

The LADY ESSEX KER, . . . . . *Appellant* ;  
 SIR JAMES NORCLIFFE INNES, Bart., BRIGA-  
 DIER-GENERAL WALTER KER, and JOHN }  
 BELLENDEN KER, . . . . . *Respondents.*

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 LADY E. KER  
 v.  
 INNES, &c.

House of Lords, 26th Feb. 1812.

**ENTAIL—DESTINATION—ELDEST DAUGHTER—HEIR FEMALE.**—An entail, after calling certain substitutes, called, failing them, “ the eldest dochter of the said Hary Lord Ker, without division, and “ yr aires male.” Lord Hary Ker had four daughters, and it was held, both in the Court of Session and House of Lords, that this destination was not to be confined to the eldest born daughter, but applicable to the whole four, whichever of them might be eldest at the time the succession opened. Lady Essex Ker, who was a female descendant of the body of Lady Jane Ker and Sir William Drummond, did not dispute this ; but she stated that the term *eldest daughter* was capable of a more extended meaning, and to mean, in the technical language then in use, an “ heir female” however remote, under which category she was entitled to succeed, as the eldest heir female of Hary Lord Ker for the time being. The Court held her claim inadmissible. Affirmed in the House of Lords.

This case respects the claim of Lady Essex Ker to the entailed estates and honours of the Duke of Roxburghe.

She did not join issue with the respondents—the three other competitors for these estates ; and it was only after the case in that competition was finally disposed of in the Court of Session in favour of Sir James Norcliffe Innes, that she and her sister, Lady Mary Ker, raised the present declarator.

The situation and circumstances of the Roxburghe estates and honours are fully detailed in the previous cases, ante vol. v. p. 320.

There it was seen that the Earl of Roxburghe obtained a charter from the crown, and executed an entail, or deed of nomination of heirs in the form of a strict entail, in 1648.

The first branch of destination in this deed called a series of heirs *nominatim* ; the second branch of destination was in the following terms, and upon which the present question, as well as the question in the other cases, arose : “ And whilks all failzeing, be’ decease, or be not observing “ of the previous restrictions and conditions above written, “ the right of the said estate shall pertain and belong to the

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“ *eldest dochter of the said Hary Lord Ker, without division*  
 “ and yr airis male; she always marrying or being married  
 “ to an gentleman of honourable and lawful descent, wha  
 “ sall perform the conditions above and under written;  
 “ whilks all failing, and their said airis male, to our nearest  
 “ and lawful airis male whatsoever.”

It has been seen how all the male line of descent, as embraced in the first branch of the destination, had failed, ending with William Duke of Roxburghe, who died in 1805. The first branch of the destination in the entail 1648 being thus exhausted, the second branch above quoted came into operation, which gave occasion to the several competitions which arose—each party giving a different interpretation to the meaning of the above clause.

It has also been seen upon what grounds the several competing parties claimed to succeed, ante p. 333.

In particular, it was contended that, by several deeds, forming a part of the investitures to the estates anterior to the year 1747, the words “ *their heirs male*” had been changed by dropping the word “ *their,*” and substituting “ *her heirs male*” in their place; and prescription having run on the title so made up, the clause was to be construed as confined to the eldest born daughter; to which it was answered, that as the last of the above mentioned deeds (1747) specially referred to the destination in the deed 1648, and adopted it, these investitures must be read as in favour of “ *their heirs male.*” But this point was not much pressed in this case.

The appellant, in her summons, represented her and her sister, (who afterwards withdrew from the action), “ as the  
 “ immediate descendants and nearest lawful heirs of the  
 “ marriage between Sir William Drummond and Lady Jean  
 “ Ker; and also the immediate descendants and lawful  
 “ heirs of Hary Lord Ker, and Robert, first Earl of Rox-  
 “ burghe.” And she maintained that the clause was capable of a much more enlarged interpretation than that given to it by Sir James Norcliffe Innes. Though the word daughter, in vulgar language, might mean a female descendant *in the first degree*; yet, in a more enlarged legal sense, it denoted any female descendant, however remote. And, in technical language, such as was used at the date of the entail 1648, it had acquired a new and separate meaning, equivalent to, and the same with “ *heir female;*” or, in other words, *heir of line, or heir whatsoever, after the failure of the male*

line of descent; and she founded on the Kinfauns case to support this view. The appellant's construction, therefore, gave the clause a more enlarged interpretation of that given by Sir James Norcliffe Innes, so as to include her. 1st, She maintained that the *individual* meaning of the words "Eldest daughter," in the destination 1648, was excluded by the arguments already stated by Sir James Norcliffe Innes, and the judgment of the Court below. That these arguments and decisions showed that the words must be taken, not as individual but as collective or generic, designating a plurality of persons succeeding to the destination one after the other. 2d, That, accordingly, the meaning contended for by the appellant was a generic meaning of that sort, well known in Scotch deeds of destination of the same kind and similar date with the deed 1648, and likewise in the Roman and feudal laws, from which the language of Scotch conveyancing was derived. That, upon the other hand, the meaning put upon these words by Sir James Norcliffe Innes was wholly unexampled, no Scotch lawyer or conveyancer having ever used the words in such a sense; and particularly Earl Robert himself and his conveyancer, or at least the latter, when he, in the deed 1644, wished to express a meaning similar to that contended for by Sir James, having used a form of words wholly dissimilar. 3d, That the intention of the entailer to use the words in this broader sense, was indicated by a variety of circumstances, in the situation of the entailer, and in the form of expression of the particular clause in question, and of other parts of the deed 1648. That the destination was not to "eldest daughter," but "eldest daughters."

In answer, Sir James Norcliffe Innes. 1. That the pursuers (appellants) were not called to the succession of the entailed estates of Roxburghe by the terms of the destination in the entails thereof: and the respondent, Sir James Norcliffe Innes, has now succeeded to these estates; and his right has been established by the judgments of the Court of Session. 2. The appellant was only heir of line of her brother, and as such could not claim under the destination of the entail 1648. 3. Besides, the word "daughter," in its proper and primary, and ordinary meaning, whether in the daily intercourse of life, or in formal deeds, means *an immediate female descendant*. It has not, and cannot be shown, that in *tailzied* succession this word has been used or understood in a different sense. And where it is intended to call

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in all the descendants in the female line, and especially where the first heirs called are heirs male of a certain description, the term "heir female" has long been in general use. But where, after calling a daughter, or several daughters of an individual, there is a substitution in favour of heirs male of the bodies, the limitation to the immediate offspring becomes if possible more clear and determinate. And still more where, after a substitution in favour of heirs male of the body, there is another to heirs male general, the exclusion of heirs female, properly so called, must thus be put beyond all doubt. Besides, in the entail of Roxburghe, the ordinary legal signification of the term "daughter" was confirmed by the general tenor and purpose of that settlement.

Lord Armadale reported the case, on Informations, to the  
 June 22, 1810. Court. The Court pronounced this interlocutor:—"The  
 " Lords, upon the report of Lord Armadale, having advised  
 " the mutual informations for the pursuer and Sir James  
 " Innes Ker, Bart., and whole process, &c., find that the  
 " pursuer, Lady Essex Ker, has not made out her claims to  
 " the entailed estate of Roxburghe, therefore sustain the  
 " defences; assoilzie the whole defenders from the conclu-  
 " sions of the libel, and decern; superseding extract until  
 " the first box day."\*

Nov. 13, 1810. On reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

The same argument was pleaded in the House of Lords as has been already set forth:

Whereupon it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *John Clerk, J. H. Mackenzie, Alex. Maconochie, Henry Brougham.*

For the Respondents, *Sir Samuel Romilly, Ro. Craigie, W. Horne.*

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\* Opinions of the Judges:—

All the judges remained of the same opinion, as delivered by them in the former case with General Ker. President Blair had since

then been raised to the Bench ; and he alone delivered an opinion as follows :—

LORD PRESIDENT BLAIR said,

“ My Lords,—

“ The pursuer insists to have it declared that she is entitled to succeed to the estate of *Roxburghe*, as heir of tailzie and provision to the last Duke, by virtue of a *deed of nomination*, executed by Robert, Earl of Roxburghe, in 1648.

“ This deed, which was granted by a person having *full power* to settle his succession in the way he thought proper, contains a long destination of heirs, consisting of different substitutions, and fenced with the usual clauses of restriction.

“ There is, first, a destination in favour of *Sir William Drummond*, and the heirs male of his body, and other substitutes, which substitutes have all failed, and the last heir-male of the body of Sir William Drummond was the last Duke of Roxburghe, who died in 1805.

“ This *failure* of the heirs called by the *first* destination, necessarily makes room for the *following part of the destination*, and the heirs thereby called to the succession.

“ *This part of the destination* is expressed in the deed of nomination as follows :—‘ And whilks all failing be decease, or be not observing of the provisions, restrictions, and conditions above written, the right to the said estate shall pertain and belong to *the eldest daughter of the said umquhil Hary Lord Ker without division, and their aires male*, she always marrying, or being married to an gentleman of honourable and lawful descent, who shall perform the condition above and under written, whilks all failing, and their said aires male, to our nearest and lawful heirs-male whatsoever.’

“ This clause, which has now become of so much importance, it must be admitted, has been framed with very little judgment or ability by the writer, contrary to the usual practice. *Brevity* has been studied at the expense of *clearness* and *perspicuity*. Accordingly, it has already been the subject of more argument and discussion, both in writing and *viva voce*, than perhaps ever was bestowed upon any composition of the same length.

“ Upon the *import* of it two questions arose almost at first view, and which were anxiously discussed in the competition between Sir James Innes and General Ker.

“ 1. Whether the expressions, *eldest dochter of Hary Lord Ker, and their heirs-male*, shall be understood as only applicable to *one daughter* ; or, whether it shall be understood to call the *whole daughters seriatim*, according to seniority, and their heirs-male.

“ 2. The other question, Whether the expression, *heirs-male*, as they stand in the above clause, and connected with the other parts of the deed, are to be understood as meaning *heirs-male general*, or heirs-male of the body.

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“ These questions were fully considered by the Court ; and the majority of the judges being of opinion that the words imported a destination to *all the daughters* of Lord Ker *serialim*, and that heirs-male must be understood as limited to *heirs-male of their bodies respectively*, the Court ultimately found that the heir-male of the body of Lady Margaret Ker was to be preferred in the competition, upon his proving his propinquity.

“ This was carried by appeal to the House of Lords ; fully argued, and considered with a degree of attention almost unexampled by the judge who gave his opinion on the above two questions.

“ The substance of that opinion coincides with that of the majority of our judges here, was formed into the shape of a motion, to be considered by the House on the first cause day next session.

(Reads the words of the motion.)

“ According to the construction, the clause contains four substitutions, which are compressed into one, and the destination, if expressed in the usual way, would stand thus, *the eldest daughter of Hary Lord Ker, and the heirs-male of her body*, whom failing, the second daughter, &c.

“ According to this destination, *how is the succession now to devolve*, in the event which has occurred ? The answer appears very simple. Begin with *first substituting* the eldest daughter of Hary Lord Ker. Lady Jane Ker has long ago failed ; *the heirs-male* of her body have also failed. Go to the next substitute, second daughter ; these have also failed. Third daughter has left *heirs-male of her body*, and Sir James Innes says that he is this heir-male.

“ Under these substitutions, *what room is there for the present pursuer ?* She is *not the eldest daughter* of Lord Hary Ker, nor is she an *heir-male* of the body of such daughter. She is an *heir-female* of the body ; and had the destination been to heirs of the body in general, her claim would have been good. But the persons called are *heirs-male*, which is exclusive of all other heirs except heirs-male. The ground upon which the pursuer maintains her claim is, that the *eldest daughter* of Hary Lord Ker does not mean singly *the daughter properly so called*. But that the eldest *heir-female* of Lord Hary Ker, for the time being, is entitled to come under this description ; and many passages quoted from *style books and deeds*, to prove that, in the language of the law of Scotland, *eldest daughter* and *eldest heir-female* are *synonymous*.

“ That a daughter succeeding under any destination, is an *heir-female*, is very true. But that a person may have *heirs-female*, who are *not his daughters*, is equally clear.

“ On the passages quoted, the words which occur are, *daughter* or *heir-female*, which, in place of proving that they are synonymous, *proves the direct contrary*. It means either daughter, or heirs-female *who are not daughters*—a phrase commonly used in that part of the destination which provides for the case of succession, opening to

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*heirs-portioners*; the heirs-portioners may either be *two or more daughters*, or they may stand in a different connection from that of sisters. Suppose aunts and nieces, or males who are in right of a female; and, therefore, when the word daughter is used, it is proper to add *heir-female*, not as synonymous, but in order to extend the provisions to other heirs-female, who were *not daughters*.

“ I must observe also, that here the destination is not to daughters in general; but to the eldest daughter of a *particular person*, Lord Hary Ker; and, further, that it is to the daughter and the *heirs-male of her body*.

“ Will the pursuer produce a single instance where the *daughter of a particular person*, and the heirs-male of her body, was ever so construed as to comprehend the *heirs-female* of the daughter; or where a conveyancer, meaning *heirs-female*, ever used such expressions?

“ One consequence of the pursuer’s doctrine may be alluded to. Suppose Lady Jane had died, leaving a *son* and a *daughter*, and the succession opens under this clause; according to the pursuer’s construction, *the daughter must take in preference to the son*: for as the destination is to the *eldest daughter*, and her heirs-male of her body—the *eldest daughter* would have succeeded *in preference* to her heirs-male, and if the heir-female is entitled to take as a daughter, or to come in at all, it must be *primo loco* in preference to heirs-male.

“ In the case of *Kinfauns*, the estate was destined, by a contract of marriage, to the heirs-male of the marriage, whom failing, to the *eldest daughter* or *heir-female*, to be procreate betwixt them, successivè, without division. Where could there be a doubt by this destination?—the heir-female of the marriage was called, whether daughter or not, the competition was betwixt a daughter of the marriage and a daughter of the eldest son. The latter was clearly the heir-female, and entitled to succeed.

“ The case *Ewing v. Miller* is not more to the purpose. A sum provided by contract of marriage, in the event of there being no heir-male of the marriage but the *one daughter*, or *heir-female*. The daughter of a second son of the marriage claimed the sum thereby provided, 3000 merks. The Court found that the provision in favour of a *daughter* of the marriage *did not comprehend a son’s daughter*. I should have doubted of this.

Kilkerran, p.  
462, Mor.  
2308.

“ On the case of *Bargany*, 1739, the destination was to the *eldest heir-female of the body of John Lord Bargany*, and the descendants of her body without division. No doubt that the succession went to heirs-female;—the only question was, Who was entitled to claim under that character? The son of a daughter of John Lord Bargany, eldest son of a daughter of John Lord Bargany, eldest son of John Master of Bargany, or the son of a daughter of John Lord Bargany?

Ante vol. i. p.  
237.

“ The pursuer, in this case, claims to have her right declared to succeed to the estate of *Roxburghe*, as *heir of tailzie and provision*,

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under a deed of nomination, executed by Robert Earl of Roxburghe in 1648.

“ By this deed the Earl, who was vested with full and *acknowledged power*, proposed to settle the succession of his estate for a very long period, and probably he thought he had done so, in a manner so clear as not to admit of dispute.

“ The *destination*, or *line of heirs*, established by this deed, consists of two branches. By the first, he called *Sir William Drummond*, and certain other *male relations*, and the *heirs-male* of their bodies, and failing them, he calls to the succession the eldest daughter of Hary Lord Ker, and their heirs-male, whom failing, his own heirs-male whatsoever.

“ The *first branch* of the destination took the *estate*, and has now *failed* in the person of the last Duke of Roxburghe, so that the succession necessarily devolves upon the heirs called by the second branch of the destination.

“ But it unfortunately so happens, that this *important clause* is framed in so *confused, inaccurate* a manner, with such contempt of all the rules of conveyancing, as to be more like an *Omnigena* for exercising the wits of people, than a *serious settlement* of an estate. To find out the import has been the subject of more argument and discussion *viva voce* and *in writing*, than ever was bestowed upon *any human composition of the same length*.

“ At the very first view, two questions arose out of it, which were contested betwixt Sir James Innes and General Ker, 1. Whether *eldest daughter* meant only *one* daughter, the *first born*, or if it was applicable to all the daughters *seriatim*; and the second question was, Whether heirs-male meant heirs-male general without limitation, or heirs-male of the body of the daughter, or daughters respectively?

“ Both these points have been determined by a judgment of this Court, and have been approved of and confirmed by certain resolutions of the House of Lords, and therefore are at rest. But the plea of Lady Essex Ker is different from either of these, and therefore is still open for discussion; and, accordingly, the proper steps have been taken, by memorials and hearing counsel, for having it decided upon full information.

Two descriptions—eldest daughter and heirs-male.

“ The merits of the case confessedly depend upon the clause in the deed of nomination, and one thing seems to be clear, that only *two* descriptions of persons are here mentioned—*daughter* of Hary Lord Ker, and *heirs-male*. The pursuer does not say that she is an heir-male, or that this can be applied to her by any latitude of construction, therefore, if called at all, it must be under the description of daughter of Hary Lord Ker.

Meaning of daughter.

“ Daughter is not a technical law word, having a particular meaning affixed to it by the law. It is a word of common popular



language; and when it occurs in a law book, or a deed, has just the same meaning as in a book, a letter, or in common course. As to the established use of the word, in common language, argument is to little purpose. It must be determined by the popular use of the language, which every person can judge of as well as the most profound lawyer; and, according to this standard, there cannot be a doubt, that the meaning of a man's daughter is his immediate female descendant in the first degree; and this is well ascertained as the words expressing other relations—Husband and wife, brother and sister, except sometimes a figurative or poetical expression, show.

“It was observed, in construing the words of an ancient deed, we must look to the language at the time when executed. It would be absurd to suppose that Earl Robert, in 1648, was speaking the language of the present day, and that, at this period, daughter had a more extensive signification, and comprehended all female descendants.”

“This proposition, if established, might be of some consequence. But counsel have failed in making it out. According to the usage of that period, I am satisfied that daughter or dochter was used in the same sense as at present. And this meaning is clearly defined in law books so far back as have any extant.

“The oldest book on our law in the English language, is Balfour's Practicks, written in the time of Queen Mary. Speaking of the rules of succession, he says, p. 222, ‘Sum aires and successors are of immediate and *nearest* degree, and sum others are of mediate and farder degree. Immediate aires the son and the dochter, quhilks failing they are of a farder degree, and mair distant sould be aires—as the nepuoy or niesse, gotton or born of the son or douchter, and after them and after others of the right line, descendant *in infinitum*.’

“Skene's English translation of the Regiam Majestatem sets forth that the expression, grandson or granddaughter were not in use in Scotland, which may have been the case. But they had an expression which answered the same purpose, now obsolete. A man's grandchild was his oye, both in vulgar language and in deeds.”

“The best authority on the subject is Earl Robert himself. What expression did he use in expressing the relation of these ladies to himself? Look to the deed executed by him in 1644, which, although revoked, and of no authority in regulating his succession, may be appealed to as to the use of the language, and his use of the language.—(Deeds, p. 6.) Speaking of the ladies, with relation to their father, Lord Hary Ker calls them daughters. When speaking of them with relation to himself, calls them oyes, which is rather a presumption against his using the expression daughter to denote female descendants much more distant.”

“I was rather surprised at the assertion, that heirs-female was

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Ancient meaning of the expression.

Authority of Balfour.

Grandson and granddaughter said to be unknown. Oye in the old Scots dialect.

Heirs-female said to be unknown.

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unknown in the law and practice of Scotland at this period. But this is a mistake. Heirs-female, or *hæredes-femellæ*, it is true, were terms at first not so common; for this reason, that female succession was not so common. All the old charters were *hæredibus suis*, without distinction of male or female. Afterwards *hæredibus masculis* came to be common; and when the succession was to go to females, it was *hæredibus quibuscunque*, or *hæredibus fæmellis*.

Instances.

“ Some instances of *hæredibus fæmellis* were mentioned, and, upon searching the records, they will be found not uncommon. In a publication now going on of the Charters of Robert the First, and succeeding kings, several examples will be found of an early date; and still more in the Index of Charters, published by Mr. Robertson, keeper of the Records.

“ Among other instances, one appears which deserves notice. A charter of the Earldom of Ross, in the reign of David II. Anno 1370. (p. 90), thus: ‘Et quando ipsi hæredis femella fuerint semper senior hæres femella sine divisione, &c. comitatum teneat.’ So that if one meant to establish a line of female succession beyond daughters, properly so called, and that the eldest should succeed *without division*, there was no want of words to express it.

“ Upon this point, accumulation of excerpts of deeds collected from the records, where the expressions occur, of ‘*daughter and heir-female*,’ and ‘*daughter or heir-female*’ which are adduced as proof that the expressions are synonymous. But, in reality, they prove that they are different, and that the word *daughter*, by itself, was not sufficient for the purpose.

“ Every daughter, if she is an heir at all, must be an heir-female. But there are heirs-female who are not daughters. For example, the son of a daughter is an heir-female. But no one will call him daughter.

“ Therefore, where female succession is not to be limited to daughters, it is necessary to add the general expression, or heirs-female, meaning that the succession shall go to daughters, or to heirs-female, whether they be daughters or not. Thus, in a contract of marriage, failing heirs of the marriage, the estate is destined to the *eldest daughter*, or heir-female of the marriage. When the marriage dissolves, there may be no daughters existing, but *sons by a daughter*, who are not considered to be daughters; and, therefore, to supply the defect, the general expression of heirs-female is added, which includes the whole.

“ Most of the clauses in the excerpts relate to the excluding division, among heirs-portioners, in the case of female succession. The maker in the settlement wants to exclude the evil of division through the whole. Looking forward to a distant period, not knowing whether the heirs-portioners are to be daughters of the last proprietor, or descendants male and female, who are all heirs por-

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tioners, first takes the expression, eldest daughter, and then adds the words heirs-female, which includes every possible case of female succession.

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“ If in any deed they have been used as synonymous, this would just afford an instance of a *writer* having used expressions of which he did not understand the proper meaning, of which instances not a few might be discovered, in a search of the records less laborious than this.

Suppose the words were heirs male or female.

“ This discussion, with regard to the abstract meaning of daughter, in law language, is not decisive of the cause. Because, in our interpreting deeds and settlements, we are not merely to consider the words as solitary and unconnected, like words in a dictionary, but to take them as connected in the sentence or clause of the deed, and in this way may be restricted or enlarged beyond their common acceptance. Words are only used to convey the meaning of the party, and his will must be the rule, if it can be made out clearly and exactly, although he has used some words not in their ordinary signification.

Meaning of daughter as a solitary word, not decisive, must be taken along with other parts of the settlement.

“ Of this mode of construction an instance has occurred in this very clause. Heirs-male standing by itself certainly means heirs-male general; yet, taking it as connected with the rest of the clause, has been construed to mean the heirs-male of the body of all the four daughters *seriatim*. Not a plurality of daughters, but that the same expression was successively applicable to each. Eldest for the time being. The eldest who existed at the time of the succession, or who had left issue male existing, and this was the most proper and natural meaning of the word.

And hence, on same principle, “ heirs-male ” have been held to mean “ heirs-male of the body.”

“ The whole context and words of this extraordinary clause stand thus: ‘ To the eldest daughter of the said umquile Hary Lord Ker, ‘ without division, and *their airis male*, she always marrying or ‘ being married to a gentleman of honourable and lawful descent, ‘ and quhilks all failing, and their saids airis-male, to our nearest ‘ and lawful airis-male whatsoever.’

“ Is there any thing in the context here that goes to extend the meaning of daughter beyond its usual meaning? On the contrary, the first thing to be observed is, that the daughters here called are daughters of a particular person named in the deed. It is not the case of daughters being mentioned in a long destination of succession, where no particular person, either father or daughter are known, and where greater latitude of speech may be allowed. They are the daughters of a person named, *Hary Lord Ker*, and the daughters existing and known to the maker of the settlement. This circumstance rather *narrows* the construction of daughter.

“ Then follow ‘ and their airis-male,’ and failing these heirs-male, the granter’s *heirs-male whatsoever*. Supposing it had been the intention of Earl Robert to call to the succession, not only the four

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“Heirs-male may in some respects admit of different constructions, as heirs-male general, heirs-male of the body. But, in one respect, perfectly stubborn and inflexible. That they are exclusive of females, as much as if they had been excluded per *expressum*; and there is no instance where a woman has succeeded under that description, or has ever claimed under it.

Difficulty attending the pursuer's hypothesis.

“We are not to consider what might be the meaning of daughter simply, but of the daughter then existing of a particular person, and the heirs-male of her body. Will a single instance be pointed out of a female descendant of the daughter having succeeded under such a description? or a single deed from the record where such expressions were used for bringing in females? Here I must suggest a view of the case, which does not seem to have been sufficiently attended to. Supposing Lady Essex to be called, in what part of the destination in this clause was it meant that she should come in? For I apprehend, that according to her construction of the deed, her place in the order of succession must be a higher one than what she pretends to

“Eldest daughter and her heirs-male implies a substitution. First to the daughter, whom failing, her heirs-male, and, of course, Lady Jane, if alive, would have succeeded *primo loco*. But we are told that daughter is here used as a generic term, comprehending Lady Jane's female issue however remote. Must not all the persons called by this expression succeed in the same order? Or is the Court to make a distinction between the persons coming under the name daughters? That one of them, namely, Lady Jane, should succeed first as the daughter of Hary Lord Ker, and that the other persons called under the same expression should only succeed at a distant period?

“I see no ground for this distinction; the female issue called as daughters would be entitled to take as Lady Jane would have done, preferably to the heirs-male of her body. So that, if Lady Jane had died, leaving a son and a daughter, the daughter must have taken the estate in preference to the son, and in the same way, if John Duke of Roxburghe had been alive, Lady Essex would have been preferable to her brother, even to her father—a construction of the deed which leads to conclusions so untenable can hardly be well founded.

Recurring substitution.

“In order to get quit of this difficulty, counsel for the pursuer talked of a recurring substitution (a phrase quite new); the import of which is understood to be, that the heirs-male of the body of Lady

Jane having failed, the female descendants are now entitled to come in as called after them.

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“ But where is the authority for adopting this order of succession? Failing Lady Jane and the heirs-male of her body, Who are substituted? The next eldest daughter, and the heirs-male of her body, and so on through all the daughters, ‘ quhilks failing and their heirs-male, to my nearest heirs-male whatsoever.’ This is the sound construction of the deed as adopted in the House of Lords, which finds, that according to the just and legal construction of this clause, ‘ the several daughters of Hary Lord Ker, in their order, and ‘ the heirs-male of their respective bodies begotten *seriatim*, were ‘ called as heirs of tailzie and provision.’ This implies, that first the eldest daughter, and the heirs-male of her body were to take, and failing them, the next daughter and her heirs-male were to take. In order to make way for this recurring substitution, it would be necessary to interpolate a substitution immediately after the heirs-male of the bodies *seriatim*, whom failing, the heirs-female of their bodies—an interpretation for which there is no authority, and which would be making a will for Earl Robert, in place of interpreting the one made by himself.

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“ After all, the expressions of this clause, whether taken together or separately considered, appear very unfavourable to the pursuer’s claim, particularly this calling of heirs-male; first heirs-male of the bodies, and then heirs-male whatsoever. Result of the whole.

“ I have attended to the pleading of counsel. I admired the ingenuity of what they made out, and the intrepidity of what they attempted, without making it out. I do not see how they could have succeeded, except setting aside these expressions by arguing them out of their place in the deed, or unless they could do what is more practicable by argument, change the sex of their client, and make a man of her, and then success would be certain.

“ The only other topic of argument introduced, was the general scope and intention of this deed, which, in some cases, where the will of the party is clearly manifested, is allowed to control and explain the particular clauses; and, accordingly, both parties have appealed to this source of interpretation. Argument from general scope and intention of this deed.

“ One thing is clear, beyond a question, that Earl Robert had a predilection for male succession, which was agreeable to the established practice, and to the feelings which were prevalent at the time. This is not disputed, and is clear from every line of the deed.

“ The first persons called to be the representatives of his family, are a set of male successors—the Drummonds and Flemings,—and the heirs-male of their bodies. In this first and favoured part of the destination not a single female is admitted. The succession goes to males, and to them only. But supposing these favoured substitutes, and their male line, to be extinct, an event which has hap-

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pened ; in what manner was it natural to suppose that the Earl, prejudiced in favour of the male line, would carry on the succession ?

“ Heirs male of his own body he had none. But his son, Lord Hary Ker, had left four daughters. If he adhered strictly to male succession, the whole of his posterity would have been cut off.

“ What therefore was most natural for him to do ? Just what I conceive he has done, to break through the male succession so far as to call these daughters *seriatim* ; and with this interruption the male succession immediately returns, the heirs male of the daughters, and failing them, the heirs male whatsoever.

“ The four daughters of Hary Lord Ker were persons existing at the date of this settlement, and known to the Earl.

“ As to all the rest of the posterity they were unborn,—who they were to be, or what their qualifications, were unknown. When Earl Robert looked forward to them in distant prospect, he could know of no distinction, except the natural distinction of males and females ; and it was natural for him to prefer the males, according to the ideas of his time.

“ Whether this was proper, or a rational plan of settling the Roxburghe estate, is of no consequence. Earl Robert had the absolute power of settling his estate as he pleased, without being answerable to any one. Our only business is to inquire what his will was, and, being satisfied of that, we must give effect to it.

“ The lady may think her case hard. But she has no title to complain of the law, because, if the estate had been left to the disposal of the law, she would have taken the estate without a deed ; and still less can she complain of Courts of law, who can only inquire into the meaning of the deed. If she shall ultimately be excluded, it is by the act and deed, by the express will of her ancestor, Earl Robert, which we must carry into execution, and to which she must submit, however unwilling.”

On reclaiming petition for Lady Essex Ker, the Lord President stated :—

“ The argument is well stated, but the case continues the same. I cannot alter my opinion.

“ The only thing new is a various reading of the nomination,—said to be *dochters* in place of *dochter*. This depends upon very curious inspection. I thought it *daughter*, and every body so read it in the question with Sir James Innes and General Ker. Case of the pursuer not improved. It would make no difference upon the present argument, although it was to be read ‘ *dochters* ’ in place of *dochter*. It would have been of consequence in the former question.”