merits of the case before him would have warranted.

I think we should be exercising our discretionary power under the 75th section wisely if we were to halve the sentence which the learned Sheriff-Substitute imposed. I move your Lordships accordingly.

LORD MACKENZIE—I concur. I think it is only fair to the learned Judge to say that in the remarks he made on the previous occasion on which the suspender was sentenced I have no doubt that he was actuated by a sincere desire to do the best for the accused, because he evidently intended to do no more than what has been often done, not only by judges in the Inferior Court but by judges sitting in the High Court of Justiciary, of warning the accused that if he again appears and is convicted of a similar offence he cannot expect the same leniency. Unfortunately the Sheriff-Substitute did not confine himself to a warning in general terms, but in the report, which is printed, he warned the accused that if he came back into his Court on a charge of this kind he would go to prison for six months.

I agree with what Mr Wark said, that this Court will not readily interfere with a sentence on the ground that it is not exactly the sentence that would seem appropriate, but then we must be satisfied that the judge pronouncing the sentence was really exercising a discretion and felt that he had entire liberty to fix a sentence which was commensurate with the offence of which the accused was convicted or to which he had pleaded guilty.

It appears to me that the Sheriff-Substitute left himself in the unfortunate position of not having any discretion when the accused pleaded guilty to this offence. I think if he had considered, what we are told is the real fact in the case, that no serious injury had been caused, that then he would have seen that the punishment of six months was disproportionate to the offence to which the accused pleaded guilty. One is forced to the conclusion that the reason why the sentence was six months was because the Sheriff-Substitute had bound himself beforehand that if the accused appeared again the sentence must be six months.

LORD ANDERSON—If the Sheriff-Substitute in April had told the complainer that if he reappeared in his Court he would probably get a severe sentence of imprisonment no objection would have been taken to such a warning. But what the Sheriff-Substitute did say is—"On the 14th April, when you were here, I told you publicly and solemnly that if you came back into this Court on a charge of this kind you would go to prison for a period of six months." In my judgment that was an indiscreet pronouncement. The crime charged might have been of the most trivial and technical character, for which a sentence of six months would have been obviously excessive. On the other hand, it might have been an assault of so serious and savage a character that six months' imprisonment was a totally inadequate penalty.

Now the ground of complaint which the complainer makes in this case is just this—that when the Sheriff-Substitute came to sentence this man on his plea of guilty he did not apply his mind to a consideration of the quality of the crime charged at all, but was solely concerned with the redemption of his pledge or promise which he had made in the month of April. It seems to me that that contention is well founded, because reading the quotation from the remarks made by the Sheriff, which are printed, I cannot find any evidence that he applied his mind to a consideration of the quality of the offence which was committed. He was, I am afraid, entirely concerned with the redemption of his promise, and it seems to me that the same sentence would have been pronounced although nothing more had been proved than that the accused had tweaked the lady's ear.

That being so, and the sentence being *prima facie* of a severe character, it seems to me that we are entitled to interfere, and that we have power to do so under section 75 of the Statute of 1908; and I agree that the amendment suggested by your Lordship in the chair is appropriate. I think the Sheriff-Substitute was quite right to send this man to prison. He has a bad record for assaulting people, and in my opinion he committed a serious assault upon this young woman; but six months was probably an excessive sentence, and the one suggested by your Lordship is more appropriate.

The Court suspended the sentence of imprisonment complained of so far only as the said sentence exceeded the period of three months, and restricted the said sentence to one of three months' imprisonment.

Counsel for the Complainer—Constable, K.C.—Duffes. Agents—Warden, Weir, & Macgregor, S.S.C.

Counsel for the Respondent—Solicitor-General (Morison, K.C.)—Wark. Agent—John Prosser, W.S., Crown Agent.

COURT OF SESSION.

Friday, November 14.

FIRST DIVISION.

DICK-LAUDER *v.* LEATHER-CULLY.

Entail — Construction — Destination — Procuratory of Resignation Containing Destination Differing from that in Dispositive Clause.

A deed of entail, dated in 1757, disponed the lands of G. to A (the second son of the entailer) and the heirs of his body, whom failing to B (the third son of the entailer) and the heirs of his body, whom failing to the younger sons of the same family in order and the heirs of the body of each and other substitutes. The

deed of entail, which was made by a person not feudally infeft, then assigned to A and "the other heirs of taillie above written" a procuratory of resignation open to the entailer. The assignation referred to the conditions of the entail, and it went on to provide "that in all cases the heirs-male shall exclude the females, and that the heirs-female shall always succeed without division." A made up a title, and the property continued to be possessed by the heirs of his body. An heir of entail in possession died unmarried survived by three daughters of his immediately younger brother, who had predeceased him, and by a still younger brother. The estate was claimed by the surviving brother, by the eldest daughter of the brother who predeceased, and by the two younger daughters of the predeceasing brother as heirs-portioners. *Held* (1) that the destination in the dispositive clause was modified by the procuratory of resignation to the effect that the declaration in the latter must be read with the destination in the dispositive clause as forming part of it; (2) that the words "in all cases the heirs-male shall exclude females" were not limited in application to a competition between brothers and sisters of the same family, but applied to all cases in which, as in the present, a competition arose between heirs descended from the same *præpositus;* and (3) that the surviving brother of the last heir was entitled to the estate.

Opinions per Lord Skerrington and Lord Cullen that the term "females" was used as equivalent to "heirs-female."

Sir George William Dalrymple Dick-Lauder, Baronet of Fountainhall, *first party*, Mrs Zella Evelyn Dick-Lauder or Leather-Cully, with consent (the eldest daughter of an elder brother of the first party, who predeceased him), *second party*, and Mrs Norma Anne Dick-Lauder or Payne-Gallwey, and Mrs Marguerita Maud Elizabeth Dick-Lauder or Bolster, with consents (the younger sisters of the second party), *third parties*, brought a Special Case to determine questions relating to the succession to the entailed estate of Grange.

By *disposition and tailzie* dated 4th August, and recorded in the Register of Tailzies 9th August, both in the year 1757 (on the narrative that the then deceased James Dick, by a procuratory of resignation dated 18th May 1731, with consent of his father the then deceased William Dick, and his mother Mrs Ann Seton, had made a settlement of the lands and estate of Grange in favour of his father in liferent and his mother in the event of her surviving her husband in security of certain provisions to her, and in favour of the said James Dick himself in fee and the heirs of his body, whom failing his sister Mrs Isabell Dick or Lauder and the heirs-male of her body, whom failing to other substitutes), the said Mrs Isabell Dick or Lauder, heritable proprietor of the said lands and estate, with consent of her husband Sir Andrew Lauder of Fountainhall, Baronet, and her mother Mrs Ann Seton, Lady Grange, disponed the same under the fetters of a strict entail "to and in favour of us the said Mrs Isabell Dick and Sir Andrew Lauder spouses and longest liver of us two in liferent for our liferent use allenarly and after the decease of the longest liver of us two to Andrew Lauder *alias* Dick our second son and the heirs of his body, whom failing to George Lauder our third son and the heirs of his body, whom failing to James Lauder our fourth son and the heirs of his body, whom failing to Archibald Lauder our fifth son and the heirs of his body, whom failing to the other sons successively yet to be procreate between us the saids Sir Andrew Lauder and Mrs Isabell Dick and the heirs of their bodys respectively, whom failing to the daughters already procreate or to be procreate between us successively and the heirs of their bodys respectively, whom all failing to me the said Mrs Isabell Dick my heirs and assignies whatsoever in fee heritably and irredeemably." The said disposition and tailzie contained also the following clause:—"And to the end that the right and title to the said lands and estate of Grange may be formally vested by resignation, charters, and sasines in the person of us the saids Mrs Isabell Dick and Sir Andrew Lauder and of the said Andrew Lauder *alias* Dick and the other heirs of taillie aforesaid according to our several and respective rights of liferent and fee aforesaid I the said Mrs Isabell Dick with consent of the said Sir Andrew Lauder my husband and I the said Sir Andrew Lauder for myself my own right and interest and as taking burden upon me for my said wife and we both with mutuale advice and with consent of the said Mrs Ann Seton Lady Grange hereby assign and make over the before mentioned prōry of resignation granted by the said James Dick with consent of the said deceased William Dick of Grange to the effect that by virtue thereof and of this present conveyance of the samen resignation may be made of the said lands and estate of Grange above disponed as particularly above written and specially contained in the said procuratory and all here holden as again repeated in the hands of the saids deceased William and James Dicks elder and younger of Grange their several and respective immediate lawful superiors thereof in favour and for new infeftments of the samen to be made and granted to us the saids Mrs Isabell Dick and Sir Andrew Lauder spouses and longest liver of us two in liferent for our liferent use allenarly and to the said Andrew Lauder *alias* Dick and to the other heirs of taillie above written substitute to him heretably and irredeemably in fee with and under the burdens reservations conditions provisions limitations and clauses irritant and resolutive underwritten, and which are hereby appoynted to be insert in the instruments of resignation charters and infeftments services and retours to follow hereon and on the said procuratorie hereby conveyed vizt. Providing always that in all cases the heirs male shall exclude the females, and that the heirs female shall always succeed

without division, and that every heir male and female who shall succeed to the said lands and estate shall from thencefurth assume use and bear the name and arms of Dick of Grange."

The Special Case set forth—"3. On the death of the longest liver of the said Mrs Isabell Dick and her husband Sir Andrew Lauder, their second son Andrew Lauder, *alias* Dick, made up his title to the said lands and estate of Grange; and the said lands and estate have been held and possessed by the heirs of his body, in terms of the destination contained in the said disposition and taillie. On 23rd March 1867 Sir John Dick Lauder of Grange and Fountainhall, Baronet, heir of entail in possession of the said lands and estate, died, survived by the following children:—(1) Sir Thomas North Dick-Lauder of Grange and Fountainhall, Baronet, born 28th April 1846: (2) John Edward Arthur Dick-Lauder, Esq., of Huntlywood, born on 28th July 1848, who died on 27th June 1913, survived by the following children, viz., (*a*) the said Mrs Zella Evelyn Dick-Lauder or Leather-Cully; (*b*) the said Mrs Norma Anne Dick-Lauder or Payne-Gallway; and (*c*) the said Mrs Marguerita Maud Elizabeth Dick-Lauder or Bolster. The said children of the said John Edward Arthur Dick-Lauder were born in the above order: (3) the said Sir George William Dalrymple Dick-Lauder, born on 4th September 1852, who has issue John North Dalrymple Dick-Lauder, Major in the Second Indian Cavalry Division: (4) Stair Dick-Lauder, Esq., residing at the Albany Club, Toronto, Canada, born on 4th November 1853: (5) Mrs Margaret Louisa Dick-Lauder or Pole, born on 3rd May 1847, residing at 13 Grosvenor Crescent, Edinburgh, widow of Arthur Charles Pole, Captain in His Majesty's Thirteenth Regiment of Hussars: (6) Mrs Charlotte Ann Dick-Lauder or Hathorn or Head, born on 16th September 1849, wife of and residing with Francis Somerville Head at Pump House Hotel, Llandrindod Wells, Wales: and (7) Mrs Catherine Seton Dick-Lauder or Duckett, born on 16th November 1850, widow of Stuart James Charles Duckett, of Russellstown Park, Carlow, and residing at 13 Grosvenor Crescent aforesaid. 4. On the death of his father the said Sir Thomas North Dick-Lauder was duly infeft in the said lands and estate of Grange as nearest and lawful heir of tailzie and provision. He died unmarried on 19th June 1919."

The first party *contended*—"Under the terms of the said disposition and taillie, heirs male of the body of the said Andrew Lauder *alias* Dick exclude the heirs female of his body in all cases; and that accordingly, as such heir male he is entitled to succeed to the said lands and estate of Grange in terms of the said disposition and taillie."

The second party contended—"That under the said disposition and taillie, there being no heir male of the body of the said John Edward Arthur Dick-Lauder, she is entitled to the said lands and estate of Grange as heir of the body of the said Andrew Lauder, *alias* Dick, mentioned therein, her sisters, the said Mrs Norma Anne Dick-Lauder or Payne-Gallway and the said Mrs Marguerita Maud Elizabeth Dick-Lauder or Bolster being excluded under the provisions that heirs female shall always succeed without division."

The third party contended—"That upon a sound construction of the said disposition and taillie the daughters of the said John Edward Arthur Dick-Lauder, who was the immediate younger brother of Sir Thomas North Dick-Lauder, are entitled to succeed to the said lands and estate of Grange as heirs-portioners."

The *questions of law* were—"1. Is the first party entitled to succeed to the said lands and estate of Grange as heir of taillie and provision under the said disposition and taillie? or 2. Is the second party entitled to succeed thereto as heir of taillie and provision under the said deed? or 3. Are the second and third parties as heirs portioners entitled to succeed thereto under the said deed?"

Argued for the first party—It was unnecessary for this party to maintain that a later clause inconsistent with the dispositive clause would override it, though there was authority for that proposition—Stair Inst., iv, 46, 21; *Grahame* v. *Grahame*, 1825, 1 W. & S. 353, *per* Lord Succoth, at p. 362, and Lord Balgray, at pp. 365 and 368. The true principle of construction was to read the deed as a whole composed of clauses mutually consistent—*Maclauchlan* v. *Campbell*, 1757, M. 2312; *Ker* v. *Innes*, 1810, 5 Pat. 320; *Grahame* v. *Grahame* (*cit.*) Here there was no inconsistency between the dispositive clause and the procuratory of resignation. That procuratory was an indispensable part of the deed; the dispositive clause contained no obligation to infeft, and the procuratory alone was the means of obtaining the feudal title upon the deed. The procuratory was one of the conditions expressly referred to in the dispositive clause as being conditions of the conveyance. The dispositive clause was not exhaustive in specifying the line of succession; the procuratory more particularly specified that line. Such a method of construction was quite legitimate even in a deed of entail—M'Laren, Wills and Succession, pp, 453 *et seq.*; *Orr* v. *Mitchell*, 1893, 20 R. (H.L.) 27, *per* Lord Watson, at pp. 29, 30, and 31, and Lord Herschell, L.C., at p. 32, 30 S.L.R. 591; *Shanks* v. *Kirk Session of Ceres*, 1797, M. 4295; *Maclauchlan* v. *Campbell* (*cit.*); *Sutherland* v. *Sinclair*, 1801, M. *voce* Tailzie, App. No. 7, 1 Ross' L.C., 45; *Forrester* v. *Hutchison*, 1826, 4 S. 824 (N.E. 831); *Grahame* v. *Grahame* (*cit.*); *Halliday* v. *Maxwell*, 1802, 4 Pat. 346, *per* Lord Eldon, L.C., at p. 355. The meaning of the procuratory was that heirs male should exclude heirs female in every case where within a *stirps* a competition arose between an heir-male and an heir-female. The construction was consistent with the general object of the deed. The construction contended for by the second party, viz., that the preference of heirs

male was limited to a competition between members of the same family, rendered the first part of the clause superfluous, and was inconsistent with the words "in all cases." It was unnecessary to argue that the heirs-male of a later *stirps* would on this view exclude the heirs-female of Andrew Lauder. *Carnegy* v. *Joseph*, 1915 S.C. 490, *per* Lord Guthrie at p. 496; approved, 1916 S.C. (H.L.) 39, *per* Lord Buckmaster, L.C., at p. 42, Viscount Haldane at p. 46, Lord Dunedin at p. 49, Lord Atkinson at p. 52, and Lord Parker at p. 54, 52 S.L.R. 370 and 53 S.L.R. 26 was distinguished on the only point analogous to the present. The result was that the preference of heirs-male in the dispositive clause stood, but it was qualified by the terms of the procuratory.

Argued for the second party—It was not possible to contradict the dispositive clause by a subordinate clause, but it was admissible to explain the dispositive clause if of doubtful meaning or to supply omissions in it from a subordinate clause—*Orr's* case (*cit.*); *Grahame's* case (*cit.*); *Halliday's* case (*cit.*). Heirs-portioners were excluded by the procuratory, for it prohibited divided succession and they necessarily succeeded by division. Heirs-portioners were excluded *ex lege* from indivisible subjects—Stair, iii, 5, 11—and no technical terms were required for their exclusion—*Leny* v. *Leny*, 1860, 22 D. 1272, *per* Lord Deas at p. 1307; *Farquhar* v. *Farquhar*, 1838, 1 D. 121, *per* Lord Cunninghame at p. 125. The words in the clause prohibiting division were sufficient to show an intention to exclude them. With regard to the preference for heirs-male over females in all cases, those words were ambiguous but the dispositive clause was clear to the effect that heirs-male were to take; that clear provision could not be innovated upon as the first party desired to do by an ambiguous procuratory. The second party's contention was that the words meant that in a competition between members of the same family males excluded females. That construction was what would have been implied by law even if the words had not been there, but that was not a sufficient ground for rejecting it—*Carnegy* v. *Joseph* (*cit.*)—and further it was the only construction which was consistent with the dispositive clause. The result was that, heirs-portioners being excluded, the second party as eldest daughter of John Dick-Lauder was entitled to the estate in question.

Argued for the third parties—Nothing turned on the fact that there was no obligation to infeft and merely a procuratory of resignation; that procuratory was not necessary to the obtaining of a feudal title; the title could have been completed by adjudication even if there had been no procuratory—Menzies' Lectures on Conveyancing, 4th ed., p. 778. The dispositive clause was the ruling clause, so long as it was not ambiguous it could not be modified or controlled by any of the subordinate clauses—Bell's Prin., sec. 760; Bell's Lectures on Conveyancing, 3rd ed., p. 586; Menzies' Lectures on Conveyancing, 4th ed., p. 505; M'Laren, Wills and Succession, p. 457; Duff on Deeds, pp. 342 and 343; Duff on Entails, pp. 22 and 24; *Shanks'* case (*cit.*); *Forrester's* case (*cit.*); *Orr's* case (*cit*); *Chancellor* v. *Mosman*, 1872, 10 Macph. 995, 9 S.L.R. 646. Here the dispositive clause was quite clear; it was in favour of the heirs of the body of Andrew Lauder. Those were technical terms of fixed meaning and not open to construction. But while an ambiguous or faulty dispositive clause might be construed or supplemented by a clear subordinate clause, conjecture was not permissible in construing a deed of entail, and hence, even if the procuratory had formed part of the dispositive clause, it could not have been used to qualify or supplement the leading provision of the dispositive clause, for the procuratory was of uncertain meaning. The words "in all cases" might mean universally throughout the whole succession or only in every case of a competition between members of the same *stirps* or between members of the same family. The words "shall exclude females" also raised similar questions of construction. So did the words "shall succeed without division," for they did not specify which female was to succeed to the undivided whole. *Leny's* case (*cit.*), at p. 1287, and *Farquhar's* case (*cit.*), *per* Lord Corehouse at p. 127, showed that a provision that the succession should be without division was not enough to exclude heirs-portioners. The first party's contention that females meant heirs-female was unsound, for in close proximity to the word females the term heirs-female was used, and consequently "females" must have meant something different from heirs-female. Further, the first party's argument involved an unnatural construction of the words "in all cases." *Halliday's* case (*cit.*) was opposed to *Grahame's* case (*cit.*) and was distinguished, for the subordinate clause was held to limit a destination in favour of heirs whatsoever. In *Sinclair's* case (*cit.*) an obvious mistake in the dispositive clause was corrected by reference to another clause. It was admittedly possible to modify or supplement the destination by means of a procuratory of resignation or precept of sasine, but the present was not a case for such a procedure, which was only competent when the alteration in the subordinate clause was intelligible and precise—Sandford on Entails, 2nd ed., pp. 71 and 84; *Ker* v. *Innes* (*cit.*), *per* Lord Eldon, L.C.; *Grahame* v. *Grahame* (*cit.*), *per* Lord President Hope at p. 372; *Macgregor* v. *Brown*, 1838, 3 S. and M'L. 84; *Edmonstone* v. *Edmonstone*, 1771, 2 Pat. 255. *Carnegie's* case (*cit.*), *per* Lord Buckmaster, L.C., showed the preference given to the dispositive clause.

At advising—

LORD PRESIDENT—I have had the advantage of reading the opinions about to be delivered by your Lordships. With these opinions I entirely concur.

LORD MACKENZIE — The result of the authorities on the question of the construction of this deed of tailzie is that the whole deed must be read, and that the dispositive clause may be explained by the other clauses in the deed. If the words in the

dispositive clause are open to construction they must be construed with reference to what is contained in the procuratory of resignation. The cases of *Halliday* (1802), 4 Paton 346, and *Grahame* (1825), 1 W. & S. 353, are conclusive authorities to this effect, the judgment of Lord Eldon in the case of *Halliday* v. *Maxwell* containing this passage—"The appellant went too far when he argued that the dispositive clause was the sole and only part of the deed which could regulate the succession of the estate to the different description of heirs who were entitled to succeed. And the respondent, perhaps, went nearly as far wrong in arguing that the procuratory of resignation was the only part of the deed which could be required to regulate the succession, and that every other part of the instrument must bend to the procuratory, however widely they might differ from it. It rather appears, however, that the one may be examined and explained by the other, or by different clauses in the same deed; and if, upon the whole, the real intention of the granter can be rationally collected, without violence to any part of it, *that* is the sound rule to be adopted by your Lordships."

In *Grahame* v. *Grahame* the judgment was "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." Although this was the conclusion at which the Court arrived, Lord Succoth stated the principle thus—"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 the deed meant to call to the succession. The only difficulty then which we encounter is to find clear evidence of what was that intention." Further on, at p. 362, the same Judge says—"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 chooses 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."

The substantial question is what construction ought to be put on the destination to "Andrew Lauder *alias* Dick, our second son, and the heirs of his body," and the rest of the dispositive clause, when followed by the words which occur in the procuratory of resignation, "providing always that in all cases the heirs-male shall exclude the females and that the heirs-female shall always succeed without division." The words in the procuratory may be read along with those in the disposition without destroying the meaning of heirs of the body of Andrew Lauder. It is not necessary to construe the language in the procuratory as bringing in anyone who is not an heir of the body of Andrew Lauder, or excluding anyone who is. The rival contentions are, on the one hand, that the procuratory does add to and explain the dispositive clause, on the other that it adds nothing and is mere surplusage. The construction which gives effect to the whole language of the deed appears to me to be the one that ought to be preferred. The words in the procuratory which require construction are "in all cases." There are three possible views—(1) that the universality of the expression ought to receive literal effect, which would mean that heirs-male should exclude the females (whatever the meaning of "female" may be) throughout the whole succession; (2) that heirs-male should exclude the females in every case where the succession opens to heirs of the body of Andrew Lauder; and (3) that the heirs-male in each family should exclude the females. Of these views I am of opinion that the second, which is the contention of the first party, gives effect to the deed as a whole. The words "in all cases" are no doubt very wide, and the construction I am prepared to adopt does limit their universality. But they ought to be read so as to harmonise with, not to contradict, the dispositive clause. Unless they are limited in the manner proposed, then the heirs-male of George Lauder would be brought in before the heirs of the body of Andrew Lauder were exhausted. This is not possible consistently with the direction in the dispositive clause that the heirs of the body of George Lauder are only to succeed failing the heirs of the body of Andrew. This means that the whole of the heirs of the body of Andrew must be exhausted before any heir of the body of George can take. I therefore think the first party was well advised not to argue for such a construction. I reject the construction that "in all cases" is to be limited to the opening of the succession *intra familiam*, and that for two reasons, first, because it does not give effect to the wide terms employed, and second, because it makes the provision in the procuratory, that the heirs-male shall exclude females, mere redundancy, being no more than a declaration of what the common law implies. It is, no doubt, true that in the case of *Carnegy*, 1916 S.C. (H.L.) 39, 53 S.L.R. 26, the House of Lords came to the conclusion, on the construction of the word "branch" in the deed there under consideration, that the clause was mere surplusage. It was contended that a strictly

logical application of the judgment in the *Carnegy* case to the present would result in construing the procuratory of resignation as containing no more than is provided by the common law. A judgment upon a deed couched in different language does not appear to me to have much bearing on the present case. Here the words which it is maintained should be treated as surplusage are contained in a proviso which is described as containing the conditions of the grant. It would, I think, be against the rules of sound construction to hold that what is expressly declared to be a condition of the grant contains no condition. If that argument were given effect to, then what the writer of the deed did was to say—I give you the lands (in the dispositive clause) subject always to this condition (in the procuratory of resignation) that you are to have them. The sound construction, in my opinion, is to hold that "in all cases" means, in every case of the succession opening to an heir of the body of the *præpositus* Andrew Lauder the heirs-male shall exclude females. If this be the proper construction to be put upon the words "in all cases," then whatever construction is put upon the expression "females," the effect of the deed is to exclude those who are at present competing for the estate with the first party. The argument against the first party is that the condition in the procuratory contains no more than an expression of what the law is, the construction suggested being that the clause means heirs who are male shall exclude heirs who are female—males among heirs shall exclude heirs who are female, *i.e.*, that brothers shall exclude sisters. This is to put a construction upon this deed of tailzie which would not be listened to if the directions had been contained in a trust-disposition and settlement. It does not appear to me necessary to hold that we are debarred by any technical rule of Scots conveyancing from arriving at and giving effect to the true intention of the maker of the deed. Upon this I refer to a passage in the judgment of Lord Eldon in the *Roxburghe* case, 1810, 5 Pat. 320, at p. 422—"You cannot reject a phrase except where it is absolutely necessary that you should reject it; and you cannot so correct it unless there is an absolute and indispensable necessity that you should so correct it. If you can give a consistent meaning to the words forming the phraseology of a deed I say that your Lordships are not at liberty to alter one syllable of it. You must take the deed as it is; you must make a consistent construction of it as it is. If you can make a consistent construction of it as it is, and making a consistent construction of it as it is if you can give effect to all the words, then I say you are bound by every judicial rule I have ever heard of in my life to say that the author of a deed meant to use every one word and syllable that he has used." If the true canon of construction be as Lord Eldon puts it, then it humbly appears to me that the real intention of the granter can be rationally collected from the dispositive clause coupled with the procuratory of resignation. In *Sutherland* v. *Sinclair*, (1801) M. App. *voce* Tailzie, No. 8, 1 Ross's Leading Cases, 45, the Court held that the omission of the words "heirs-male of the body" in the dispositive clause was to be supplied from the procuratory. The construction of the procuratory for which the first party contends is that females mean heirs-female, but even if it means heirs who are females the first party is the heir-male of the body of Andrew Lauder. Neither construction contradicts the language of the dispositive clause. Either is explanatory of heirs of the body in the dispositive clause, a term which is flexible as regards the order of succession. In my opinion the first question should be answered in the affirmative. The other questions in the case do not, in this view, at present arise.

LORD SKERRINGTON — The dispositive clause of the deed of entail of the lands of Grange destined the estate to Andrew Lauder *alias* Dick, the second son of the entailer (a married lady) "and the heirs of his body," whom failing to the entailer's third son *nominatim* and the heirs of his body, and so on with the other sons in their order and the heirs of their bodies respectively, whom failing to the daughters of the entailer and the heirs of their bodies respectively. This destination is of course unambiguous and if it had stood alone and unqualified it would on the recent death unmarried of the last heir of entail in possession have carried the estate to his three nieces, the daughters of his next younger brother, who predeceased him. These ladies, being the nearest and lawful heirs of the body of the institute Andrew Lauder *alias* Dick, would have been entitled to succeed as heirs-portioners. The eldest of them however (the second party to this special case) maintains that by a subsequent provision which forms a condition of the entail, heirs-portioners were impliedly excluded from the succession and that as the eldest heir-female she is therefore entitled to succeed without division. Her claim is opposed by her two younger sisters, the third parties. Founding upon the same provision, the first party, who is a younger brother of the father of the second and third parties, maintains that as the heir-male of the body of the institute he is entitled to succeed as nearest and lawful heir of taillie and provision. It will thus be seen that the third parties stand upon the dispositive clause alone and deny all legal effect to the subsequent clause. The first and second parties, on the other hand, while admitting that the succession belongs to the "heirs of the body" of the institute, maintain that the order of succession of these heirs *inter se* is a matter dealt with by the subsequent clause to which I have referred, and that such order is different from what it would have been if the entailer had left the matter to be regulated by the dispositive clause alone.

The provision founded on by the first and second parties (though they differ as to its meaning and effect) occurs in the executive clause of the deed of entail, which assigned

to the institute and "the other heirs of taillie above written substitute to him" an open procuratory of resignation in favour of the entailer, who was not herself infeft in the lands. Up to this point the executive clause was artistically framed so as to avoid repeating the original destination, an unnecessary and dangerous practice, which, however, was not merely usual (Duff on Deeds, section 259) but was actually recommended in the Juridical Styles (3rd ed., vol. i, p. 227). The assignation then proceeded to specify the conditions of the entail, which according to Mr Duff (section 259) were "in practice annexed to the procuratory, as burdening the resignation of the fee." The first of these conditions is open to the criticism that it reverted to a topic appropriate to the dispositive clause and already dealt with in that clause, and that it did so in language which if not ambiguous was at any rate slovenly and unusual. The condition in question immediately precedes the "name and arms" clause. It runs as follows—"providing always that in all cases the heirs-male shall exclude the females, and that the heirs-female shall always succeed without division."

When I first read these words (of course along with their context and the other material parts of the deed) it did not occur to me that there was any doubt as to their meaning or any room for the destructive criticism to which counsel afterwards subjected them. After listening to that criticism and reconsidering the whole matter I adhere to my original opinion. The condition assumes that the entailer had already established an order of succession according to which (1) the succession might open sometimes to an heir-male and sometimes to an heir-female, (2) an heir-male would not "in all cases" exclude an heir-female, and (3) an heir-female would not "always" succeed without division. These assumptions are justified by the language of the dispositive clause when read in the light of the ordinary rules of heritable succession. The object and effect of the condition was to substitute "in all cases" and "always" in place of "in some cases" and "sometimes." In expressing a general preference for heirs-male the entailer followed the course which was regarded as just and expedient and was commonly adopted by landed proprietors at the date of the entail (1757). In his opinion in the case of *Grahame* v. *Grahame* 1825, 1 W. & S. 353, at p. 356, Lord Hermand referred to "that preference of male succession, incident, as everybody knows, to landed proprietors in Scotland," and indicated that he would not have been surprised "if the granter had excluded females altogether" even in the case of his own daughters. In his opinion in the same case (p. 371) the Lord President describes such a destination as "a very natural and a very usual destination, and more frequent than any other to be found in entails." In the course of his opinion Lord Balgray stated (p. 369) that he attached importance to the original investitures of the estate, which were referred to in the deed of entail, and which presumably were before the parties to it. In the present case also it might have been urged that by the open procuratory mentioned in the deed of entail the lands were destined to the entailer and to the heirs-male or female of her body; that these words implied a preference for heirs-male; and that the reasonable inference was that the entailer intended to perpetuate this destination but excluding always her eldest son and his descendants—they no doubt being otherwise provided for. I place no reliance, however, upon this last argument because it was not mentioned at the debate and so subjected to a criticism which might have shown it to be fallacious.

In reply to the claim of the first party counsel for the third party placed great reliance upon the fact that the condition in each of its limbs is carelessly expressed and departs from the proper and customary style. Thus in the first limb it is stated that the heirs-male shall exclude "the females"—a popular term which may or may not mean "heirs-female." So too in the second limb it is not expressly stated that the estate is to descend to the eldest heir-female excluding heirs-portioners. These arguments would have been formidable if it had been possible to contend that the destination in an entail is subject to the same strict construction as the fettering clauses, or again, if the inaccurate or elliptical character of the language suggested a real doubt as to what was the intention of the entailer. For my own part I entertain no doubt that the entailer did not propose to establish an entirely original and unprecedented order of succession, and that the noun "females" was merely an ungrammatical equivalent for the adjective "female," to which by implication the noun "heirs" might correctly and grammatically have been prefixed. In the view which I take of the case it is unnecessary to express any opinion upon the question whether a direction that heirs-female shall succeed without division can on a reasonable construction mean anything else except that the land shall descend to the eldest heir-female in the same manner as a superiority or other indivisible right. That question may have to be decided at some future time as regards this same entail.

Counsel for the second party pointed out that the expression "in all cases" in the first limb of the condition would if construed literally involve a complete subversion of the fundamental idea of the entail, which was to exhaust the whole descendants of the second son of the entailer before admitting to the succession an heir of the body of the third son, and so on. In my judgment the obvious meaning of the condition is that in every case where a competition arises among the heirs of the body of the same *præpositus* his heir-male, if there is one, shall exclude his heir-female. This reasonable and necessary limitation of the generality of the expression "in all cases" does not seem to justify the contention that it ought to be read as meaning "in all cases where that has been already provided by the dispositive clause."

There is ample authority for the proposition that a perfectly clear and unambiguous destination contained in the dispositive clause may be controlled by reference to expressions found in other parts of the same deed. Thus a destination in the dispositive clause in favour of "heirs-male" has been construed as restricted to "heirs-male of the body"—*Ker* v. *Innes* (1810, 5 Pat. 320)—and a destination in favour of "heirs whatsoever" as restricted to "heirs-male"—*Halliday* v. *Maxwell* (1802, 4 Pat. 346). It is even implied that it is not incompetent actually to contradict the terms of the dispositive clause, and that an heir-female may be declared entitled to succeed though the dispositive clause mentions heirs-male only. In the case of *Grahame*, already referred to, an attempt was made to obtain such a declaration. The attempt failed, because the Court held that there was no necessary inconsistency between the word "descendants" in the procuratory of resignation and the phrase "heirs-male to be procreated of the marriage" in the dispositive clause, but the competency of establishing such a contradiction was upheld in the opinions of Lord Succoth (p. 362) and of the Lord President (p. 372), and was implied in the judgment. A deed of entail must be read and construed as a whole, and the question in every case must be whether it is clear that the entailer intended that the destination and order of succession should be different from what they would have been if the matter had been regulated by the dispositive clause alone. In my opinion there is no reasonable doubt that the entailer intended by the first condition of the entail to explain that in the succession of the heirs of the body of any of her sons or daughters a preference should be given to an heir-male of such son or daughter if there was one.

It follows that the questions of law must be answered in favour of the first party. Counsel for the second and third parties attached much importance to the decision of the Second Division, affirmed by the House of Lords, in the case of *Carnegy* v. *Joseph*, 1915 S.C. 490, 52 S.L.R. 370, *affid.* 1916 S.C. (H.L.) 140, 53 S.L.R. 26. One of the questions in that case was very similar to that which we have to decide, but the deed of entail was differently expressed from that which we have to construe.

LORD CULLEN—I am of the same opinion. The clause in the assignation of the procuratory of resignation as I, in common with your Lordships, construe it does not present that species of contradiction of the dispositive clause which would go to subvert radically the scheme of succession down the line of heirs of the body of the various *præpositi* respectively which is generally prescribed in the dispositive clause. It only adds a regulative condition as to the order of preference among the heirs of the body of a particular *præpositus*, so that the two clauses can live together. It is, I think, in accordance with the authorities that the later clause on this construction should be allowed effect.

Passing to the construction of the clause in the assignation of the procuratory of resignation, one observes that the preference it provides is given to "the heirs-male." Now this is a well-known technical term in our law, and presumably it is here used in its technical sense. No doubt such a technical term may in a particular case have a context which clearly displaces its proper meaning. But it would, I think, be a very unlikely use of the term "heirs-male" to ascribe to a feudal conveyancer of 1757 that he selected it merely to describe heirs of the male sex. It is, however, pointed out by the parties of the second and third parts that the preference given to the heirs-male is, in the language of the deed, over "females," not over "heirs-female." It would not, of course, be adverse to the claim of the first party if the term "heirs-male" being read technically the term "females" were read literally. To do so, however, would be to construe this entail as making a destination of an eccentric kind unknown in practice. The choice, otherwise, thus lies between reading "females" as meaning "heirs-female," on the one hand, and reading "heirs-male" as meaning merely "males" on the other hand. I adopt the former construction, because I think that a looseness in language on the part of the framer of the deed would be much less likely to occur in describing what would be in the foreground of his mind, namely, the class to be singled out for preference. And the term which he used to describe that class was a technical one, and as such definite, involving its own antithesis.

The heirs-male are to be preferred "in all cases." There is a width about the words "in all cases" which seems to make it highly unlikely that they were intended to apply only in the narrowest sphere of competition, that is to say, among brothers and sisters in a particular family. Moreover, such a narrow application would make this solemnly announced "condition" a merely superfluous statement of the common law—unless, indeed, the entailer were supposed to have been anxiously providing against an alteration of the common law, which I think highly improbable. And there is a certain presumption against words having been used superfluously in a deed of this kind, especially where, as here, the intention of the user seems to have been to do something practical and effective at his own hand, in deliberately imposing a condition on the right of succession under the deed. And the presumption is not removed in a particular case merely by saying that in other cases superfluous words have been found to occur.

If one deserts the narrow *intra familiam* construction of the words "in all cases," it does not seem to me difficult to determine their true scope otherwise. In my opinion they refer to all cases where the succession opens among the heirs of the body of a particular *præpositus*. This confines the operation of the "condition" to the function of qualifying the scheme of

succession among the heirs of the body of the various *præpositi* respectively, in the stated order of preference of the latter, which is generally prescribed in the dispositive clause. To construe the words "in all cases" so widely as to mean that heirs-female of the body of a preferred *præpositus* are to be excluded by an heir-male of the body of a postponed *præpositus* would involve a radical subversion of the scheme of succession, and against a construction leading to such a result there is a very strong presumption.

The Court answered the first question of law in the affirmative and the second and third in the negative.

Counsel for the First Party—Chree, K.C. —R. C. Henderson. Agents — Scott & Glover, W.S.

Counsel for the Second Party—Watson, K.C.—D. P. Fleming. Agents—Dundas & Wilson, C.S.

Counsel for the Third Parties—Constable, K.C. — MacRobert. Agents — Mitchell & Baxter, W.S.

Friday, December 19.

SECOND DIVISION.

(SINGLE BILLS.)

WORLING AND ANOTHER (MILNE'S TRUSTEES), PETITIONERS.

Trust—Nobile Officium—Advance to Beneficiary Prior to Date of Payment under Will.

A testator executed a trust settlement six years before he died, at a time when his estate was much smaller than it had become at the date of his death. He left a small annuity to his widow and directed that the residue should vest in his children on her death or second marriage, but payment should not be made to them until they attained majority. Power was given to the trustees to make advances for the education, maintenance, or advancement in life of any of the children who might be in minority at the date of vesting. In exercise of its *nobile officium* the Court *authorised* the trustees to make a yearly allowance to a daughter who had attained majority and kept house for the mother and a younger sister.

James Worling and another, the testamentary trustees of James Strachan Milne, preserved provision manufacturer, Aberdeen, *petitioners*, presented a petition to the Court seeking authority to advance yearly allowances to the daughters of the testator.

The *petition* was in the following terms:—"That by his said trust-disposition and settlement the said James Strachan Milne disponed to and in favour of the persons therein mentioned as trustees his whole means and estate, heritable and moveable, real and personal, but in trust always for the purposes therein specified, and he nominated his trustees to be his sole executors. By his said trust-disposition and settlement the said James Strachan Milne, after directing payment of his debts, sick-bed and funeral expenses, and the expenses of the trust, provided as follows for the disposal and distribution of his estate, viz. —'(*Second*) For implement of the following provisions in favour of my wife Mrs Agnes Gall or Milne in the event of her surviving me, declaring that the same, so far as in liferent, shall subsist only so long as she remains my widow, viz.—(1) For payment to her of a legacy of One hundred pounds to provide for her mournings, etc.; (2) for payment to her of the sum of Three hundred pounds per annum free of all deductions, including income tax, which amount shall be paid quarterly, the first payment to be made three months after my death for the quarter preceding, and I declare that the said allowance of Three hundred pounds shall be purely alimentary and not subject to the debts or deeds of my wife nor liable to the diligence of her creditors; and (3) I direct my trustees to allow my said wife to occupy free of rent the house number Twenty-six Erskine Street foresaid presently belonging to and occupied by me, or any other house which may belong to and be occupied by me at the time of my death, and the use of all my household furniture, pictures, plate, etc.: Declaring that my said wife shall not be charged with or liable for feu-duty, interest of debt, any rates, taxes, or assessments in respect of property (tenant's taxes alone excepted) or for repairs: (*Third*) Subject to the foregoing provisions in favour of my wife, I direct my trustees to hold the whole residue of my means and estate, including the share belonging to me as ascertained at the date of my death in the firm of Alexander Milne and Sons, preserved provision manufacturers, Canal Road, Aberdeen, of which I am a partner, for behoof of my whole children, and on the death or second marriage of my wife as soon thereafter as may be convenient, but only at such times and on such occasions as they in their absolute discretion shall consider most expedient for the judicious realisation of my estate, to realise and convert my whole means and estate into cash and divide the same equally between my whole children, share and share alike: Declaring that any advance or advances which I may have made during my life to any of my said children shall be deducted from the share respectively falling to them: Declaring also, as it is hereby specially provided and declared, that the period of vesting of the shares of my said estate falling to my said children shall be as at the date of the death or re-marriage of my said wife and not *a morte testatoris*: Declaring further that in the event of any of my said children dying before said date of vesting without leaving lawful issue, the share which such child or children would have taken had he or she survived shall be imputed as part of my estate and divided amongst my remaining children accordingly: Declaring further that should any of my said children prede-