No. 12. 'The Lords find, That the lands and estate contained in the deed of entail 'executed by Mr. Robert Scott Moncrieff, as surviving trustee of the deceased 'Mr. James Smollet, are attachable for the debts contracted by the late Alex- 'ander Telfer Smollet, the heir of entail in these lands, prior to the date of re- 'cording said entail in the register of tailzies; and therefore find that the diligence 'used by the creditors on their debts, is good and effectual against said tailzied 'estate.'

Lord Ordinary, *Armadale.* For the Creditors, *Dean of Faculty Blair, J. H. Mackenzie.*
Agent, *Richd. Mackenzie*, W. S. For Captain Smollet, *J. Clerk, Moncrieff.*
Agent, *Ja. Balfour*, W. S. For Carmichael the Purchaser, *Cathcart.*
Agent, *W. Patrick*, W. S. Clerk, *Scott.*

F. *Fac. Coll. No. 279. p. 629.*

1807. *June* 23.

COMPETITION.—Sir JAMES NORCLIFFE INNES,—BRIGADIER-GENERAL WALTER KER,—AND BELLENDEN KER.

No. 13.
Sequestration of estate in competition.

Construction of doubtful clauses.

SIR ROBERT KER of Cessfurd, was created Earl of Roxburghe, 18th September 1606, by King James VI., with remainder to his heirs-male.

By the predecease of his only son, Hary Lord Ker, the Earl, seeing that his honours would die with himself, obtained from his Sovereign a power to institute a new series of heirs, both to his title and estate; and on the 17th July 1643, he executed a procuratory, resigning his dignities and estates of Cessfurd, &c. into the hands of his Majesty, in order to obtain new grants thereof to himself, and the heirs-male of his body; whom failing, to his heirs and assignees in his option, to be designed, nominate, made and constituted by him at any time in his lifetime, or before his decease, by assignation, designation, nomination or declaration, under his hand-writing, and under the provisions, restrictions, limitations and conditions therein to be contained, and no otherwise.

A deed of nomination was accordingly executed 22d March 1644, by which the Earl calls to his succession certain near relations, under condition that they should marry one of his grandaughters, the children of Hary Lord Ker; and they and the heirs-male of their body form the first branch of the succession. If their marriages should not take place, or if the male issue of them should fail, he next calls his grandaughters themselves, and the heirs-male of their bodies, by any other husbands, of the rank and quality pointed out by him in this clause; 'and failzieing of all the before-namit persounes be deceis or not per- 'formance of the fors[d] conditiounes In that case we have designit and be thir 'pntts designes the saides Lady Jeane Margaret Anna and Sophia Ker our oyes

No. 13.

'and failzieing of the first the next immediate eldest of the sds dochters suc-
'cessivè after uyrs and yr airis-maill lawlie to be gottine of yr bodies to be
'the persoune wha sall succeed to us in our sds landes baronies erledome and
'uyrs abovewrn They always mareing and taking to yr lawll spous ane gen-
'tleman of the name of Ker of lawll and honell descent and yr saides husbands
'and yr aires forsds taking keiping and retaining the said surname of Ker and
'arms of the sd hous of Roxburghe allenarlie in all tyme yrafter as also per-
'formand the remanent conditiounes of this pnt nominatioun.'

Earl Robert had not yet obtained a new charter proceeding upon the procuratory executed by him in 1743. This, however, he obtained on 31st July 1646, and it contained also a *novodamus* of his dignities and estates under the sign manual conceived in terms of the procuratory. Upon this charter, the Earl (6th July 1647) was infeft.

The Earl (10th July 1648) carried into effect the permission obtained from the Crown, (the former nomination being probably considered as ineffectual, for want of a previous power to make it,) by executing a new destination of his dignities and estates. After narrating the procuratories of resignation and charters and infeftments from the Crown, the deed proceeds; 'And we now 'being willing to make the said designation and nomination of the persons to 'succeed to us in our said estate ereldom lordship and living Therefore wit 'ye us of certane knowledge and proper motive to have made nominate de-'clared and constitute and be thir pntis makes nominates declares and consti-'tutes (failzing of aires-male lawfully to be gotten of our awin bodie) upon the 'provisions restrictions and conditions always after specified the persons after 'mentionat in manner after specified to be aires of tailzie to us and successors 'in our said erledom lands lordship baronies titill dignity offices jurisdictions 'patronages and others qtsomever containit in the infeftments pröries and 'otheris richtes and securities generally and specially above-written.' The nomination then proceeds in favour of Sir William Drummond, fourth son of his daughter Jeane Countess of Perth, and the second and younger sons of his grandaughter Jeane Countess of Wigtoun, in their order, 'all of whom and 'the aires-male lawfully to be gottin of their bodies with their spouses res-'pectivè after nominate,' he declares and constitutes to be heirs of tailzie and successors 'to him in the said earldom lands lordship baronies exprest title 'dignity and others above written under the express provisions restrictions and 'conditions after specified.' Then follow various limitations and restrictions regarding their marriages: Among these, he appoints his heir to marry one of his grandaughters, the children of Hary Lord Ker, offering himself first to the eldest, and so on. There are also the usual clauses as to bearing the name and arms of Ker. The deed then contains the following prohibitory clause: 'And sicklyke it is specially providit that it sall not be lawful to the persons 'before designit and the aris-male of their bodies nor to the others aris of tail-'zie above written to mak or grant any alienation disposition or other right

No. 13. 'or security qtsomever of the saids lands lordship baronies estate and leiving 'above specified nor of no part thereof nather zitt to contract debtis nor do 'ony deidis qrby the samen or any part thereof may be apprizit adjudgit or 'evict fra them nor zitt to do any other thing in hurt and prejudice of thir 'pntis and of the foresaid tailzie and succession in haill or in part.' Then succeeds an irritant clause, and next the resolutive clause: 'And in case it 'sall happen the foresaids persons and airis of tailzie respectivè above written 'to failzie in observing keeping and fulfilling of the haill provisions restrictions 'and conditions respectivè above rehearsit and every ane of them in form and 'manner as is particularly before set down In that caise the person or air of 'tailzie sua failzeand and doing in the contrair and the aris-male of his body 'sall amit lose and tyne in all time thereafter the foresaids earldom title dignity 'lands lordship baronies estate and leiving above specified and all benefit and 'right of succession thereto and the samen sall appertain and belong to the 'next person or air of tailzie appointit to succeed in manner foresaid and sua 'forth successivè in caice of several failzies as said is Likeas the person fail-'zier and the airis-male of his body sall be halden and obliest to denude them-'selves *omni habili modo* of the said estate and leiving and to make and grant all 'writts and rights requisit and necessar thereof in favors of the next succeed-'ing person or air of tailzie and his said airis-male of his body qlks failzing in 'favours of the other airis of tailzie respectivè above-written upon the condi-'tions always and provisions respectivè and particularly above exprest.'

Next follows what was termed the second branch of the destination: '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 be-'long to the eldest dochter of the said umqⁱ Hary Lord Ker without division 'and yr aires-male she always mareing or being maried to ane gentilman of 'honourⁱ and lawful descent wha sall perform the conditions above and under-'written Qlkis all failzing and yr sds airis-male to our nearest and lawful 'airis-male qtsomever.'

This is immediately followed by these clauses: 'And mairover it is hereby 'expressly declarit that the airis of tailzie respectivè haveand right and suc-'ceeding to the said estate leiving and dignity sall naways be halden to pay onie 'debtis or perform onie deidis contractit or otherwise done be the person or air 'of tailzie qrunto he sall happen to succeed ather by service and retour or 'be the failzies above written excepting always sick debts as are or sall be 'auchtand be us the time of our decease qrunto our saids airis sall always be 'obleist Quhilks personnes successivè designit be us in manner foresaid and 'under the provisions restrictions and conditions above written and na other-'wise we be thir pntis design nominate and appoint to succeed to us as airis 'of tailzie in our haill lands baronies erledom and others above written con-'tainit in the said pröries and infeftments and in all otheris lands and heritages 'pertaining to us (failing of airis-male lawfully gottin or to be gottin of our

No. 13.

'awin body as said is) and sall be servit retourit enterit and infeft thereintill
'as airis to us sicklike and in the samyn manner as giff they were specially and
'particularly insert in the saidis prŏries and infeftments following or to follow
'thereupon and ordains that the samen conditions provisions and restrictions
'abovewrn sall be ather particularly or generally exprest and set down in the
'service and retour and infeftment to follow thereupon in favor of the saidis
'aires of tailzie respectivè And in caice they sall happen not to be exprest and
'set down thereintill nather generally nor particularly In that caice we will
'and be thir pntis expressly declare that the samen provisions restrictions and
'conditions above specified sall be as effectual as giff they were specially ex-
'prest and set down thereintill And farder we have sauld and disponit and be
'thir pntis sellis and disponis to our saidis airis of tailzie successors to our said
'estate leiving erledom and lordship foresaid and the aris-male lawfullie to be
'gotten of their bodies always under the conditions restrictions and provisions
'above specified qlk are herein halden as exprest (failzeing of airis-male law-
'fullie gotten or to be gotten of our awin bodie) all and sundry utheris lands
'heritages annualrents milns woods fishings patronages tacks and rights of
'teinds reversions and otheris heritable rights whatsomever pertaining and be-
'longing to us and binds and obliges us and our airis als well male as of line
'(failzing of aris-male of our awin bodie as said is) to denude ourselves of
'the right thereof to and in favours of our saidis airis of tailzie successors
'foresaidis always under the provisions restrictions and conditions above spe-
'cified in sik form and manner as sall be devysit.'

Earl Robert soon afterward obtained a parliamentary ratification of this entail. Sir William Drummond, afterward second Earl of Roxburghe, succeeded in virtue of this entail, and married Lady Jeane, Hary Lord Ker's eldest daughter.

In 1729, John, the fifth Earl and first Duke of Roxburghe, executed a disposition and tailzie of his estates, proceeding entirely upon the above deed 1648, with this single addition, that on failure of all the heirs of entail therein nominated, there is a concluding destination to his own heirs and assignees whatsoever.

Robert the second Duke of Roxburghe (12th September 1747,) executed a disposition and deed of entail comprising all the estates in which he stood invested. After narrating the inductive causes of the deed, he dispones 'To
'John Marquis of Bowmont my eldest son, and the heirs-male lawfully to be
'procreated of his body; which failing, to the other heirs-male yet to be pro-
'create of my body; which failing, to the other heirs of tailzie substitute to
'them by the nomination, designation, and tailzie made and granted by the
'said deceased Robert Earl of Roxburghe, my great-grandfather's grandfa-
'ther, bearing date the 23d day of February 1648 years, and by the infeft-
'ments following thereupon, (all which heirs of tailzie are held as herein in-

No. 13. 'sert and expressed); which all failing, to me, my heirs and assignees what-'soever, heritably and irredeemably, All and haill the earldom of Roxburghe, 'comprehending therein all and sundry the lands, baronies,' &c.

This disposition is made under a reservation of the granter's liferent, 'and 'with and under the several provisions, conditions, limitations, restrictions, 'and irritancies hereafter expressed, contained in the said nomination, desig-'nation, and tailzie made and granted by the said deceased Robert Earl of 'Roxburghe, my great-grandfather's grandfather, dated the 23d day of Fe-'bruary 1648 years, and in the infeftments following thereupon.' The different prohibitory, irritant, and resolutive clauses of the deed 1648, are then recited *verbatim*, including the second branch of the destination.

John, Marquis of Bowmont, was the third Duke of Roxburghe, and upon his death, in March 1804, he was succeeded by William, Lord Bellenden, who took up the estate and honours, 21st May 1804, by a special service as heir of tailzie.

Duke William, on 18th June 1803, executed a trust-disposition in favour of Henry Gawler and John Seton Karr, Esquires, of the estate of Roxburghe, for the purpose of paying certain legacies.

He also executed of the same date, a disposition and deed of tailzie of the estate of Roxburghe, in favour of himself, and the heirs of his body; whom failing, to John Gawler, and certain other heirs.

On the 26th September 1804, Duke William disponed to the same trustees the lands of Byrecleugh and others, part of the estate, for the purpose of being sold, to pay certain additional legacies to the Dutchess of Roxburghe, and other persons; also sixteen feu-dispositions, whereby the whole estate, with the exception of the mansion-house of Fleurs, and a few acres of ground around it, is disponed to John Gawler, his heirs and disponees, for payment of certain feu-duties.

Lastly, the Duke, 8th June 1805, executed another tailzie, whereby he disponed the estate directly to John Gawler, and the heirs-male and female of his body; whom failing, to certain other substitutes.

Duke William died 22d October 1805, without issue, and in him failed all the descendants of Sir William Drummond: No descendants of the Wigton family called to the succession existed; so that the first branch of the nomination was exhausted.

Infeftment was taken on the feu-rights in the Duke's lifetime, and upon the deed of entail and trust-disposition immediately after his death.

Brigadier-General Walter Ker of Littledean, asserted his claim to succeed as heir of tailzie under the second branch of the destination, and consequently to exclude both the Trustees and Mr. Gawler, as being heir-male general of Lady Jeane Ker, the eldest daughter of Hary Lord Ker, the son of the first Earl Robert; and also as being the nearest heir-male of the same Earl Robert,

and also to Hary Lord Ker his son, having expede a general service as heir in these last characters. No. 13.

Sir James Norcliffe Innes, Baronet, also claimed the character of an heir of tailzie under the same clause, as heir-male of the body of Lady Margaret, the third daughter of Hary Lord Ker, in virtue of which he maintained his right to exclude both the trustees and Mr. Gawler, as well as General Ker.

General Ker and Sir James Innes took out brieves for ascertaining their character of heir of tailzie; and also raised actions of reduction against John Gawler, now Bellenden Ker, the disponee, as well as against Henry Gawler, and John Seton Karr, the trustees of Duke William, for setting aside the deeds Duke William had granted to their prejudice, and in violation of the limitations of the entail, under which he possessed the estate. Mr. Bellenden Ker also raised an action of reduction, to have the two services expede by General Ker set aside.

Mr. Bellenden Ker and the trustees continued to reside at Fleurs, to the exclusion of the other competitors. General Ker, therefore, presented a petition to the Sheriff of Roxburgh, to be put in possession, while Sir James Innes applied to the Court for having the estates sequestrated.

This was opposed by Bellenden Ker, who contended, that as disponee infeft of the late Duke, and in possession, he is entitled to retain it, as his competitors have yet established no right which can compete with his; for they must first show that one or other of them is an heir of entail, and next, that the late Duke could not make the settlements he has done. In the mean time, the right in his person is *ex facie* good.

The sequestration was opposed by General Ker, on the ground that he was entitled to obtain immediate possession, as by a service he had shewn himself to be heir-male to Hary Lord Ker, and consequently he was the apparent heir of tailzie to the late Duke, to the exclusion of any voluntary disponee, or any other whose right rested on a doubtful construction of words, unascertained by the verdict of an inquest.

The Court did not consider Mr. Bellenden Ker's possession as peaceable, having been disputed the moment the Duke died, and as it was not clear that the Duke could grant any right in his favour, they would not put him in possession; neither did they consider General Ker's claim of possession better founded, as his title of heir-apparent was, on probable grounds, disputed by Sir James Innes; therefore, 17th December 1805, they sequestrated the estates.

In the competition of brieves severally taken out by General Ker and Sir James Innes, there were two heads of inquiry; the first being the descent and pedigree of the competitors in the characters claimed by each; and the second, the construction or interpretation of the settlements under which they respectively claimed the succession. As to the first, one of the competitors, Bellenden Ker, being a direct disponee, had no occasion for any service or proof of

No. 13. propinquity. The other two claimants insisted, each of them, to be served and retoured *in special*, and to be infeft in the estate as heir of tailzie by the investitures; and those claims being contradictory to each other, could not both proceed without a discussion of the points of law, or of construction of title-deeds, &c. in order that it might be determined which of them had the preferable right, supposing their pedigrees to be fully instructed. In these circumstances, it was thought proper that the assessors should report to the whole Court, the debate before the macer-court upon the matters of law and construction, before proceeding in the proof of propinquity, unless in so far as either party might insist to bring forward any evidence, which they might be in danger of losing by delay. The Court accordingly (14th February 1806) remitted to the macers, with an instruction to that effect.

Another question occurred, how far in this competition, Mr. Bellenden Ker and the trustees were entitled to appear, as they did not claim the character of heirs of tailzie and provision, but only, under the title of disponees infeft, claimed the privilege of appearing in the special service, and of opposing every step which was taken to void their right to the estate of Roxburghe. This point was also disposed of by the interlocutor, 14th February 1806, which remitted to the macers, 'to find that they had a title to appear in these services, and to 'be heard for their interest.'

In the reduction brought at the instance of General Ker and of Sir James Innes, of the deeds executed by Duke William, it was maintained,

I. 1. *The clause of destination in a tailzie may come after the limiting clauses, provided it be clear that these are to apply to the whole series of heirs.* 2. *A prohibition against doing hurt and prejudice to the tailzie and succession, is sufficient to prevent an alteration in the order of succession.*

The defenders, on the other hand, insisted, That the destination under which the pursuers claim, is not included within the limitations and conditions of the entail; and, 2*dly*, That these conditions and limitations do not effectually prohibit alterations of the course of succession which is there prescribed, and therefore do not affect the deeds executed in their favour. In support of these defences, they

Pleaded: 1. When conditions and restrictions are intended by an entailer to affect equally all the heirs of destination or tailzie, the constant and invariable practice is to enumerate the whole series of heirs successively in one clause; and to the destination so made, the prohibitory, irritant and resolutive clauses of the entail, are applied in such a manner as to affect them all without distinction. Now, by the form of the deed 1648, the restrictive clauses are introduced immediately after the first nomination of heirs in the estate and dignity; and it is not till after these restrictive clauses have been concluded, that the additional substitution to the estate alone, without the dignity under which the pursuers claim, is inserted. The last class are in this manner completely se-

parated from the first, and they are separated precisely by those clauses which are essentially necessary to protect their right. The first nomination alone the entailer surely meant to protect by the restrictive clauses, which expressly refer to *the persons before designat, the heirs of tailzie above written*, all of which precede the second branch of the destination. The consequence of this must be, that the first class alone are heirs of tailzie; and that the last heir of tailzie, being entitled to hold the estates in fee-simple, (Earl of March against Sir Thomas Kennedy, No. 40. p. 15412.) is at liberty to settle it in any manner he pleases. Now, Duke William is on all hands admitted to be the last heir under the first destination, and as such he had the power of an unlimited proprietor over it. No. 13.

2. But supposing the second branch of the destination equally protected as the first, by the limiting clauses of this entail, the prohibitory clause, according to its natural and technical meaning, without straining or inference from other parts of the deed, does not prohibit deeds in prejudice of the particular order of succession there established. The words are, 'nor to do any other thing 'in hurt and prejudice of thir presents and of the foresaid tailzie and succes-'sion.' The statute 1685, which is the foundation and support of entails, requires, that in order to guard against the three several modes in which they may be defeated, there shall be specific clauses applicable to each of these acts. They are all distinct in their own nature, and must be separately guarded against. General words against defeating or injuring the tailzie will not be effectual against any deeds whatever; Scott Nisbet against Young, November 1763, No. 90. p. 15516. The prohibitions directed against two of the three kinds of deeds referred to in the statute, does not imply the third; Hepburn against Lord Hopetoun, 15th February 1732, (not reported *;) Campbell against Wightman, 17th June 1746, No. 85. p. 15505; Home of Argaty, 8th July 1789, No. 98. p. 15535; and it follows, that general words subjoined to the prohibition of two of the kinds of deeds protected by the statute, will create no effectual prohibition against the third class; Sinclair against Carlowrie, 8th November 1749, No. 22. p. 15382; Bruce of Tillycoultry against Bruce, 15th January 1799, No. 100. p. 15539. The words in the deed 1648, said to import a prohibition against altering the order of succession, are so general, that they apply equally to sales and the contraction of debt, and when taken in connection with the immediate preceding words, they are evidently confined to deeds and acts of the same nature with alienations, debts or burdens on the estate. They exclude deeds in hurt and prejudice of the tailzie and succession, which pre-supposes that the tailzie continues to subsist, but that it suffers prejudice by the thing done. But an alteration of the succession puts an end entirely to the tailzie. The deeds in hurt and prejudice of it, here meant, are the indirect means, which have the same effect as selling and contracting debt, by which the substitute heirs of entail may be disappointed.

* See APPENDIX, PART II. *h. t.*

No. 13. Answered: 1. Various restraints may be imposed on the right and exercise of property; but the statute 1685, which sanctioned and legalized those restraints, required no precise and technical words, the omission of which will be fatal to the entail. The prohibitory, irritant and resolutive clauses, in scarcely any two entails, are found to be the same. It is sufficient that the limitations and conditions are expressed in plain and intelligible language. What has been omitted, even though *per incuriam*, cannot be supplied; but neither an overstrained nor too limited an explanation of what is expressed, ought to defeat the intention of the entailer; and in a question which resolves into a competition among heirs, the same strict rules of interpretation which with creditors and purchasers have been adopted, are never admitted. Now, in the very outset of the deed, the various descriptions of persons whom it was in contemplation to call to the succession, are all, without any discrimination, denominated heirs of tailzie, and successors to the title as well as lands, which applies equally to both clauses of destination. The prohibitory clauses of the entail, though intervening between the two, are sufficiently applicable to both. The restrictive clauses point out what acts are prohibited; but the clauses of destination alone can regulate the classes of persons whom those prohibitions are intended to affect. It is of no consequence whether the restrictions be put before or after the destination of heirs, or partly before and partly after, provided it be clear they are meant equally to apply to all. Now, the second clause of destination expressly declares, that the eldest daughter and her heirs-male 'shall perform the conditions above and under written,' including both such as precede and such as are subsequent; and it lays the burden of the whole limitations upon any person succeeding in virtue of this clause. In Don against Don, 5th February 1713, No. 126. p. 15591. and Lawrie against Spalding, 24th July 1764, No. 140. p. 15612. reference to another deed was sufficient to create an entail. In the future clauses of this deed immediately following this second destination, the whole, without any distinction, are termed heirs of tailzie, in whose favour the tailzie must still be a subsisting deed.

2. In a strict entail, three different things must be expressly prohibited; direct and onerous alienations; indirect alienation, by the diligence of the law, for the payment of debt; and a gratuitous destination to a different series of heirs. The entail must contain some words applicable to each of these three things, and sufficiently descriptive of them; not merely general words: But as no specific words are required by statute, and as no technical formula has ever been adopted in practice, to use such as are distinct and intelligible is all that is requisite. In the present case, the clause of a prohibitory kind, which is completely redundant, with a view either to onerous alienations or to the contracting of debt, is said to be too general to prevent gratuitous alienation of the estate to a different series of heirs. But it plainly imports a prohibition of other things different from sale, and from contracting debt; they are ex-

pressly said to be 'things in hurt and prejudice of the tailzie and succession, 'in hail or in part;' the different members of the clause standing in connection, and in contrast, point out and illustrate the meaning of each. The entailer has shewn his intentions, besides prohibiting sale and contracting debt, to prevent altering the succession, and he has expressed this meaning in words sufficiently precise and intelligible. The words of 1685, 'to frustrate or interrupt the 'succession,' are in all respects synonymous with 'doing hurt and prejudice 'to the succession, in hail or in part;' and the former are in no respect more precise or intelligible than the latter. No. 13.

The Lords (13th January 1807) '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; and find, 'That the persons called to the succession under that branch of the destination, 'beginning with the eldest daughter of Hary Lord Ker, are heirs of tailzie 'under the said entail.'

To which the Court (23d June 1807) adhered, by refusing a reclaiming petition, with answers.

II. 1. *The term Eldest Daughter in a settlement, means eldest daughter at the time the succession opens, and includes the whole daughters in succession.* 2. *Heir-male means heir-male of the body.*

It having been fixed, that the estates of Roxburghe were validly entailed in favour of the branch of the destination beginning with the eldest daughter of Hary Lord Ker, Sir James Norcliffe Innes, in maintaining his right to succeed against General Ker,

Pleaded: 1. In all questions as to the right of succession, a liberal interpretation is to be adopted, to give effect to the intention of the entailer. The words '*eldest daughter*,' when used in a settlement of heritage, are capable of various meanings. They may signify the eldest born, the eldest at the date of the settlement, the eldest at the time when the settlement became irrevocable by the death of the maker of it, or the eldest when the succession opened to the person so described. The last of these was evidently meant here. When a person is appointed, not individually, but as distinguished by some general mark or character, to perform a certain act, or to receive a certain benefit, it is not he who may be in possession of the character at the time when the appointment is made that is understood to be meant, but he who falls under the description when the act is to be performed or the benefit received. Lady Jeane Ker is not specially called, but the eldest daughter of Lord Ker, which cannot be confined to the Eldest Daughter, either at the date of the settlement, or of the entailer's death, but must include the whole four daughters in succession, according to their seniority, the eldest of whom, when the succession opens, will be entitled to succeed; and in case of their death, it must go in like manner to their heirs respectively. But the destination is 'to the eldest

No, 9. 'daughter and *their heirs-male*,' shewing that no one individual daughter was meant to be favoured, but the whole in their order. Further, it 'is the eld-'est daughter, and their heirs-male *without division*,' which must have been unnecessary if Lady Jeane alone was called to the succession, as the destination to her would have implied the exclusion of heirs-portioners. If the succession had opened immediately to Lady Jeane Ker, and she had died without male issue, the second sister would clearly, under this clause, have succeeded, and not the collateral heir-male of the family. Still more, if Lady Jeane had predeceased the entailer without issue male, the second daughter would have taken up the succession, as being then the eldest daughter. The clause seems clearly to be an abridgment of the similar clause in the deed 1644, and abridged, because too little room was left for its insertion; but the words are still clear, sufficiently expressive of the entailer's intention, which was to regulate his succession among his nearest relations and descendants, who would by law have jointly inherited his estates.

2. The destination in favour of the eldest daughter, and their heirs-male, she always marrying 'a person of lawful and honourable descent,' carries the succession to the entailer's grandaughters *seriatim*, and the heirs-male of their body. The expression heirs-male must always signify either heirs-male of the body, or heirs-male whatsoever; it does not specify the one more precisely or naturally than the other. Circumstances must decide whether it be applied to the one or to the other. In all cases where a settlement is made by a person having children or descendants, any doubtful words ought to be construed in such a manner as to prefer those descendants to stranger heirs; Craig, B. 2. D. 16. § 19; Stair, B. 2. Tit. 3. § 58. B. 3. Tit. 4. § 33. In giving effect to ambiguous clauses in settlements, such an interpretation must be adopted as will make the whole deed consistent in itself. No person would call the heirs-male whatsoever of his eldest grandaughter, and then his own heirs-male whatsoever, the persons so successively called being exactly the same. But the clause does not merely call to the succession unconditionally the eldest daughter, and her heirs-male, but adds 'she always marrying a person of lawful descent,' which clearly implies that the heirs-male here mentioned are the issue of this marriage, the heirs-male of her body, who alone are to be forfeited if this condition as to her marriage be contravened: Her heirs-male whatsoever are not to be excluded on this event, since they are not contaminated by it, and they are expressly called immediately after, as the heirs-male whatsoever of the entailer. But the succeeding clauses for regulating the succession to the estates which might be afterward acquired by the entailer, convey these new acquisitions to the same series of heirs as the existing lands, and declare, that the whole are to go to the persons favoured, 'and the heirs-male of their bodies,' fixing distinctly the use here made of the flexible term Heirs-male beyond the possibility of doubt.

No. 13.

Answered by General Ker:

The ancient investitures of this estate, and the feelings of the times, destined the succession to males only; and when this was changed, the departure from the ancient forms was made as slight as possible. Hence, after calling the eldest grandaughter, the male succession was again adopted. For a destination to the eldest daughter cannot be converted into a destination to any of the daughters, or to the four *seriatim*. It can denote only her who was the first born; and the phrase 'without division,' has been used for marking more strongly the entailer's will, that only one of his grandaughters should have an interest in the succession. The eldest daughter is synonymous with Lady Jeane Ker, and any other construction is a new but unauthorised alteration of plain and technical words, and can never introduce the third or any other daughter, and still less their descendants, who are not named in the clause, to the exclusion of those who are. If Lady Jeane had succeeded, this substitution would have been exhausted: Under the character of eldest daughter, she had taken the succession, and if she had died without male issue, her second or third sister could not have claimed the estate in virtue of the destination to the eldest daughter, under which Lady Jeane herself had possessed. The heir-male whatsoever must have succeeded. If the youngest daughters were not substitutes during the lifetime of Lady Jeane, it is inconceivable how they could afterward become substitutes. The words of the clause are not of doubtful meaning; they are plain and technical; they neither require nor admit of construction; they can mean only an individual, and not a class of persons indefinitely.

2. The distinction between the terms heirs-male and heirs-male of the body, has been long recognised; and the destination of every title and estate in Scotland has been extended to collaterals and ascendants, or limited to descendants, as the one or the other is used. There is here a positive grant in plain language to the heirs-male of Lady Jeane, which strictly mean the heirs-male general; Baillie against Tennant, 17th June 1766, No. 46. p. 14941; Hay against Hay, 25th November 1788, No. 56. p. 2315. Now, the technical words Heirs-male, cannot be controlled, because one of the subsequent provisions in this deed, applicable to a remote and contingent event, may seem to be superfluous. Nor ought this important clause, which regulates the succession of the estates then in the family, be interpreted by any subordinate clause, introduced for the sake of such as might afterward be acquired. The opposite rule should be adopted; and in construing a deed of settlement, it is not the probable intention of the testator which alone is to be considered, but what is the meaning of the words he has used. Whatever may be the presumed intention, unless it can be extracted from the words by necessary implication, the rule must be, *Quod voluit non fecit*.

The Lords (6th March 1807) 'remit to the macers, with this instruction, 'That they prefer the claimant Sir James Norcliffe Innes, heir-male of the

No. 13. 'body of Lady Margaret Ker, in the foresaid competition of brieves relative to 'the estates and honours of the family of Roxburghe, and to dismiss the 'brieve at the instance of Brigadier-General Ker.'

And upon advising a reclaiming petition, with answers, (7th July 1807) the Court 'of new remit to the macers, with this instruction, That they prefer 'the heir-male of the body of Lady Margaret Ker in the foresaid competition 'of brieves relative to the estates of the family of Roxburghe, on his proving 'his propinquity; and in that event, to dismiss the brieve at the instance of 'Brigadier-General Ker; and with these explanations, they refuse the desire 'of the petition, and adhere to the interlocutor reclaimed against.'

For Sir James Norcliffe Innes, *Dean of Faculty Blair, Solicitor-General Boyle, Craigie, Campbell, Horne.* Agent, *James Horne*, W. S. For General Ker, *H. Erskine, Gillies, Thomson, Cranstoun.* Agent, *Richard Hotchkis*, W. S. For Bellenden Ker, *Ross, Cathcart, Clerk, Monypenny, Moncrieff.* Agent, *Alex. Goldie*, W. S.

F. *Fac. Coll. No. 285. p. 643.*

*** See a subsequent report, relative to this entail, *infra h. t.*

1807. *June* 23. MACLAINE *against* MACLAINE.

No. 14.
An effectual prohibition against altering the order of succession.

ARCHIBALD MACLAINE of Lochbuy executed, of this date, (31st May 1776,) an entail of his estates, written by himself, containing this prohibitory clause: 'And it is hereby specially provided and declared, that it shall at no rate be 'allowable for the heirs-male to be procreate of my own body, or to any others 'of the heirs of tailzie above mentioned, to sell off or dispose of any part of 'the above lands or estates, nor to contract debt, or to do any other deed 'whereby it may be adjudged or evicted from the succeeding members, or their 'hopes of succession thereto in any measure evaded; and if they do in the contrary, it is declared, in the first place, that the deeds of contravention shall be 'absolutely void and null, and of no manner of strength or effect whatsoever; 'and, in the second place, that the contravener, and the descendants of his 'body, shall, *ipso facto*, forfeit the benefit of the succession to which they are 'called by the present settlement, and the same shall forthwith accresce to the 'next heir in the substitution, who immediately on the back of the contravention, may commence a declarator thereof, and serve heir to the person who 'died last invested with the estate, passing by the contravener without representing him, or being any way liable to fulfil his obligation.'