifest absurdity 'in supposing a distinction intended to be made, in reference to the order of succession 'of the postponed heirs, between the case of the existence and non-existence of an heir-'male of the intended marriage. But the *Lords Justice-Clerk, Bannatyne*, and *Craigie*, 'without feeling it necessary for the decision of the cause to determine the question 'whether the daughters of the marriage were specially called as substitutes or condi-'tional institutes, concurred in opinion that the contract, viewed in all its parts, did not 'entitle the Court to ascribe an intention to the parties which is contradicted by the 'technical acceptation of the leading and most material branch of the destination.'

April 8. 1824. The eldest sister having appealed, the House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.'

LORD GIFFORD.—In the case in which Mrs Elizabeth Stewart, wife of James Richardson, Esq. of Pitfour, and the said James Richardson, are appellants, and Mrs Elizabeth Craigie Stewart, wife of James Hay, Esq. and Mrs Stewart, wife of James Alston, Esq. and the said James Hay and James Alston, for their interests, are respondents, which was heard at your Lordships' Bar in the course of the last week, I wish, before making any motion to your Lordships as to the decision to which your Lordships should arrive in this case, to state to your Lordships what has occurred to me in this, which is undoubtedly a case of very considerable importance in the law of Scotland.

My Lords,—It appears that the appellant took out a brieve, claiming to be served the only heir of provision under the marriage-contract of her father. The respondents upon this took out a brieve for a general service as heirs-portioners, and, as such, heirs of provision under that contract. This case coming on in the Macers' Court, the parties were heard by their counsel, and the debate in the competition was ordered to be stated in informations, to be reported to the Second Division of the Court of Session. The case was accordingly so stated, and on its coming on before that Division, the Lords of the Second Division, on the 13th May 1820, pronounced this interlocutor:—'The 'Lords having advised the mutual informations for the parties, with the 'contract of marriage referred to, remit to the Macers, with instruc-'tions to proceed in the service of the three sisters of John Stewart 'as heirs-portioners and of provision to the estate of Urrard.' By that decision, Mrs Christian Craigie Stewart, and Mrs Charlotte Stewart, were held entitled to be served as heirs (conjunctly with the appellant) of John Stewart, as heirs-portioners and of provision under the marriage-contract. Against this interlocutor the appellant presented a reclaiming petition, which was answered by the respondents; and on that the Lords of Session pronounced a second interlocutor, adhering to the decision which had been pronounced.

The question in this case arises on the construction of the marriage-contract entered into by Mr James Stewart of Urrard, in the county of Perth, with a lady of the name of Elizabeth Robertson, dated on the 10th February 1769; and I will shortly state to your Lordships the terms of that contract in contemplation of marriage on which the question arises. (His Lordship then read the clause. See p. 149.)

In a further part of this deed provision is made for an obligation to infeft, and a procuratory of resignation in certain events. Then it proceeds, 'Likeas if a son,' &c. See p. 150.

After the execution of this contract, the terms of which I have stated to your Lordships, this marriage took effect, and Mr Stewart the

father died in the year 1781; his wife, Elizabeth Robertson, survived him, and of course there was no second marriage. The issue of this marriage by Elizabeth Robertson consisted of four sons and four daughters. The three younger sons died many years ago, and left no issue; the eldest son, John Stewart, survived all his younger brothers, and died in September 1818 unmarried. By his death, therefore, the male issue of James Stewart and Elizabeth Robertson became extinct; and as James Stewart, the father, was survived by his wife, there could be no heir-male of a subsequent marriage. The appellant Mrs Elizabeth Stewart, wife of Mr James Richardson, is the eldest daughter of the marriage; and the respondents in this appeal are the other children. April 8. 1824.

The question arises on the construction to be applied to the destinations, as they are called, in this instrument. It is admitted on all hands, that, prima facie, and according to the technical meaning of the terms used in the first destination of this marriage-contract, the respondents are entitled, because the words 'heirs and assignees,' or 'heirs whatsomever,' describe the heirs of line, which character these ladies, in conjunction with the appellant, take; but then it has been contended, that although this is, prima facie, the technical meaning of this destination, that meaning may be restricted by the context, or other parts of this instrument, if it can be clearly shewn that this party intended to use those terms in a more restricted and limited sense; and undoubtedly, my Lords, I apprehend that is a correct statement of the law of Scotland with respect to the construction of instruments; and in this sense it is that the word 'heirs' or the words 'heirs-male,' are terms which in this case, and in other cases, have been by your Lordships treated as flexible terms;—that is, that they have a meaning which is to be applied to them, provided there is nothing in the case to shew that they were meant in a restricted sense; but if so, then, although such be their general meaning, they must be limited and restrained, and therefore the terms used in this case, and in others, have been considered to be flexible. It is also admitted by the learned persons, all of whom pronounced opinions upon this case in the Court below, that although such be the law, you are undoubtedly not to restrain the meaning of terms of this nature by mere conjecture, or upon a notion that, without restraining them, you cannot carry that into effect which you may conjecture would have been the meaning of the party, if he could have foreseen the events which have happened, —the events which raise the question as to the construction of this instrument. And, my Lords, I cannot, I think, state to your Lordships so applicably, or more applicably, what the law of Scotland is, as decided in their Courts, but still more as decided by your Lordships, than by referring your Lordships to what is stated by a noble and learned Lord, the present Lord Chancellor, in the great Roxburghe case, in a most luminous judgment pronounced by him upon that occasion. My Lords, he states the result of the law as laid down in

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a case which has been referred to; I mean the case known by the name of the Linplum case. He states, that the result of that decision was, (which he considered to be most accurate in all its parts), 'that in con-'struing a deed, on 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 these 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 had used; and unless you collect (I think I may safely 'add that, and abstain from going further) that that is not the mean-'ing 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.' And, my Lords, undoubtedly, in considering this case, it is my duty, and my anxious desire, to adhere to that criterion in the construction of this instrument.

Now, my Lords, that being the law, I will once more call your Lordships' attention to the language of this instrument. The first destination is 'to the heirs-male to be procreate betwixt Mr Stewart 'and his wife, and to the heirs and assignees whatsoever of the said 'heir-male in fee.' If it had stopped here, there would have been no question; because undoubtedly the result of that destination would be, that the eldest son of that marriage, John Stewart, would take; and he dying, the estate would descend to those persons who were heirs of line of that gentleman under the destination. The deed then goes on, 'whom failing,'—and, my Lords, I shall, in the course of the observations I shall address to your Lordships, have something to observe on the meaning of those words,— 'whom failing, to the heir-male or 'son to be procreate of the body of the said James Stewart of any 'subsequent marriage, and the heirs of his body;' so, that in this destination he no longer mentions the 'heirs and assignees whatsoever,' which had occurred in the first destination, but he here confines the destination to the heir-male or son of the second marriage, and the heirs of his body, 'whom failing, or if the said heir-male to be procreate 'of the body of the said James Stewart of a subsequent marriage shall 'exist, and afterwards fail by death before he is either married or 'attains to the age of 21 years complete, to the heir-female or eldest 'daughter to be procreate of the intended marriage, and the heirs of 'her body,'—here again he uses the words 'heirs of the body,'—'with-'out division; whom failing, to the next eldest daughter of the intend-'ed marriage, and the heirs of her body; and so on successively while 'any daughter of the intended marriages exists.'

'I stop here for a moment—not that it is very material in the consideration of the present question—to remark to your Lordships, that undoubtedly the word 'marriages' occurs in the plural number. I cannot help thinking, however, that this is a slip, that the letter s got

in there by mistake; for I find in the procuratory of resignation to this deed the word ‘ marriage’ is in the singular number, and one can hardly suppose that, in talking of a second marriage, he would talk of it in this instrument as an intended marriage; the intended marriage was that about to take place with Mrs Robertson; but undoubtedly the word is marriages. I observe in the provisions for younger children there is no provisions for the daughters of the second marriage; all the provisions are for the daughters of the first marriage. Then he says, ‘ whom failing, to the said James Stewart, his own nearest heirs or ‘ assignees whomsoever.’ Now, here again you have the expression ‘ heirs and assignees whatsoever,’ which occur in the first part of this destination. I remark upon this, because I think it shews that the framer of this deed, (and we must consider Mr Stewart, the party entering into this contract, to be acquainted with the terms he uses), was aware of the distinction between heirs and assignees whatsoever, and heirs of his body. But in order to get at the construction which the appellant contends for, you must construe the words ‘ heirs and ‘ assignees whatsoever,’ in the first destination, to mean heirs of the body; because undoubtedly, unless they can be so restricted, the appellant cannot succeed in this appeal. April 8. 1824.

Now, my Lords, I say, when the party has used two distinct sets of terms, one as applied to one set of individuals, and another occurring in almost the next succeeding sentence, as they do in this instrument, it requires, I think, very strong expressions in other parts of the instrument to satisfy any Court, that when he used two distinct expressions, he meant one and the same set of persons; that when he used the words in the first part, ‘ to the heirs-male’ of that mar- ‘ riage, and to the heirs and assignees whatsoever of the said heir- ‘ male in fee,’ he meant heirs of his body, though in the very next destination, when he is contemplating the possibility of a son of a second marriage, he applies different terms, namely, ‘ heirs of the ‘ body;’ shewing in that case he did not mean that heirs-male or heirs of line of that marriage should succeed, but only the issue or heirs of his body.

My Lords,—I find nothing decisive in the other parts of this instrument, though undoubtedly a great deal of ingenuity has been used, yet it does not appear to me, on an attentive consideration of these provisions, that they at all shew that which has been insisted for. If I were to conjecture, I might perhaps say, if this gentleman had been asked, in the event which has happened, do you mean that this estate should go to all your daughters, or only to your eldest daughter? perhaps I might have had a difficulty in making up my mind what would have been his intention, if he could have foreseen the event, but we can only collect his intention from the terms he has used. Now he undoubtedly contemplates, first, that a son may come into being of the first marriage, who may succeed to this estate; in that case he makes portions for his younger children. He then contemplates that,

April 8. 1824. in the event which he has looked to in the previous provisions, it may happen, that an eldest daughter may succeed to this estate alone, as undoubtedly she might, and then he appropriates provisions for the younger daughters; and he looks forward to the events which undoubtedly, in point of order, occur first in the provisions for the younger children,—he contemplates the event of there being no son of the first marriage, or, in the construction put upon it, that, if there were a son, the heirs of the body of that son might subsequently fail, and the son of a second marriage might succeed to the estate; and in that event he has provided portions for the daughters of the first marriage: and it is argued, that it must have been the intention of the framer of this deed, that if there had been a son of the first marriage, and he failed, this estate should go to the eldest daughter, and the younger daughters should be provided for. If I were to speculate what this gentleman intended, if he had foreseen the event, it is difficult to say whether that might not have been his intention; but the question is, whether your Lordships can collect from this instrument such an intention, and that he meant to confine the words to the heirs of the body of the first son; for unless you can do so, it is impossible to arrive at the construction the appellant contends for. But more than that, there follows the words 'whom failing, to the 'heirs-male of the said James Stewart of any subsequent marriage, and 'the heirs of his body;' and it is contended, that the words 'whom 'failing' may apply to two events, namely, the non-existence of a son of the first marriage, or his existence and afterwards failure by death. Undoubtedly, my Lords, those words do apply to both those events; but then we should apply the rule of construction to those words which the appellant seeks to have applied to 'heirs and assignees whatso-'ever,' and see what he meant by the words 'whom failing.' Now, my Lords, in the very next sentence you will see, I think, that he meant by the words 'whom failing,' not both those events, but only the non-existence of a son of the first marriage. I will state, my Lords, the words:—He says, 'whom failing, to the heir-male or son to be 'procreate of the body of the said James Stewart of any subsequent 'marriage, and the heirs of his body; whom failing,'—here you have the same words again, but followed by these remarkable words, 'or if 'the said heir-male or son to be procreate of the body of the said 'James Stewart of a subsequent marriage shall exist, and afterwards 'fail by death before he is either married or attains to the age of 'twenty-one years complete, to the heir-female or eldest daughter to 'be procreated of this intended marriage between the said James 'Stewart and Elizabeth Robertson, and the heirs of her body.' It therefore appears to me tolerably clear, by this expression, that the words 'whom failing,' in the contemplation of the framer of this deed, meant entirely non-existing; because if they had applied to the second event, why does he go on to say, or if the heir-male shall exist, and afterwards fail by death before a certain event? and I observe one of

the learned Judges in the Court below, I think very justly, remarks upon this in the view I have taken the liberty of remarking to your Lordships, as shewing that the words 'whom failing' applied only to the case of a son of the first marriage not existing. April 8. 1824.

My Lords,—If I am right in this view of the case, I say there is nothing in this instrument from whence you can collect, in the language of my Lord Chancellor in the Roxburghe case, that the author of the deed did not intend that that which is the prima facie and obvious meaning of this term should not be applied to it in the event that has happened. A son of that marriage came into existence; he lived (unfortunately in a state of mental incapacity) and then died; and the question is, whether these ladies have not the right to say under this instrument, that, having existed, and having therefore become entitled to this property under this destination, the father being dead, they have now a right as heirs-portioners of that gentleman, in conjunction with the appellant, to claim possession of the estate? and your Lordships will see that there is this inconsistency arising from this construction contended for on the part of the appellant,—the portions are provided for the daughters of the first marriage in case of a son coming into existence and succeeding to the estate; these ladies are clearly entitled in such case to those portions: there is also a provision, that if the eldest daughter shall come into possession of the estate, the younger daughters shall have portions. The construction, therefore, put upon this deed on the part of the appellant is this, that these ladies would be entitled to portions in consequence of the first event contemplated, and would also be entitled to other portions if the appellant succeeded to the estate, which, as it appears to me, is inconsistent with the intention of Mr Stewart the author of this deed. He contemplated an event, by which the estate would belong to one of his children, namely, the eldest son of the first marriage, and in that case he provided portions for the daughters; and I think it is clear that, in this case, the daughters would not succeed to the estate under the destinations of this deed, but would be entitled to the portions; whereas, if the construction contended for on the part of the appellant be a true one, they would be, as I have stated to your Lordships, entitled to two portions.

Then it is said, that he clearly meant to prefer the son of a second marriage to the daughter of the first, and that that intention would be frustrated by the construction sought to be put on the part of the respondents. My Lords, there was a little difficulty in that mode of arguing; for I observe in the papers in the Court below, (nor have they entirely abandoned it in the appeal case before your Lordships), that the construction sought to be put upon these words 'heirs whatsoever' is, that they were not quite so extensive as had been contended for. It is said, he evidently meant to prefer the male line; but your Lordships will see, that the destination to the eldest son and heir-male of the second marriage, is to the heirs of his body,

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undoubtedly to daughters as well as sons; and therefore the daughters of that son would come in preferably to the daughters of the first marriage. Therefore it appears to me difficult to reconcile the construction of this instrument; in the way sought by the appellants, with all those events which might (supposing they had happened) have carried it away from the family of the first marriage; for undoubtedly, under this destination to a son of the second marriage and the heirs of his body, they would have taken before the daughter of the first marriage. It appears to me we are therefore driven into such a wide field of conjecture, that, so far from furthering the intention of the settler, we should more probably frustrate his intentions;—that we should be applying his words to events which he did not contemplate, and which we consider him as contemplating, unless, indeed, we conceive those words were intended to meet every possible contingency.

But then it is said, if the words 'heirs and assignees whatsoever' cannot be construed in the way contended for, still, as in this clause of the instrument, the eldest daughter existing is always to take without division; and as a case has occurred in which those daughters are claiming the estate, the eldest daughter must, by virtue of that provision, take the estate alone, and not with her sisters. My Lords, the succession to the estate must be in the lines which have been provided. If she had succeeded through those lines, then you would have the case for which she contends; but those words apply only to a succession of the daughters under this instrument. Now, here they claim as heirs of provision under this marriage settlement; but how do they claim? in the character of heirs whatsoever of their brother, and in the character as heirs of provision under the marriage settlement; but they do not claim it, if I may use the expression, under the original provision to daughters under the settlement, but as heirs-at-law to the son, and, as such heirs-at-law of the son, now entitled to the estate.

My Lords,—Such are the views I have taken of this case; but I cannot conclude these observations without adverting to topics which have been very forcibly urged at your Lordships' Bar in this case, as well as in others, namely, the danger to the law of Scotland from a decision such as I ask your Lordships to pronounce. In this case the decision of the Court below, proceeding upon the principle I have stated to your Lordships, and professing to adhere most strictly to the law as laid down in the judgment of this House, but expounded at large by the Lord Chancellor in his able and most elaborate judgment in the Roxburghe case;—I say, professing to be guided by those principles, the Court below have decided, that the obvious and technical construction of those words in this case must prevail; because they are unable to discover from the rest of the instrument that it was the intention of the author of the deed, in the events which have happened, to restrict the meaning of those terms: and I observe one of the learned Judges has stated the principle in the same way. It only shews how difficult it is for different minds to apply the same principle to

the same case; for although he states it even more broadly than the Lord Chancellor, that it must appear as clear as the sun upon the whole of the instrument, that the meaning of the author of the deed was that which is contended for by the appellant; yet he thinks that, looking to the whole of this contract, that clearness does appear. The other learned Judges, taking the view of the case which I have, but professing to adhere, as I trust your Lordships will in this and in every case, to former decisions of this House, have come to a different conclusion. But your Lordships are told at your Bar, that to decide according to the judgment of the Court below, will be to introduce obscurity into the law of Scotland, and to throw doubts upon those principles which have been considered as established by the Linplum case, and previous cases. My Lords, I have heard, in the course of my experience in other cases, your Lordships called upon to affirm the judgments of the Court below, and that if your Lordships did not affirm them, you would throw the whole law of Scotland into confusion. Here, my Lords, it is represented, that there would be great danger of introducing obscurity into the law of Scotland by affirming the judgment of the Court below. My Lords, as an individual of your Lordships' House undoubtedly I should regret as much as any man that any doubt should be thrown upon the principles which have already been established in the law of Scotland, and particularly by your Lordships' decisions. Nothing can be more dangerous, and nothing undoubtedly is farther from my object on the present occasion; because undoubtedly my object in this, as I trust in every case in which I shall have the honour of humbly assisting your Lordships in any way, is not only to adhere to former decisions of your Lordships' House, but to enable your Lordships, as far as my abilities will enable me to assist your Lordships, to decide those cases upon principles of Scottish law, divesting myself of the prejudices arising from an education in an English court of justice, and confining myself to the principles to be extracted from the decisions of the Courts of Scotland on subjects of that nature. I trust therefore, my Lords, that nothing which has fallen from me in the course of the observations I have had the honour to make, will throw the least doubt upon the law of Scotland. I take that law to have been most ably expounded by the Lord Chancellor in the Roxburghe case; and it is with that view I have abstained from going through the cases which have been cited at your Lordships' Bar, the most luminous view of those cases having been taken of them in that case, to which I have frequently had occasion to refer your Lordships in the course of the observations I have made.

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My Lords,—Adhering to those principles, applying them to this undoubtedly imperfectly and ill-drawn instrument, yet anxiously applying those principles to this case, I, for one, have not been able to discover in the whole of this instrument sufficient to entitle me to say that there is that 'declaration plain,' that necessary implication, to shew that the author of this deed meant by these terms, 'heirs and assig-

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'nees whatsomever,' any thing different from what is their obvious and technical meaning. When I find him using expressions in a more limited sense, following almost immediately in that destination; when I find him repeating those terms in the final part of this destination; I cannot, for one, understand him to mean, by 'heirs and assignees 'whatsomever,' that which he has expressed in another part of the instrument by 'heirs of the body.' When I find those different expressions used, and that undoubtedly the persona prædilecta was the heir-male of the body; when I find nothing inconsistent with that construction, though any one reading this instrument cannot but see there were events not contemplated by him; I cannot, for one, say what he would have said if he had been asked, If you have a son of the first marriage, and he dies without issue, do you mean that all the daughters should come in without distinction, or one should take without division?—when I cannot find that solved by the declaration of the parties, it appears to me it is the safest course to adhere to the natural construction of those words; by adhering to which construction I am adhering also to the principles on which all these cases must have been decided. I say, my Lords, therefore, for one, if your Lordships should concur with me upon that principle, this judgment must be affirmed; and if your Lordships should be of that opinion, I should humbly move you that this judgment be affirmed.

Appellant's Authorities.—2. Mack. p. 325.; Kilk. 463.; 3. Ersk. 8. 48. and 35.; Kilk. 190.; Buchanan's Trustee, March 4. 1813, (F. C.); Harvie, Dec. 12. 1811, (F. C.); Begg, Jan. 14. 1663, (4251.); Gordon, Feb. 19. and March 4. 1685, (14,849.); Schaw, Nov. 10. 1687, (14,850.); Laws, Jan. 19. 1697, (14,850.); Dickson, Feb. 23. 1697, (14,851.); Stephenson, June 24. 1784, (14,872.); Lord Eldon in Roxburghe cause; M. of Clydesdale, Dec. 16. 1725, (1262.); Kerr, June 23. 1807, (F. C.); Tinnoch, Nov. 26. 1817, (F. C.)

Respondent's Authorities.—3. Mantica, 4.; Baillie, March 26. 1770, (F. C.); Campbell, Nov. 28. 1770, (14,949.); Hay, July 24. 1788, (2315.); Sutties, Jan. 15. 1809, (F. C.); 2. Dict. 369.; Ballantyne, 1687, (3002.)

J. CHALMER—SPOTTISWOODE and ROBERTSON,—Solicitors.

(Ap. Ca. No. 29.)

No. 23. JAMES B. FRASER, Esq. Appellant.—*Shadwell—Murray.*
J. JORDAN WILSON, Esq. Respondent.—*Walker—Matheson.*

Real Burden—Poinding of the Ground—Ameliorations.—Held, (affirming the judgment of the Court of Session), 1. That it is competent to constitute a real burden on lands by a resignation ad remanentiam, effectual against a singular successor; 2. That the creditor in such real burden is entitled to pursue a poinding of the ground; and,