APPENDIX

TO VOLUME VI.

OF

WILSON AND SHAW'S REPORTS

OF

APPEALS TO THE HOUSE OF LORDS.

INDEPENDENT OF THE GREAT AND PERMANENT IMPORTANCE OF THE FOLLOWING SPEECHES, THEIR APPLICATION TO THE CASE OF THE ANNANDALE PEERAGE, NOW BEFORE THE HOUSE OF LORDS, HAS INDUCED THE REPORTERS TO PRINT THEM AS AN APPENDIX TO THE PRESENT VOLUME.

Lincoln's Inn,
24th July 1834.

SPEECHES

OF

THE RIGHT HONOURABLE JOHN LORD ELDON,

LORD HIGH CHANCELLOR.

Delivered in the House of Lords on the 15*th*, 16*th, and* 19*th June* 1809,

in the Roxburghe Causes *.

FIRST DAY, *Thursday*, 15*th June* 1809.

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 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,

* Sir James Norcliffe Innes, Brigadier-General Walter Ker, and Bellenden Ker, 23d June 1807. (Mor. Dec. N. 13, App. voce Tailzie.)

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.

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 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, exeept 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 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; 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 "failzieing 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.

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 under 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 Lordship's 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 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 towns, 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 succeed to the lands, baronies, and utheris above specified, be " virtue of this present bond of tailzie and resignation, and " infeftment following 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 contineu 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 husband 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 succeed to the " lands, baronies, and utheris speciallie and generally above men- " tionat, 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, failed 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 present 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 looking 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 dilecta* 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 dilectæ;* 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 was 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, 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 Lilias, 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 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 caises We have designet nominate and appoynted and " he thir pntts designes nominattes and appointes—" Now, I beg

your Lordships attention to these words, "the imediate next eldest "lawll sones" in the plural number, "of the saidis Johne Lord "Flemyng and Dame Jeane Drumound his lady being ime- "diatelie next in birthe to thair eldest sone and aire ilk ane of them "successive after uyrs To be the persounes wha sall succeed to us "in our sd estate landes baronnies and uyrs abovespectt, They "alwayes mareing and taking to yr lawll spousez the eldest lawll "dochter of the sd Lord Ker our sone being on lyffe and "unmaried for the tyme And they and yr aires maill forsaid of "the said mareadge keipand performand and fulfilland the haill "remanent conditiounes of this pnt nominatioun."

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 imediate next eldest lawll sones of the saides Johne Lord "Flemyng and Dame Jeane Drumound his lady being ime- "diatelie next in birthe to thair eldest sone." 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 alwayes mareing "and taking to yr lawll spousez the eldest lawll dochter of the sd "Lord Ker our sone." 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 un- "maried for the tyme;" and the question, therefore, under any other instrument would be, whether the words, "eldest lawll "dochter of the sd 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 aires-maill," " and " yr aires maill forsaid of the said mareadge keipand perform- " and and fulfilland the haill remanent conditiounes of this 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 befornamit " persouns 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 falzeing of the first the next imediate eldest of the sds " dochters successive after uyrs and yr aires maill lawlie to be " gottine of yr bodies to be the persoune wha sall succeid to us " in our sds landes baronnies erledome and uyrs abovewrn." Here, your Lordships observe, is an express limitation, that the daughters are to take successive; and I mark that as I go along, because the insertion of such an express limitation in this instrument, 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 successive 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 imediate eldest of the sds dochters after uyrs "and yr aires maill lawlie to be gottine of yr bodies to be the "persoune wha sall succeid to us in our sds landes baronnies "erledome and uyrs abovewrn," I think it must have been indisputably clear, that that would have created a succession without the word successive. And I have to call your Lordships attention here to the singular word "*persoune*;" 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 alwayes 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 alwayes mareing and taking to yr "lawll spouss ane gentilman 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 hous of Roxburghe allenarlie in all time yrafter As also "performand the remanent conditiounes of this pntt nominatioun "And falzeing also of all the sdes persounes be deceis or not performance as sd is In that caise we have designit and be thir "pntts designes and appoyntes our narrest and lawll air maill "qtsumever being ane gentilman of the name of Ker of lawll "and honoll descent and the aires maill lawlie to be gottine of his "bodie." 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 hapine the said " Sir William Drummond or ony others of the persounes either " particularlie or generally before namit and thaire aires maill forsds " lawlie to be gottine of yr bodies being maried as sd is or ony " of them to succeid to us in the said estate and living be verteu " of thir pnts That thane and in that caise the samyne persone " sua succeiding and yr 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 thair aires " maill forsaides sall be haldine and obleist to content and pay To " the remanent dochters befornamitt of the said umql Hary Lord " Ker the severall soumes of money afterspectt ilk ane of them " for yr awne pairts as is after devydit to witt give thaire be onlie " ane of them to content and pay to the said dochter the soume " of Fortie thousand merkis usuall money of this realme And give " thaire be only twa of them on lyffe to content and pay to the eldest " the soume of Threttie thousand merkis good and usuall money " forsaid" (Your Lordships will recollect these portions are enlarged in the deed of 1648,) " And to the youngest the soume of " Twentie fyve thousand merkis money And give they be all thrie " on lyffe to content and pay to the eldest the soume of Threttie " thousand merkis usuall money forsd To the second the soume of " Twentie fyve thousand merkis money foirsaid And to the youngest " the soume of Twenty fyve thousand merkis money foresaid and " that sua soune as they sall be of the aige of sexteine zeires" " Providing that in caice it sall happine 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

" maried In that caice" (This I would also draw your Lordships attention to,) " the portioun of the sd dochter sua deceisand sall " returne to our said air and nawayes fall to the rest of the saides ' sisteris yr aires 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 aires 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 I have termed the power of revocation, and which is in these words: " But prejudice alwayes to us at any tyme during our lyfe- " time to discharge reforme alter or renew thir pnts 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, " designandis, nominandis, vel constituendis per ipsum, aliquo " tempore in vita sua, vel ante ejus decessum, per assignationem, " designationem, nominationem, seu declarationem, sub sua sub- " scriptione." 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 ane Noble Erle Johne Earl of Perth and the airis-male lawfully " to be gottin 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: "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 "bodies with their spouses respective 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 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," 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 time to succeed as said is sall marry "and take," to what? to *his* lawful spouse? No: it is "sall marry "and take to *thair* 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 the 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 sirname of Ker "and carry and bear the said arms of the house of Roxburgh In "that caice the person failzier 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 failzeand,"—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 provi-"sions 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 contest, whether it will pass the dignities, as well as the lands, "The right of the said estate sall pertain and belong to "the eldest dochter of the said umq^{l} Hary Lord Ker without division "and y^{r} aires-male she always mareing or being maried to ane "gentilman of honour^{l} and lawful descent wha sall perform the

" conditions above and under written" and then follow these words: " qlkis all failzing and yr sds airis-male to our nearest " and lawful airis-male qtsomever."

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 whatsoever, 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 can take 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 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. 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. Bellenden Ker insists, that the individuals here described, however the description may suit, are not individuals whose rights and interests are affected as heirs of tailzie.

I would now call your Lordships attention to the words, "qlkis all "failzing and y^r^ sds airis-male;" and there are two constructions which have been put upon these words. Upon the part of Sir James Innes Ker, it is contended, that the words, "qlkis all failzing and "y^r^ sds airis-male," 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.

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.

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 daughers, 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 admit, 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 ony utheris our airis of taillie and "provision specially or generally before mentionat or ony of them "to succeed to us in the said estate and living be virtue of thir "pntis That then and in that case the samen persone" in the singular number "sua succeeding and y^r spouses to be joined in "marriage with y^m and y^r airis-male foresaids sall be halden and "obliged 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 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, taille, and provisioune whatsumever, "to ratify and approve the particular letters of prory of resigna- "tioune 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 con- "ditions 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 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

* Johne Leirmount servitor to Johne Leirmount W. S. wrote the most part of the deed 1648, and Alexander Don, clerk of Kelso, wrote the deed of 1644.

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 that 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 Cassils, Lord

" Kennedie, her spouse for their interest, on the other pairt, in " manner, form, and effect, as after 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 hereby 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 lyfetimes of the said Coun- " tess of Cassillis and Countess of Roxburghe *respectivè* living both " together; and failing of a son of the said marriage, 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 taille* 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 said lands and teinds of West Sprouston, 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 Jane 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 Countesses 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 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 Rox- " burghe, Marchionem de Beaumont et Cessfurd, Comitem de " Kelso, Vicecomitem de Broxmouth, et Dominum Ker de Cess- " furd et Cavertoun; dando, concedendo, et conferendo, sicuti " nos, per præsentes, damus, concedimus, et conferimus, in dict. " Joannem Comitem de Roxburghe, ejusque hæredes masculos de " suo corpore, quibus deficientibus, aliquos hæredes, titulo et " dignitate Comites de Roxburghe, per priora diplomata præ- " decessoribus dict. Joannis Comitis de Roxburghe eatenus fact. " et concess. succedere destinat. dictum titulum, honorem, 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, con-"tained 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 infeftments 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 observantiam, seu præstationem, 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* "*hæredes* masculos, illa omni modo obligata nubere, seu nupta

" esse, generoso viro præclari et legitimi stemmatis, qui omnes " conditiones suprascript. perimplebit; quibus omnibus deficien- " tibus, ad præfati quondam Roberti primi Comitis de Roxburghe " propinquiores et legitimos hæredes masculos quoscunque, 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 Roxburghe, my great grandfather's grandfather, " bearing date the 23d of February 1648 years, and by the infeft- " ments following thereupon (*all which heirs of tailzie are held as* " *herein insert and expressed*); which all failing to me, my heirs, " and assignees whatsoever." 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 declared 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 pro- " vided 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 informa-

tion 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 the 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 Roxburghe, 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 trustees named by the Duke 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 the 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 the 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 the trustees could make out, either that neither of these gentlemen were heirs of tailzie, or 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 nobody 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 recommended 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, 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.

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, (though signed on the 15th) of January 1807,* the Court of Session pronounced this interlocutor,

* This judgment having been appealed, the Court of Session, (10th July 1807) in respect of the said appeal, remitted to the macers, with instructions that they suspend in *hoc statu* further proceedings in the said service.

" 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." 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, " and find that the persons called to the suc- " cession under that branch of the destination, beginning with the " eldest daughter of Hary Lord Ker, are heirs of tailzie under the " said entail." 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 the 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, 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 repre-

sented 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 interlocutor, by another of the 23d 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 instruction, that they prefer the claimant Sir James Norcliffe "Innes, heir-male of the body of Lady Margaret Ker, in the fore-"said 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."

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-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 pro-"pinquity; 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 inter-locutor 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 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 their 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 it 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 estate sall " pertain and belong to the eldest dochter of the said umq^{l} Hary " Lord Ker without division and y^{r} aires-male she always mareing " or being maried to ane gentilman of honour^{l} and lawful descent " wha sall perform the conditions above and under written qlkis " all failzing and y^{r} sds airis-male to our nearest and lawful airis- " male qtsomever."

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,

to 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 division" 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 pertain and belong to the eldest dochter of the " said umq^{l} Hary Lord Ker without division and *her* aires-male " she always mareing or being maried to ane gentilman (not in " the plural number) of honour^{l} and lawful descent who sall per- " form 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 pronoun by the antecedent " eldest daughter," for 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 "or being maried to ane gentilman of honourl and lawful descent, "who sall perform the conditions above and under written."—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 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 not 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 1648 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 descrip-

tion. 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 provisions 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 *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, accord-

ing to the true interpretation of this deed, of Lady Jane 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, 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, altho', 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, 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.

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.

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 controul, 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

* Robert Hay *v.* Miss Frances Hay, 24th July 1788, (Mor. Dec. 2,315,) affirmed in House of Lords, 7th April 1789.

putting it, *cædit quæstio.* It would be misspending time to discuss the matter further.

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 decided 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 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 without "division; and that whenever, and as oft soever as the succession, "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 "provision, 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 whole heirs of entail before mentioned, suc-"ceeding in the right of the said lands, annual rents, and others, "shall be obliged to assume and constantly to retain, use, and bear "the surname and designation 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, or 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 construction 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 " descendants," were not, each and every 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 " descen- " dants" 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 contravention " 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 be- " gotten;" 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 " aforesaid" 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 Tweed- " dale, and his ' heirs aforesaid:'" 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 " Tweeddale 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 him- " self in favour of the said Marquis's second son, in the same man- " ner as is here provided if the said Lord Charles Hay had suc- " ceeded upon a contravention 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 no body can doubt that these words " second " son" must mean second 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, tho' 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 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

* See infra, page 79.

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 sufficiently 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 wool-sack 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 doc-

trine 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 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 hæredibus ex ejus corpore masculis*; "and then to C, *et ejus hæredibus masculis; quibus omnibus defi-* "*cientibus, hæredibus dicti Titii, sive primæ personæ masculis qui-* "*buscunque.*" It was contended upon the text of that author, that he meant precisely the same species of heirs under the words "*hære-* "*dibus 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, tho' 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

* Cragii Jus Feudale, L. 11. Dieg. 16. § 19.

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 "repeated in the rights and conveyances whereby any of the heirs "of tailzie shall bruik or enjoy the tailzied estate, the said omission "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 constructon 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 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 in-
" tended 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 alto- " gether 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 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 incontestibly 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 marriage 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 determination that the term was so inflexible. The case of Baillie *versus* Tennant*, upon which the Judges seemed to have

* William Baillie v. Agnes Tennant, 17th June 1766; (Mor. Dec. 14941.) Reversed in House of Lords, 26th March 1770.

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 tne 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 pro- " create 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 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 professes 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.

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 I hereby legate and bequeath to the "respective persons after mentioned, and their heirs, executors, "or assignees." She then gave to her grand-nephew the sum of 1,800*l.* 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 1,800*l.* 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 afterwards added a codicil in these words (her grand-nephew being then with the expedition in Egypt): "If my lovely James Coutts should not come home, what "money I left to him I leave to be divided amongst my nearest re-"lations, plate, and other things, I left to my sister Mrs. Crawford."

It turned out that this nephew, who had returned from Egypt, was lost at sea, on his passage from Harwich to Cuxhaven, 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 1,800*l.*? 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

* Ball, 6th March 1806. See note to Dykes and Boyd, 3d June 1813, F. C.

said, if he did not come home, this sum of 1,800*l.* 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.

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 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 resig-"nation of all and sundry lands, lordships, baronies, &c. to and in

* See additional case for Countess of Sutherland, p. 27.

† Marquis of Clydesdale v. Earl of Dundonald, 26th Jan. 1726; (Mor. Dec. 1262.)

" 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 Cochrane, and the heirs-male law- " fully to be procreate of her body; which failzieing, to Lady " Catharine 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, *fail-* " *zieing 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 as* " *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 *primâ 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 general" 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 Anna, 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.

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 *primâ facie* sense; for they are deprived of that *primâ 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 "aforesaid,"—by the words "herein before no- "minate,"—"herein before provided,"—"called to the succes- "sion,"—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 expreslie provydit that in caise it sall happine ather " the forsaides persounes nominate and designit to succeed to " us, as saidis or the persounes abovenamitt with whom they are " appoynted to matche all ather to be departed this liffe or to be " maried before thes aid successioun fall to them Thane and in " that caise the persounes nominate and being on lyffe being " maried to persounes of honorll and lawll descent to be frie of " that pairt forsaid of the conditioun of the said mariadge and " notwithstanding thairof to succeid to us in maner before " exprest They always keipand observand and fulfilland the " remainent conditiounez befoir and afterspect and na other- " wayes And in caise it sall happine all the foresaides persounes " particularlie before namitt appoynted to succeid to us in maner " forsaid to depairt this lyffe without aires maill lawlie gottine of " yr awne bodies 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."

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 that 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 sicklike it is providit That in caice it "sall happen all the foresaids persons to qm our saids airis of "tailzie respective are appointed by us to be married to depart this "life or be all married before the said airis of tailzie respective "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 persons and airis respective nominate by us in manner "foresaid are hereby declarit be us na ways to amit bot to have "and enjoy the benefit and right of tailzie and succession they "always marrying persons of honourable quality and lawful birth "and withall 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 tó 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 umq^{l} Hary Lord Ker without " division and y^{r} aires-male she always mareing or being maried " to ane gentilman of honour^{l} and lawful descent who sall perform " the conditions above and under written qlkis all failzing and " y^{r} sds airis-male to our nearest and lawful airis-male qtsom- " ever."

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, 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 con-

struing 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 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 " our nearest and lawful heirs-male whatsomever." 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 shews 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 gentle-

man 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, in all probability, any 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 pntis sellis and disponis to our saidis airis of " taillie successors to our said estate living erledom and lordship " foresaid and the airis-male lawfullie to be gotten of their bodyes " always under the conditions restrictions and provisions above " specifiecd qlk are herein halden as exprest (failzeing of airis- " male lawfullie gotten or to be gotten of our awin bodie) all " and sundrie utheris lands heritages annualrents milns woods " fishings patronages tacks and rights of teinds reversions and " otheris heritable rights whatsomever pertaining and belonging " to us And binds and obliges us and our airis als well maile 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-male of our awin bodie as said is) To denude ourselves of " the right thereof To and in favors of our saidis airis of taillie " successors foresaidis 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 the 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 whatso-"ever." 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 liablities 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 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 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 called, 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 probably 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 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.

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 *seriatim* 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.

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 further now, because I am giving the 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 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.