seats they allotted also for the Advocates, and a portion also to the Writers to the Signet. June 10. 1825.

The appellants stated in their summons, that they had a right to a full, free, and uninterrupted access to the several Court rooms; and concluded, that it ought to be found and declared, that they had an equal right and title with any other class of practitioners to occupy the seats, and that the Faculty of Advocates and Writers to the Signet should cease to prevent them from doing so.

It was stated at the Bar, that the proceedings against the Faculty of Advocates were abandoned.

It has been stated also, that the appellants, as agents employed in conducting causes, ought to have free access to the Courts. But here they are, as a body, seeking to have a place in the Courts allotted to them; or, if that shall not be so done, that the Writers to the Signet should have no place peculiarly allotted to them.

It should be recollected, that regulations of this kind are made, not only for the benefit of the practitioners in the Court, but for the benefit and advantage of the public in general also.

Considering the respectability of the body who are the appellants, I cannot help regretting, that when they found the allotment of seats made, by which they thought themselves aggrieved, they did not make a respectful representation to the Court. I am sure it would have been attended to. Instead of doing this, however, being hurt at the preference which had been given to the Writers to the Signet, they chose rather to bring the question here.

There certainly is, in my opinion, no foundation for making this complaint in this form; and I shall therefore move the affirmance of the judgment.

Appellants' Authorities.— Act of Sed. June 23. 1750; 1672, c. 16. § 31.; Act of Sed. Aug. 10. 1754; Sir Ilay Campbell's Act of Sed. p. 58.; Pitmedden's MS. Books of Sed. p. 68.; Act of Sed. Jan. 29. 1642; Feb. 28. 1662; June 22. 1665; Nov. 3. 1671; Feb. 3. 1685; Dec. 16. 1686; Nov. 6. 1690; 1693, c. 27.; Act of Sed. Feb. 12. 1754; 1540, c. 93.

Respondents' Authorities.—Act of Sed. Feb. 3. 1685; Feb. 12. 1754; June 12. 1760; Aug. 18. 1754; Feb. 23. 1687; June 17. 1746; Nov. 2. 1748; Jan. 28. 1756.

SPOTTISWOODE and ROBERTSON—J. CHALMER,—Solicitors.

SARAH GRAHAME, and Husband, Appellants.—*Shadwell—Stuart.* No. 38.

FRANCIS GRAHAME, Respondent.—*Brougham.*

Clause—Process—Res Noviter.—Found, 1. (affirming the judgment of the Court of Session), That deeds on public record cannot be regarded as instrumenta noviter reperta, so as to entitle a party to found on them under the rule res noviter veniens,

&c. 2. That a clause in a procuratory of resignation, 'that the eldest son, and 'the descendants of his body, shall always succeed preferably to the younger 'sons, and their descendants,' did not alter or qualify a destination in the dispositive clause to heirs-male of the marriage; whom failing, heirs-male of any other marriage; whom failing, heirs-female of the marriage; so as to let in a daughter of the eldest son (his issue male failing) in preference to that eldest son's next brother.

June 14. 1825.

1st Division.
Lord Gillies.

William Grahame of Morphie, having in contemplation to marry Catherine Ogilvie, (who brought and assigned to him 17,500 merks), his father, James Barclay of Ballendarg, by contract of marriage, (1748), containing the fetters of a strict entail, 'with and under the reservations, burdens, provisions, faculties, 'restrictions, and irritancies after written,' gave, granted, and disponed 'to and in favour of the said William Grahame of 'Morphie, his eldest lawful son, and the heirs-male to be pro-'created of the marriage betwixt him and the said Mrs Catherine 'Ogilvie; whom failing, to and in favour of the heirs-male law-'fully to be procreated of the body of the said William Grahame 'of any after marriage; whom failing, to the heirs-female to be 'procreated of the marriage betwixt the said William Grahame 'and Mrs Catherine Ogilvie; whom failing, to the heirs-female 'lawfully to be procreate of the body of the said William 'Grahame of any after marriage; whom also failing, to and in 'favour of Robert Barclay, second lawful son of the said Mr 'James Barclay, and the heirs-male lawfully to be procreated of 'the body of the said Robert Barclay; whom failing, to the 'heirs-female lawfully to be procreate of his body; whom all fail-'ing, to any other person or persons that shall be afterwards 'named and called by the said Mr James Barclay to the suc-'cession of the lands and estate after disponed, and their heirs 'and assignees respectively, in the order he shall appoint,' &c. all and haill the lands of Ballendarg, Little Mill of Forfar, and others. The deed contained procuratory of resignation for new infeftment to William Grahame, and the heirs of taillie and provision; 'but with and under the reservations, burdens, provisions, 'faculties, restrictions, and irritancies after written, which are 'expressly to be inserted in all the charters, retours, convey-'ances, and infeftments of the whole lands before disponed, and 'in all charters thereof,' &c. Then, after reserving James Barclay's own liferent, this provision followed:—'Provided also, as it 'hereby is, and by the charters, infeftments, and other writs to fol-'low hereupon, shall be expressly provided and declared, that the 'eldest son and descendants of his body shall always succeed pre-'ferably to the younger sons and their descendants, and that the

June 14. 1825.

'eldest female and her descendants shall succeed without division, 'and exclude the younger females and their descendants from 'being heirs-portioners.' The heirs, male and female, were then taken bound to bear the name and arms of Grahame, and power was given to make reasonable liferent provisions to spouses, and provisions to younger children, whether male or female. Of this marriage there were two daughters, but no sons. Catherine Ogilvie died, and William Grahame married Wilhelmina Barclay of Almericross. By her he had three sons, Robert, Francis, and James; and two daughters. He died in 1776, and Robert expede a service to him, as nearest lawful heir-male of taillie and provision; and was infeft upon a precept from Chancery. Robert died in 1793, having a son who died in infancy, without any titles having been made up, and a daughter Sarah. Her uncle Francis took out brieves from Chancery, and was duly served heir-male of taillie and provision to his brother Robert, and entered into possession.

After being in possession twenty years, Francis was called as defender in an action of reduction of his service, at the instance of Sarah (having attained majority), who claimed the estates as heir of taillie and provision of her father Robert, under the tailied succession in the marriage-contract 1748, being the descendant of the body of Robert Grahame, and the entail bearing, that 'the 'eldest son and descendants of his body shall always succeed 'preferably to the younger sons and their descendants.' Francis Grahame, in defence, stated, that according to the sound and consistent interpretation of the deed of entail, he was the heir entitled to take up the succession; the word 'descendants,' meaning merely male descendants. The Lord Ordinary found, 'that 'by the settlement in the contract of marriage betwixt William 'Grahame of Morphie and Miss Catherine Ogilvie, under 'which the pursuer's father, the late Robert Grahame, succeeded 'to the lands of Ballendarg and others, as eldest son and heir of 'taillie to his father, the deceased William Grahame, the pur-'suer, upon the death of the said Robert Grahame without issue 'male, was entitled, as his eldest daughter or descendant, to suc-'ceed to the said lands in preference to the defender, the second 'son of the said William Grahame; and therefore, in so far re-'pelled the defences, and sustained the reasons of reduction.' Thereafter, however, his Lordship having ordered informations to the Court, their Lordships altered the interlocutor, sustained the defences, and assoilzied the defender. The pursuer then reclaimed; and the Court, in respect of the importance of the

June 14. 1825. law of the case, ordered a hearing in presence. Counsel being heard,—

**Lord Hermand* observed,—More has been made of this cause than I could have conceived; more than its merits can justify; for the mere recital of the clauses in the appendix, when compared with the authority of Lord Stair, and with the rules of construction laid down by the pursuer herself, brings it to the clearest issue.

The dispositive clause contains the following destination;—(His Lordship then read the clause; see ante, p. 354.)

It is not pretended that there is the smallest doubt as to the meaning of this clause. It is in favour of the heirs-male of the first marriage with Catherine Ogilvie; of the heirs-male of any subsequent marriage; of the heirs-female of the first marriage. William Grahame's heirs-male by a second marriage have, by this clause, a preference over the heirs-female by the marriage between him and Miss Ogilvie.

It is unnatural, perhaps, to alter the regular course of succession founded upon the law of nature, and the general feelings of mankind. But it is congenial with that preference of male succession, incident, as every body knows, to landed proprietors in Scotland. Under that impression, I should not have been surprised if the granter had excluded females altogether. I have seen such settlements, even in the case of a man's own daughters. This deed, however, does not exclude the daughters of the marriage with Miss Ogilvie from all hope of succession; but only prefers the heirs-male of any subsequent marriage to the daughters of that first marriage.

But this is said to have been altered or explained by a clause in the procuratory of resignation. In that view, I lay no stress upon the particular part of the deed where it is inserted, or its want of juxtaposition. But I consider the purpose and object of this relative clause as expressed in itself. The words are, 'And for making the saids infeftments in the lands and others 'before disponed, in the respective events before expressed, 'effectual by resignation,' &c.

Now, what is the way in which this effect is to be produced? According to the pursuer, it is to overturn the deed, by making a relative subordinate clause the instrument of destroying that leading clause which it professes to make effectual.

---

* These are the speeches which were laid before the House of Lords, and which were said to have been revised by the Judges.

But no such harsh language can be applied to this clause. It admits subordination to its chief, nor contains a syllable tending to violate the allegiance it so clearly professes. Let it speak for itself: 'Provided also, as it hereby is, and by the charters, 'infeftments, and other writs to follow hereupon, shall be ex- 'pressly provided and declared, that the eldest son, and the 'descendants of his body, shall always succeed preferably to the 'younger sons and their descendants; and that the eldest female, 'and her descendants, shall succeed without division, and ex- 'clude the younger females and their descendants from being 'heirs-portioners,' &c. There is no contradiction, nor appearance of contradiction, in these clauses. A son is as much a descendant as a daughter; and, since heirs-male are expressly called in the dispositive clause, why set the two clauses at variance, in themselves intelligible and consistent? June 14. 1825.

The clause, indeed, was not very necessary; but may have been introduced to remove some doubt of the granter himself, a half-bred lawyer, who may have heard of the first case of Bargany without understanding it.

'Descendants,' equally applicable to sons, must here be confined to them, on a just construction of the whole deed. For I agree with the pursuer, that the whole deed must be taken together, and a construction adopted which applies to the whole.

Were there any uncertainty, it is removed by the immediately succeeding clause, illustrative of the generic force of the term 'descendants,' as already explained. 'And that the heirs, both 'male and female, and the husbands whom the heirs-female shall 'marry, or to whom they are married at the time of their acces- 'sion to the said estate, and their heirs, shall be holden obliged, 'from that time forward, to assume the surname of Grahame,' &c. This clause is a complete commentary, were one necessary, upon the term 'descendants' used in the former. It is a flexible term, applicable to all descendants, or, according to circumstances, to male or female descendants, as the case may be; and here it must be explained consistently with the leading clause of destination. For it is impossible that the term 'descendants' in the procuratory, should have the effect so as to alter the clause of destination. Were more necessary, look at the clause on the 18th page of the appendix, as pointing out the intention of the granter. It is adapted to the very event which happened, that the heirs-female, even of the first marriage, should be excluded. 'Likeas, in case the succession to the foresaid lands and estate 'shall devolve upon the heir-male to be procreate of the body of 'the said William Grahame of any after marriage, he, with con-

June 14. 1825.

'sent of his said father, binds and obliges him, his heirs and suc-
'cessors, to make payment of the sums after specified to the
'daughters to be procreate of the marriage betwixt him and the
'said Mrs Catherine Ogilvie, at the terms, conform to the divi-
'sions, and in the manner after mentioned.'

It is obvious, that on the footing of the pursuer's argument such a clause was unnecessary, and indeed absurd.

It has been said, that there is no power of giving provisions to daughters, should they have a brother who took the estate; a thing not without precedent, on an idea not always realized, that a brother taking under an entail will not suffer his sisters-german to starve. In fact, however, there is a provision for daughters. For 'full power and liberty' is reserved 'to the said William 'Grahame, and the other heirs and members of taillie above-'mentioned,' to make reasonable provision to their ladies and husbands; and 'to provide their younger children, whether male 'or female, in reasonable portions.'

I would now say a word upon the rules of interpretation laid down by the pursuer, and subscribe to almost all of them, particularly the doctrine of Lord Stair, (B. 4. tit. 46. § 12.) who says, that 'if there be different acknowledgments or declarations by the 'same person, posteriora derogant prioribus, which holds also 'in clauses in the same writ; for the posterior clauses, if they 'agree not with the former, do always qualify, correct, alter, or 'even take off the former, if they do fully contradict the same, 'or be inconsistent therewith; for parties, in forming of writs, 'which ofttimes are very long, are unwilling to alter the whole 'frame, which takes long time and expenses, and therefore do 'rather add posterior clauses not agreeing with the former.' Be it so; but the two clauses, when reasonably considered, do not contradict each other. The procuratory agrees with the dispositive clause, as will be obvious when they are fairly thrown together in one sentence, thus:—'To and in favour of the said 'William Grahame of Morphie, his eldest lawful son, and the 'heirs-male to be procreate of the marriage betwixt him and the 'said Mrs Catherine Ogilvie; whom failing, to and in favour of 'the heirs-male lawfully to be procreate of the body of the said 'William Grahame of any after marriage; whom failing, to the 'heirs-female to be procreate of the marriage betwixt the said 'William Grahame and Mrs Catherine Ogilvie; whom failing, 'to the heirs-female to be lawfully procreate of the body of the 'said William Grahame of any after marriage,' &c.

So far the dispositive clause; and in perfect consistency the procuratory proceeds, 'Provided also, as it hereby is, and by

'the charters, infeftments, and other writs to follow hereupon, 'shall be expressly provided and declared, that the eldest son, 'and the descendants of his body, shall always succeed preferably 'to the younger sons and their descendants; and that the eldest 'female and her descendants shall succeed without division, and 'exclude the younger females and their descendants from be- 'ing heirs-portioners,' &c. June 14. 1825.

Upon this simple statement from the deed itself, unless the granter had two minds at the same instant, not a doubt can remain as to his real meaning.

A procuratory of resignation is a subsidiary clause; but suppose that, as in the case of Gibson of Durie, by a marginal note the clause in the procuratory had been immediately subjoined to the destination in the dispositive clause, and been followed by the clause as to heirs-female, and the obligation for assuming the name and arms,—Is it possible, taking the clauses as constituting one declaration of will, to suppose, that the general term 'descendants' can be applied to heirs-female, who are excluded in the original destination?

If Mr Guthrie, the framer of the deed, had his wits about him, and truly meant an alteration, he must have inserted it in a marginal note. But the case is much weaker as it stands; for the subserviency of the relative clause, admitted in itself, cannot be laid out of view; and the genuine view of the matter is to be found in the speech of a noble and learned Lord, in the Roxburghe case. '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 destin- 'ation to A and his heirs-male, without more;—that you are ap- 'plying 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 indi- 'vidual, and an individual only; but that you are applying your- 'selves to the consideration of a question which arises upon a 'clause consisting of a great many expressions, a great many ob- 'scure 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,

June 14. 1825. '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 ven- 'ture to go the length of saying, that if there has been anywhere 'an opinion that this clause cannot be construed but with refer- 'ence 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.'

The pursuer appealed to the maxim, in dubio pro herede respondendum. True; but the heir of investiture is the favourite of the law; and the investiture of this estate was to heirs-male. By another maxim, doubtful words are to be interpreted contra preferentur. True, in the stipulations of the Roman law—but inapplicable to mutual contracts—and the present deed was a contract of marriage.

The pursuer has been equally unfortunate in her reference to other entails. The first was that of a small laird employing a schoolmaster to make an entail, who, being ignorant of the maxim si sine liberis, inserted a long clause to insure what would have been implied without it. The entail of Kinnaird was drawn by able conveyancers; and were there any thing out of common course, it must be ascribed to their client, who, as observed by Mr Clerk, was not easily led. But there is nothing here of the kind. The destination in the first clause contains an exception; and, with an addition to the substitution, the second clause is precisely the same. It was said, that the clause calling the daughter of the last possessor would exclude the daughter of an eldest son, if he predeceased his father. It certainly would, and though uncommon in so near a degree, it appears highly natural in the more distant; and, if generally adopted, would put an end to the complaints so often made against entails, whereby a peasant may be called to an opulent succession, and daughters, educated to be ladies of rank, reduced to beggary.

To conclude, as well observed by Mr Jeffrey, heir is a generic term, and may be modified into heirs of the body—heirs of a marriage—heirs of investiture—heirs of line—heirs-male. But heirs-male is specific, and exclusive of females. A man may be heir-female; but a woman never can be heir-male.

The expression 'descendants' is equally generic, embracing

heirs-male and female, as called by the deed in which they occur; and the question, if it can be called a question, is simply this, Will an inflexible term yield to one that is flexible? It is the competition of a rod of glass with a bar of iron. The pursuer seeks a contradiction. But I, with the defender, take the whole deed together, and put a rational construction upon it. June 14. 1825.

Lord Succoth.—I am of the same opinion as formerly in this case, which is certainly a question of nicety. One thing perfectly clear, and as to which both parties seem to be agreed, is, that although this is a question arising out of an entail, yet we are entitled, and indeed bound to ascertain the meaning and intention of the maker of the deed, if we can do so. In judging of the import of the deed, it is material to consider whether the two clauses founded on are contradictory. We must find out in the best way we can, from the context and whole clauses, what classes of heirs the maker of this deed meant to call to the succession. The only difficulty, then, which we encounter is, to find clear evidence of what was that intention.

It is sufficiently clear from the dispositive clause, near the beginning of the deed, that if that clause had stood alone, this is a male fee, in favour, first, of the heirs-male of the marriage with Catherine Ogilvie; and secondly, of the heirs-male of any subsequent marriage.

In point of fact, there was no heir-male of the first marriage; but the gentleman at present in possession of the estate, is an heir-male of the second marriage; while, on the other hand, Miss Grahame is an heir-female of that second marriage, being the daughter of the eldest son of the second marriage.

Such is the relationship between the parties; and there is no such question here as has often occurred under other deeds, viz. Whether the term 'heirs-male' may be qualified so as to mean heirs-male of the body, in consequence of some expressions occurring in an after part of the deed, though only the term 'heirs-male' be used in the leading clause of destination; a question which occurred in the Roxburghe case, and was attended with considerable difficulty.

The question in the case before us, is, Whether the term 'heir-male,' employed in the deed, can be so qualified as to bring in heirs-female to the succession?

It is not easy to see how heirs-female should be brought in under a destination to heirs-male. Here, the lady tries to qualify the term 'heirs-male,' which is used in the dispositive clause, by another clause, which is introduced into the procuratory of resignation.

June 14. 1825. And before I go to the particulars of that other clause, and the way and manner in which it bears upon the destination clause, I would observe in passing, that the lady here is not one of the heirs-female who are first called by the destination clause of this entail; for she is not one of the heirs-female of the first marriage, who are called after the heirs-male of the first and second marriages, if there should be such; but she is an heir-female of the second marriage, and is claiming, even in preference to the heir-female of the first marriage. That is the shape in which she makes her claim. I just mention this in passing, because it does certainly strike one as a strange proposition, that she should be claiming the property as heir-female of the second marriage, in preference to the heir-female of the first marriage.

It is needless to advert minutely to the destination in the dispositive clause, as it is perfectly clear. As to the after clause, I agree, that the procuratory of resignation may be a proper part of a deed to bring in any clause that the maker chuses to insert; that he may insert a new clause there, making an entirely different destination from that which he made in the original dispositive clause of the deed. Such a mode of alteration would be very unusual; but there is nothing in point of law to prevent a person from adopting this mode of altering his original intention. And therefore, if I had seen clearly that this after clause, beginning with, 'Provided also,' &c. had contained an express alteration, in clear and unambiguous terms, I would have held myself bound to give effect to it, although certainly contradictory of the first clause. It would have been an awkward way of carrying such an intention into effect; but the clause would have been binding. If an alteration, of the description to which I allude, had been wished for, which is a complete destruction of the original destination clause, and a making of a new destination, care should have been taken to have had the thing done in clear and explicit words, so that there could be no doubt of what was intended. It is, I think, to such a case as the above, that the maxim, as to which we have had so much argument from the Bar, and in the printed pleadings, 'posteriora derogant 'prioribus,' properly applies; and if the present case had been of that description, I would have given effect here to that maxim.

We may either take the case of different deeds, or that of different clauses in the same deed. This last applies to the present question. The plain rule of law is, that in construing any deed of this description, you are to hold the destination clearly stated in the dispositive clause of that deed, to continue through-

out, unless a contrary intention be announced in clear and ex- June 14. 1825.
press terms. We are not to go upon presumptions in such a case.

We have here an odd sort of a clause, in some respects an absurd clause, inserted in the procuratory of resignation, by which it is stated, that 'the eldest son, and the descendants of 'his body, shall always succeed preferably to the younger sons 'and their descendants.' In order to see whether this second clause of the deed alters or qualifies the destination clause in the first part of the deed, it is necessary to attend to the principles upon which we ought to be regulated in such questions. In the first place, it is a clear principle of law, that technical and specific terms, such as occur in the destination clause of this entail, are not to be controlled by terms of a more general and flexible nature. The terms that occur in the destination clause of this deed, are specific, appropriate terms, viz. the 'heirs-male' to be procreated of two marriages. Upon the other hand, what are the terms which occur in the other clause, upon which the pursuer founds? 'That the eldest son, and the descendants of his 'body, shall always succeed preferably to the younger sons and 'their descendants.' The terms here used are, 'the descendants 'of the body of the eldest son.' I think it cannot be disputed, that the word 'descendants' is much more flexible than the term 'heirs-male of the marriage,' in the prior part of the deed. It is quite possible to make the term 'descendants' bend and apply to heirs-male; but the contrary is not possible. The term 'descendants' is of a much more general, as well as flexible nature, than the appropriate and specific term 'heirs-male.' The term 'descendants,' it is admitted, may mean either heirs-male or heirs-female, or it may mean both. It may have either or all these meanings, according to the context and the other clauses of the deed, from which the meaning of the parties must be gathered. It did appear to me, at the time this admission was made by Mr Clerk, (and he made it from necessity certainly), that the admission was decisive of this case. For it appears clearly, from the whole plan of this settlement, and clauses commented on, taking them together, and particularly from looking to the leading clauses of destination, that the testator wished to bring in and favour 'heirs-male.' That being (at least in my apprehension) sufficiently made out, must we not hold, that the word 'descendants,' used in this second clause, means what is consistent with that intention, so appearing from the first and leading clause of destination? If the words can be construed so as to mean

June 14. 1825.

what is consistent with the leading intention, are we not bound to give them that meaning? We must read the word 'descen-'dants,' as if it applied to heirs-male of the eldest son, agreeably to the intention of the parties evinced in the original destination clause. It has been admitted, that the term 'descendants' may mean heirs-male only; and if this be admitted, we have only to have recourse to what appears to have been the meaning of the maker of the deed: In short, upon the principle with which I set out,—that a flexible term of this description must yield to one which has but one determined meaning, we are bound to interpret the term 'descendants' in the manner I have mentioned.

The construction which is put upon the clause by the pursuer, appears to me to make a complete alteration of the destination in the first clause, and not merely a modification or qualification of it. Are we to admit of an alteration of this kind, in so material a particular as this, by implication, if it be possible to avoid it? I apprehend not.

We are told of the probability of Catherine Ogilvie and her friends having laid their heads together, and consulted for the protection of her rights and interest; but if so, is it likely that, looking to the possibility of her husband contracting a second marriage, after she should be in her grave, they would consent, that if there should be no heirs-male, but only heirs-female of the two marriages, the heirs-female of the second marriage should take precedence of the heirs-female of Catherine Ogilvie's own marriage? It is not at all probable they would have been brought to agree to such an arrangement.

If, again, the two adjoining branches of this clause in the procuratory of resignation be considered together, 'Provided also, as it 'hereby is,' &c. 'that the eldest son, and the descendants of his 'body, shall always succeed preferably to the younger sons and 'their descendants; and that the eldest female and her descen-'dants shall succeed without division, and exclude the younger 'females and their descendants from being heirs-portioners,' the term 'descendants,' in the second part of this clause, is to be applied to females, in order to make sense of the clause. All this part of the clause is applicable to females succeeding without division, so that, in the latter part of it, the term 'descendants' can denote females only. If this be a fair interpretation of the second part of this clause, why may we not also apply the term 'de-'scendants' in a limited sense in the first part of it? The word 'descendants,' therefore, must, I think, apply to heirs-male only, in the first part of the clause.

According to the construction which I am putting upon this clause, the whole deed is made consistent; and in construing deeds, it is a most material consideration to make them so, if we can. It is said, that this second clause would be useless according to this construction, because heirs-male are clearly called by the first clause in the dispositive part of the deed. But it may be useless or redundant, according to our notions of the present day, while at the time this deed was written it may not have been considered useless and redundant. There may have been doubts, whether it was not possible, under the destination clause as it originally stood, to bring in a younger son before an elder; and possibly some such doubt may have been in view, as was stated in the case of Bargany. But, supposing it to be a useless clause, it is no very uncommon occurrence to find useless clauses in deeds, which often abound with redundant clauses. Various instances of this are to be found in the excerpts from deeds laid before the Court, which it is sufficient to refer to. June 14. 1825.

Upon the whole, I am of opinion, that the destination in favour of heirs-male is not altered by the subsequent clause inserted in the procuratory of resignation.

Lord Balgray.—This is a deed of entail in a contract of marriage; and in judging of it, we must look to the will and intention of the parties; and if such intention can be discovered, (it matters not in what part of the deed), we are bound to give it effect. After mature consideration of the case, I am come to a different opinion from that which I formerly delivered.

In order to exhaust this case, we must go deeper in our examination of it than has yet been done. We must not only consider the clauses separately, but the relations of those clauses to one another, and the import of the whole deed, as expressing the will of the parties.

It is a general rule, that every dispositive clause is exclusive quoad the disponee; that is, it implies disposition to him only. Here the clause is clear; but it is in favour of the disponees sub modo. It is a modal clause; and in all such clauses, attention must be given to the nature of their modality. That is to say, when a dispositive clause bears to be with and under reservations, burdens, provisions, faculties, restrictions, irritancies,—the disponer must be held to have intended that the property should go to the disponees exclusively, under these reservations, burdens, restrictions, &c. When you come to interpret the posterior part of the deed, unless you can bring it under the modifications of the dispositive clause, you can give it no effect.

June 14. 1825.

In the present case, the dispositive clause proceeds on a narration of the existing investitures. The estate is then said to be disponed 'under the reservations, burdens, provisions, faculties, 'restrictions, and irritancies after written.' When you come to the posterior clause, therefore, you are to consider whether it falls under the description of reservation, burden, provision, faculty, restriction, or irritancy; and if the clause cannot be brought under any of these, the dispositive clause is not affected, and cannot be touched by it.

It is clear you cannot bring the second clause under the terms, reservation, restriction, burden, or irritancy. The words 'provision,' or 'faculty,' can alone be applicable to the clause. A provision, as affecting a dispositive clause, may be either in the shape of an obligation on the disponee, or as a right to a third party. It is never understood to affect the destination, for it would then become a substitution. Is this second clause, then, embraced by the term 'faculty?' A faculty is a power to do something which is reserved to the disponer, or some other party, and implies some exercise of will. It must always have reference to futurity in its operation; and as far as it is not exercised, the deed is not affected.

Taking all these words together, therefore, unless you can bring the second clause under one of these modifications, you do nothing at all, nothing that can affect the destination in the dispositive clause. Thus far, then, as to an exercise of the first clause.

As to the second clause, 'Provided also, as it hereby is, and 'by the charters, infeftments, and other writs to follow hereupon, 'shall be expressly provided and declared, that the eldest son, 'and the descendants of his body, shall always succeed preferably 'to the younger sons and their descendants; and that the eldest 'female, and her descendants, shall succeed without division, and 'exclude the younger females and their descendants from being 'heirs-portioners,' &c. Considering this clause per se, the term 'descendants' makes the difficulty. In its general and comprehensive meaning, it expresses that personal state, natural or civil, which a person has, by being born of a lawful marriage. It is a relative term, and has either mediate, immediate, or more distant relations. It has relation also either to males or females. Only three interpretations are possible under that second destination in the procuratory of resignation: First, the term 'descendants' may mean heirs-male, but not heirs-female; it may mean them both; or it may mean heirs-female, but not heirs-male. These three are

the only possible designations under the term 'descendants.' One of these senses must be taken as to this second clause: Either the most comprehensive one; and then, what does the clause amount to? It is declaratory of the common law; and the term 'descendants' means heirs-general. If, again, the term be taken in a restrictive sense, the clause would form a provision. The second son would come to have a right of preference which did not otherwise exist in his favour. Under the other meaning of the clause, it also becomes a provision; for, in consequence of it, the eldest heir-female gets a right which she has not by common law, nor by the proviso part of the deed. The clause if narrowed, and not taken in its most comprehensive sense, becomes a provision. June 14. 1825.

It is of importance to compare the two clauses together. By the first clause the destination is not ambiguous; but it alters the common law. In the second clause, the destination is ambiguous in terms. If taken in one sense, it corresponds with the first clause. Nothing is provided which is not in the first or destination clause. If, in the first member of the second clause, the word 'descendants' is taken in the whole extension, the destination is the same as at common law, and a provision is taken away which was constituted by the first clause. How is it possible to argue upon that clause as a provisionary clause, which does not so much make a provision as take one away? How, again, can the clause be considered as constituting a burden? It would then resolve into—I give my estate to certain sons, &c. under the burden of not giving it to them. As to a faculty, it clearly is not one. Again, when a person makes a reservation, does he exercise it in the same deed? It is neither a reservation of a faculty, nor a constitution of one. In the second clause, no act of will is exercised. A power is neither reserved to the disponer, nor constituted to others, to do any thing. The second clause, for these reasons, cannot be construed as a modification of the first or dispositive clause.

But, while I say this, a difficulty still remains. Although the second clause may not be a modification of the first, yet it still remains a declaration of will; and then there is still the question, Whether there is an intention and declaration of will so expressed as to alter the original destination clause? Taking the term 'descendants' in one sense, we have seen that the destination of the second clause would be coincident with the destination at common law. The destination in the first clause is not contrary to the destination at common law, though not in terms of it.

June 14. 1825.

We must look to the general rules of interpretation as to deeds of this kind, viz. contracts of marriage with deeds of entail. The rule is, that we should look to the whole deed. The intentions of parties can be expressed only in succession; but in looking for their will and meaning, we must look for it as extended and expressed over the whole deed; and if it be found, it must receive effect from us. If the second clause be a restriction upon the first, it must have effect. If it extend the original clause, it must also have effect. According to the principles of law, if you can make out, from the second clause, the will of the parties to be as affirmed by the pursuer, her case is clear. As to explanation of the second clause by the first, it will not bear you out in this case. It is a good general rule, that the first destination clause should explain other subsidiary clauses. When words used in posterior clauses are ambiguous, the dispositive clause is sometimes had recourse to for an explanation. But the strength of the pursuer's case rested here, that such rule will not apply to contracts of marriage. A principal object of the dispositive clause, is to point out the lands conveyed; and the destination clause, it is clear, may be affected by particulars inserted in the procuratory of resignation.

But I fear, after all, we must resort to general principles of law, applicable to the whole circumstances of the case; and I come now to views which have much weight with me. First, The term 'descendants,' used in the second clause, is a universal term, somewhat analogous in its signification to the word 'heirs;' and it has been admitted by the pursuer's Counsel, that there are cases where 'descendants,' by relative parts of deeds, may be restricted to males or females. It is a universal term, capable of explanation according to circumstances. Secondly, It is a rule of interpretation, that a meaning should be put upon every clause of a deed. If the term 'descendants' had no other meaning than that which is favourable for the pursuer, you would have to attend to and enforce that meaning. But it is capable of another meaning; and therefore, though the decision be not in the pursuer's favour, you give effect and explanation to the term. Thirdly, In the case of dubious clauses, it is a rule to interpret them so as to avoid contradiction. If you take the term 'descendants' in its comprehensive meaning, there will be contradiction in the deed; but if you take the term in its limited sense, the first clause will not be contradicted by the clause in the procuratory of resignation. Farther, What appears ambiguous, is sometimes to be explained by what is less so. If you adopt the

pursuer's interpretation of the second clause, and apply it to explain the first clause, you throw an ambiguity upon the first clause, which, of itself, appears clear of all doubt and ambiguity. In fact, you alter the destination from heirs-male to heirs whatsoever. Can you do that? Would that be a fair construction? By taking the term 'descendants' in one sense, a contradiction between the two clauses is evident; but there is no contradiction if 'descendants' be taken in another sense, which is equally applicable to the term. By taking the word in the sense for which I contend, there appears no inconsistency,—nothing which involves insurmountable obstacles to a rational interpretation of the deed. June 14. 1825.

I confess I find two circumstances weigh strongly with me in this question. One is, the state of the original investitures of this estate; for it is fair to resort to these, even in this question, as there is reference made to them in the deed. They must, therefore, it is to be supposed, have been before the parties, and in their view, when the present deed was framed. It is plain, that were the interpretation of the pursuer to be followed, there would be an alteration of the investiture from heirs-male to heirs whatsoever,—an alteration which it does not seem probable from the deed was intended by the parties. But that circumstance alone would not have been sufficient to influence my opinion, had not my mind been led to what appears to me to be the right rules of interpretation in the present case, and which I have already noticed. There is also a clause which Lord Hermand adverted to, of provision to daughters, which I think would have had no place in the deed, had it been understood that daughters, in the situation of the pursuer, were to succeed to the estate.

Lord Balmuto.—I have no hesitation in saying, I have had no difficulty in forming an opinion on this question. By the first destination contained in the deed, it clearly appears that all parties agreed there should be a male succession. Catherine Ogilvie agreed to give up her daughter's claim to the heirs-male of a second marriage, if there should be no heirs-male of her own marriage. Mr William Grahame married a second time, and had three sons by that marriage. According to the destination, the estate was given first to William Grahame, and the heirs-male to be procreated of the marriage betwixt him and Miss Ogilvie; whom failing, to the heirs-male to be procreated of his body of any after marriage; whom failing, to the heirs-female to be procreated of the marriage with Miss Ogilvie; whom failing, to the heirs-female to be procreated of his

June 14. 1825.

body of any after marriage; whom all failing, to Robert Barclay, &c.

William Grahame's eldest son Robert had one daughter. According to the first destination, failing Robert Grahame, the estate does not go to the pursuer. Miss Grahame, the pursuer, is undoubtedly a descendant of Robert Grahame; and it is contended, that, being so, she excludes, by the clause in the procuratory of resignation, her uncle from the estate. But is it possible to conceive that it was the intention of Miss Ogilvie, when she had allowed her daughters to be passed over in favour of heirs-male of a second marriage, to consent farther, that the daughters of a son of the second marriage should exclude her own daughters? The pursuer is the daughter of a son of the second marriage; and according to the plea which she maintains in the present action, she must exclude the daughters of the first marriage, which is a contradiction of the destination in the first clause. We are called upon to explain this deed, which is expressed in a very confused manner. And considering the whole clauses, and that the estate was formerly vested in heirs-male, I think the defender ought to be assoilzied from the conclusions of the action. Were the pursuer to succeed, in consequence of the term 'descendants' in the clause in the procuratory of resignation, I think the daughters of the first marriage would sustain a great hardship; and the succession take a course against them in a way not contemplated by the framers of the deed under our consideration.

Lord President.—I concur with the whole of your Lordships in thinking, that the interlocutor at present under review should be adhered to. At the same time I may observe, that this is a case in which I have felt considerably perplexed; and I own, that, notwithstanding the original opinion which I formed in favour of the interlocutor, that opinion was at times affected by the arguments of Mr Moncreiff and Mr Clerk. But, after hearing Mr Jeffrey, and turning the matter in my own mind, I adhere to the opinion which I formerly delivered; and I think the defender ought to be assoilzied.

The first thing that must strike us here is, that this is an entail, not made by an unilateral deed, flowing from the mere will and pleasure of the disponer; but is contained in a contract of marriage, where, in so far as intention is to be considered, or to be gathered from doubtful words, you are bound equally to discover the intentions and views of the lady and her friends, as of the husband and his friends. She brought a fortune, which in

June 14. 1825.

those days was considered large; and she and her friends had as good a right to make stipulations as to the succession of the estate, as the gentleman and his friends. The estate, no doubt, was the gentleman's; but it depended upon the lady and her friends to consent to the marriage, according to the reasonableness of the terms proposed as to the succession.

The order of succession originally agreed upon in the dispositive clause, cut off the succession as fixed by the common law; but, at the same time, it is a very natural and a very usual destination, and more frequent than any other to be found in entails. An entail upon heirs-male of a marriage, in the terms of the destination in the dispositive clause of this deed, is the most usual destination in entails and contracts of marriage. But, at all events, such undoubtedly is the fact as to the present deed, that it contains a disposition cutting off the female succession. To that destination both parties had consented. But I admit, that it was in the power of the parties, in any after part of the deed, to modify that destination in particular instances. They might have declared, that if the estate should happen to descend to a certain son, he should hold it in fee-simple. That was competent; or any other provision and modification might have been introduced by a subsequent clause.

One thing is plain, that there can be no entail or settlement without a destination of some kind or other in the dispositive clause. Suppose that the destination in the dispositive clause had been blank, and that the provision stood in the procuratory of resignation, neither of the parties would have succeeded to the estate under that provision. It would have gone to heirs of line; or to the Crown, for any thing I know. Though I believe it is now held, that an estate goes to heirs of line, if descendants of no kind are mentioned.

Therefore the original destination here must stand, unless altered by a subsequent clause which is intelligible and precise. A provision appears afterwards; and if it carry the estate to the present claimant, it makes a very important alteration upon the original destination. The second part of the second clause, which occurs in the procuratory of resignation, it is admitted on all hands, does make an important alteration on the destination in the dispositive clause as to female succession. We are all agreed, that the provision in the procuratory of resignation, 'that the eldest female and her descendants shall succeed without division, and exclude the younger females and their descendants from being heirs-portioners,' limits the general des-

June 14. 1825.

tination to heirs-female in the first clause. The presumption therefore is, that the disponer in like manner meant something by what he inserted in the procuratory of resignation regarding the succession of males. But whether he meant merely to confirm the original destination in the dispositive clause, or intended to make an alteration on it, he does not distinctly say; and that is the question to be determined. He might have inserted in the procuratory of resignation, a destination which, if clearly worded, would have utterly subverted the original destination, and we must have given effect to the destination in the procuratory; and if any person had taken the estate under the first destination, he would have been bound to denude in favour of the heir pointed out by the procuratory of resignation. But the question is, has the disponer said any thing to make us infer that his intention was to alter the original destination? The destination, as governing the general case, it is clear, must stand. How has he limited it? Or, if it be said he has explained it, he has used for the purpose the most ambiguous terms I ever saw employed in my life. He must profess, too, to explain a clause requiring no explanation; for 'heirs-male' are clear terms, and require no explanation. If he professes to limit the original destination, let him take some intelligible and forcible terms for the purpose. The words employed are: 'Provided also, as it here-'by is, and by the charters, infeftments, and other writs to fol-'low hereupon, shall be expressly provided and declared, that 'the eldest son, and the descendants of his body, shall always 'succeed preferably to the younger sons and their descendants; 'and that the eldest female and her descendants shall succeed 'without division, and exclude the younger females and their 'descendants from being heirs-portioners.'

There are two interpretations which we are desired to put upon this clause: first, that the word 'descendants' shall be held to mean the descendants as previously pointed out in the destination; the effect of which is only to make this clause perfectly redundant. It won't, however, make the clause contradictory of the original destination. According to the other interpretation, the term 'descendants' is taken in its loosest and most general meaning, including males and females; the effect of which is to introduce an utter inconsistency and contradiction into the deed; and the redundancy still remains as much as in the other sense. There is a destruction of the original clause, and the redundancy is still left; for it is declared in so many words, that younger sons shall not succeed till after elder sons, which is the clear rule of law, under the previous destination. So that there is as much redun-

dancy in the one case as in the other, and the last superadds positive contradiction, and utter destruction of the destination previously agreed on. Some of the constructions contended for by the pursuer, and put by Mr Clerk, involve suppositions so monstrously absurd, that the parties, if they entertained them, could not be deemed capable of entering into a marriage. June 14. 1825.

I take the rule of construction to be, in the case of a mutual contract, to interpret it in the way most likely to have corresponded with the intention of both parties. Now, as to Mr Grahame and old Mr Barclay, they might readily agree to either of the interpretations, because all the descendants, by whatever marriage, were descendants of their bodies. But Miss Ogilvie had different interests, and therefore might naturally have views; and these, in this question, must not be overlooked. She brought what was considered an ample fortune in those days, eighty years ago. She conceded so far to the prejudices of this family, that she allowed heirs-male of a second marriage to be preferred to heirs-female of her own. But nothing could be more natural or reasonable than for her to object to any clause, the effect of which could be supposed to be, to give a preference over her own daughters, in favour of the daughter of a son of her husband by a second marriage.

I cannot therefore give into the interpretation of this deed which would suppose, that a particular destination, in itself highly reasonable and very common, was stipulated in the first part of the deed, and then directly destroyed by the clause in the procuratory of resignation introducing an order of succession unusual in itself, and very unreasonable, in so far as the lady was concerned. This clause may be redundant according to the interpretation I give to it; but mere redundancies are seen every day in deeds; and, even according to the pursuer's interpretation, redundancy still attaches to the deed. Surely, in the interpretation of the deed, we are bound rather to admit redundancy than inconsistency, which I cannot think the parties had in view. And as to the lady, I cannot think she could consent to a clause of the import contended for by the pursuer. Taking into view, therefore, the nature of the deed, and looking at the whole clauses; considering that, as a mutual contract, the intention of both the parties is to be our guide, if it can be discovered; I am of opinion, that we ought to look upon the clause merely as redundant, and not both as redundant and inconsistent. What had put it into the mind of the inserter, we are not bound now to discover or explain. (Here the Lord President

June 14. 1825.

noticed several instances of singular provisions as to successions, the wisdom of which appeared to him questionable.)

In deciding questions as to succession under entails, we should never look to considerations of hardship. The only way is to let the destination go according to law. For all the reasons which I have stated, I adhere to the former interlocutor.

The Court (20th June 1816) adhered.

The pursuer appealed.

Before, however, the appeal was heard, she discovered in the public records a bond of provision, executed by William Grahame, in favour of his younger children, and a discharge by Francis (the defender) of his proportion; deeds which to the pursuer seemed of weight in supporting her construction of the contract of marriage. She, therefore, with concurrence of Francis Birmingham, whom she had recently married, prayed the House of Lords to 'grant permission to put in an additional 'case, containing those statements, whether in law or in fact, 'which your petitioners are advised are still requisite on their 'part; and to allow the said additional case to be accompanied by 'such appendix as may be in conformity to the standing orders of 'this most honourable House.' The House refused this motion; and being unable, from the standing order of the House, to found on these documents at the hearing, the appellants being 'most 'anxious to be heard on the import of these deeds, and as they 'cannot be heard unless the cause is remitted back to the Court 'of Session in Scotland,' prayed the House to remit, 'with in-'struction to hear parties forthwith farther thereupon, with li-'berty to receive such new allegations and evidence as the occa-'sion may require.' This the House also refused, and ordered the appellants to pay the costs of the day. Then the appellants applied for leave to withdraw the appeal; and the respondent consenting, the appeal was allowed to be withdrawn.

The appellants then petitioned the Court of Session to resume consideration of the cause, which being granted, they obtained a diligence to recover the deeds on which they relied for alteration of the judgments of the Court. Under it, they produced from the public records a bond of provision and discharge; but were unsuccessful in recovering the marriage-contract between William Grahame and Wilhelmina Barclay,—Francis Grahame, the defender, deponing that he had never seen, and knew nothing about it.

June 14. 1825.

The bond of provision bore, that William Grahame, by marriage-contract with Wilhelmina Barclay, had bound and obliged himself, and the heirs-male of the marriage, in the event of there being three or more children of the marriage beside the eldest son, to make payment to the younger children of the sum of L. 3000, to be divided among them; and therefore, in implement of the said contract of marriage, and in virtue of the powers thereby reserved of dividing the same, he bound and obliged himself to content and pay, &c.; 'And if it shall please God to remove by 'death any one of my said four younger children, whether the same 'shall happen before or after my own decease, without issue lawfully procreate of his or her body, and without uplifting and 'discharging, or legally assigning, his or her share of the aforesaid 'sum of L. 3000 hereby appointed to be paid, then and in that case 'it is hereby expressly provided and declared, that the share of 'the child dying as said is shall fall, accresce, and belong to, and 'be equally divided amongst the other three surviving children. 'And if it shall please God to remove the said Robert Grahame, my 'eldest son, without male issue lawfully procreate of his body, in 'which event the succession of my real estate, by the title-deeds 'thereof, shall devolve upon the said Francis Grahame, my second 'son; and in case, at the time of the said Francis Grahame his succession to the said estate, he shall not have received payment, or 'legally conveyed his share of the aforesaid sum of L. 3000; then, 'and in that event, the said Francis Grahame's share aforesaid 'shall fall, accresce, and belong to, and be equally divided amongst 'the other three surviving younger children.' The testing clause bears, 'the word 'male,' in the eleventh line from the top 'of the third page, being delete before subscribing.'

After William's death, letters of inhibition on this bond were raised by Francis, and the other younger children, against their eldest brother Robert; and Francis having received payment of L. 900, his share, granted, on a narrative of the bond of provision, a regular discharge of the amount, 'together with the said 'contract of marriage, bond of provision, letters of inhibition 'raised thereon,' &c.

The appellants, in support of their former arguments, maintained, that these deeds proved that Francis was only to succeed on failure of issue of Robert, and that Francis had signified his acquiescence in that state of the titles, by accepting payment of a provision under the bond containing that limitation. The respondent contended, that the application to be heard was incompetent; that deeds on public record were not noviter venientes

June 14. 1825.

ad notitiam, and therefore could not now be founded on; and that, at all events, a bond executed more than twenty years after the marriage-contract directing the succession, could not alter or qualify the original destination, even if the terms of the bond were more precise and unambiguous than they are.

Lord Hermand observed,—The new production is said to import the opinion of the respondent in favour of the petitioners' claim. I do not think that of consequence at all. Even the opinion of the entailer could not enable me to controul the meaning of the words used. Look to the deed itself. The dispositive words are as clear as can be conceived:—(His Lordship then read the clause, see ante, p. 354.)

Is it possible, by any construction, to cast a doubt upon this, that the heir-male of the second marriage is to be preferred to the heir-female of the first? Does the entailer prefer the heir-male of the first marriage to the heir-male of the second? By no means—'whom failing, to and in favour of the 'heirs-male 'lawfully to be procreated of the said William Grahame of any 'after marriage; whom failing, to the heirs-female to be pro-'create of the marriage betwixt the said William Grahame and 'Mrs Catherine Ogilvie.' There can be no doubt as to the case.

The procuratory of resignation in the same deed is founded upon by the petitioner. I would not quarrel with the disposition, if the two clauses stood contiguous. I allow the deed to be transposed as the petitioner desires. It is to me incredible that two opposite destinations should be in the same deed. There is one destination as clear as the sun, and another which is consistent with it, and yet it is said to overturn the deed. It is impossible for me to conceive such can be the meaning of the granter, or any man of common sense.

The procuratory is for making effectual the dispositive clause —and am I to be told it is to overturn it?—'And for making 'the saids infeftments in the lands and others before disponed, 'in the respective events before expressed, effectual by resigna-'tion,' &c.—Are we to be told, that this subordinate clause is to overturn the clause to which it professes to give effect? Are we to set the clauses a-quarrelling—But they are intelligible and consistent—'Provided also, as it hereby is, and by the charters, in-'feftments, and other writs to follow hereupon, shall be expressly 'provided and declared, that the eldest son, and the descendants 'of his body, shall always succeed preferably to the younger 'sons and their descendants; and that the eldest female and 'her descendants shall succeed without division, and exclude the

'younger females and their descendants from being heirs-por- June 14. 1825.
'tioners,' &c. Did any person ever hear that a male is not a descendant as much as a female? I cannot conceive there is any difficulty in the case. The term 'descendants' applies to males as well as females, and should be explained according to the dispositive clause.

I agree with a passage quoted on the 36th page of the petition: —'But if there be different acknowledgments or declarations by 'the same person, posteriora derogant prioribus; which holds 'also in clauses in the same writ; for the posterior clauses, if 'they agree not with the former, do always qualify, correct, alter, 'or even take off the former, if they do fully contradict the same, 'or be inconsistent therewith; for parties, in forming of writs, 'which ofttimes are very long, are unwilling to alter the whole 'frame, which takes long time and expenses, and therefore do 'add posterior clauses, not agreeing with the former.' Will any one say the two clauses do not agree with each other—that they do fully contradict one another?

On the eighth page of the appendix I read, 'And that the heirs, 'both male and female, and the husbands whom the heirs-female 'shall marry, or to whom they are married at the time of their 'accession to the said estate, and their heirs, shall be holden 'obliged, from that time forward, to assume the surname of 'Grahame, if they were formerly called by another name, and to 'bear the arms of the family of Grahame of Morphie in all time 'thereafter; likeas, that it shall not be leisome nor lawful to, nor 'in the power of the said William Grahame, nor any of the said 'heirs of taillie and substitution before expressed, to alter, in- 'fringe, innovate, or change the foresaid taillie or order of suc- 'cession before set down, nor to do any deed, directly or indi- 'rectly, whereby the same may be changed.' What is the succession before set down? Is it not that pointed out by the dispositive clause? That in the procuratory not only does not overturn, but confirms the terms of the dispositive clause.

Lord Balgray.—I am of the same opinion as to this case.

Lord Balmuto.—There are two questions here. Are the petitioners entitled to found upon the deeds they point at, as res noviter veniens ad notitiam? If they ought to be admitted, are we to allow this new diligence to be granted? I think they are not entitled to found on the deeds as res noviter—nor are they entitled to a new diligence.

This is a male destination, and I think the petitioners' claim unfounded.

June 14. 1825. *Lord Succoth.*—I have some doubt whether the parties, the petitioners, have made out the plea of res noviter veniens ad notitiam—for this deed of provision seems to have been upon record; and the presumption in law is, that they might have known any deeds in the public record.

But I am, at any rate, of the same opinion with all of you who have spoken, that this deed is not of such importance as to make us alter our former opinion.

We formerly went over the grounds of the question fully; and although I have full notes upon the subject, I do not think it necessary to go over the grounds upon which I am of opinion, that the leading clause of the destination of this entail is not to be controlled by the after clause that is to be found in a subsequent part of the deed, in which the word 'descendants' is used, which; by the argument of one party, is said to qualify or alter the original clause altogether. I could never go into that construction, if the subsequent clause could be any way reconciled to the leading clause. 'Descendants' is a flexible term, which may mean either male or female descendants, and if so, you must construe it so as to make it mean the descendant mentioned in the leading or prior clause. In the other way, you make it a very extraordinary deed.

As to the question, whether the present bond of provision is of such importance as to induce us to alter the construction we have put upon the entail, I agree with your Lordships that it is not so—that, in the first place, it is not a deed executed by the proper parties to this entail. Though it may be a bond of provision, executed twenty-four years afterwards by the son of the maker of the entail, and although it may shew his construction of the clause in question, that is not a circumstance of sufficient weight to induce you to adopt the construction, which you would otherwise think was not the proper construction of the destination of the entail.

That being the case, I do not care whether this is res noviter veniens ad notitiam or not. Admitting this, I think our former judgment was right.

Lord President.—I am of the same opinion. Were the proposed production received, I cannot see what effect it could have. The important clause of the destination is not to be controlled by such expressions in a subsequent clause, or by such subsequent interpretation.

Mr Clerk.—Are we to understand your Lordships to decide upon the merits?

Lord President.—Upon both points.

The Court, 29th May 1821, accordingly repelled 'the objection June 14. 1825.
'stated to the competency of the application, and find, that the
'two deeds founded on by the petitioners cannot be received,
'as not being properly noviter veniens ad notitiam; but although
'the same were receivable, and had been received, find, that
'they cannot have any effect on the merits of the question at
'issue; and therefore they refuse the desire of the said petition,
'and adhere to the interlocutor reclaimed against.'*

The pursuer and her husband again appealed.

Appellants.—1. The objection that these deeds cannot be received, as not coming within the rule of noviter veniens, is unfounded. 2. The pursuer is called by the deed before the respondent. The object of the parties to the marriage-contract was, to make a provision in the first place for William Grahame and his issue; and this is apparent from the scheme and structure of the deed, from the express proviso in the procuratory of resignation, and by the bond executed under the power of providing for younger children. A limitation to the heirs-male of the body in the dispositive clause may, by words in the after part of the deed, be extended to heirs-general of the body; and the contrary principle, that a specific clause cannot be altered by a general clause, is unknown to law. Many examples occur of the procuratory of resignation having the effect of subverting or changing the destination in the dispositive clause. In the present case, the procuratory of resignation unquestionably rules the dispositive clause, in so far as it excludes heirs-portioners; and it also rules that clause, by letting in Robert's daughter, as his 'descendant,' before the brother Francis. To say that the word 'descendants' means 'males' only, leads to manifest inconsistencies; for, throughout the clause, it elsewhere includes females as well as males: and the power given by the deed to the heirs of taillie to provide portions for their younger children, is in direct opposition to the reading which would deprive the son in possession of providing for a daughter, if his only child. But, in point of fact, the respondent has claimed and received a portion as a younger child, under a bond which declares that he should not succeed to the estate in question, till a failure of the issue of Robert Grahame, the pursuer's father.

Respondent.—1. To obtain admission for instrumenta noviter

---

* 1. Shaw and Ballantine, No. 39.

June 14. 1825.

reperta, the party producing them must not only have been ignorant of their existence, but must not have had in his power to know of it. But here the deeds now founded on were on the public record, and as much accessible before insisting in the suit, as after final judgment. The appellants are therefore barred from availing themselves of the rule res noviter veniens, for the 'noviter' is awanting. 2. The appellants reach their conclusion by a breach of all recognized rules of construction. The meaning of the term 'heir-male of the marriage' is clear and inflexible, and cannot be so qualified as to mean heir-female of the marriage. But what is held to qualify it? The word 'descendant.' Now, nothing can be plainer than that this word is a flexible term, and must yield to the inflexible. It signifies male and female descendants in the order previously pointed out in the destination clause. A special term cannot be qualified by a general expression. If the reading of the appellants were adopted, the most distinct clause is made inoperative; an effect never permitted, unless every other construction of the alleged qualifying clause fails. The deeds now produced, even if they could in point of form be received, do not strengthen the appellants' case; for the declaration said to be imported by the bond of provision, is not by the maker of the deed, but by a different person, who might have mistaken the meaning of the contract, or might have had some mala fide object in view, and been endeavouring to create evidence to thwart or contradict the true intentions of the entailer. But the terms of the bond are not conclusive; and in dubio, such a construction should be put upon a deed, as may be most favourable to the heir of the former investiture.

The House of Lords ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.

Appellants' Authorities.—3. Stair, 4. 33.; 2. Craig, 17. 11.; Johnston, December 15. 1681; 1. Ersk. 1. 50.; 35. Voet, 4. 4.; Durie, Feb. 28. 1667, (16,927.); 4. Stair, 46. 21.

Respondent's Authorities.—Dundas, March 9. 1810, (F. C.); 4. Stair, 46. 21.; 3. Ersk. 8. 47.; Rowan, Nov. 22. 1775, (11,371.); Johnston, June 10. 1710, (11,351.); Kerr, Nov. 18. 1810, (F. C.); 3. Stair, 5. 12.; 2. Bridgeman, 285.

M'Dougals and Callender—Thomas,—Solicitors.