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a special clause of dispensation, which entirely obviates the objection stated, arising from the dissolution of that union by selling a part, because such a clause, not resting on any such principles, is adapted to the event of the land's being disunited; and provides expressly that a sasine taken on any one part shall be sufficient for the whole, however locally separated. By the charter from the crown 1781, such an infestment was authorized.

The summonses of removing were in all respects regular, and agreeable to the usage in the Sheriff courts. It has not been said that any objection lay to the original summonses which were subscribed by the clerk of court himself. The objections only apply to those which Mr. Cameron, acting under the authority of the clerk of court, has subscribed, after the Sheriff officer had been despoiled of those received from the Sheriff clerk, but the messenger who executed had a special commission to do so.

After hearing counsel, it was

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

For the Appellants, *Wm. Alexander, Alex. Maconochie.*

For the Respondents, *Wm. Adam, Thomas Baird.*

NOTE.—Unreported in the Court of Session.

The Most Hon. JOHN, MARQUIS OF BUTE, and
HERBERT WINDSOR STUART, Esq., com-
monly called LORD HERBERT WINDSOR
STUART, second son of the said Marquis of
Bute, } *Appellants;*

The Hon. JAMES STUART WORTLEY, second
son of JOHN, late Earl of Bute, } *Respondent.*

House of Lords, 4th March 1803.

SERVICE — COMPETITION OF BRIEVES — ENTAIL — CLAUSE OF
DESTINATION — DEVOLUTION CLAUSE. — From the intermar-
riage of Sir George Mackenzie of Rosehaugh's family with the
Bute family, Sir George executed an entail of his estate of
Rosehaugh, and provided, that if one and the same person
should happen to succeed both to his estate, and the Bute estate,
then, in that case, if the person so succeeding should happen to
have a second son, he and his heirs were taken bound to denude
the Rosehaugh estate in favour of such second son. A cadet of

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the Bute family succeeded to both estates, and had several sons. His eldest became third Earl of Bute; and his second son, James Stuart, afterwards Lord Privy Seal, succeeded to the Rosehaugh estate. The Lord Privy Seal died in 1800, without issue. His elder brother John, had died before him in 1792, leaving several sons, John, now fourth Earl of Bute (and first Marquis), and James Stuart Wortley, the respondent, and others; but when the Lord Privy Seal died in 1800, John, the fourth earl, had also several sons; and the question was, Whether, according to the construction of the destination of the entail, the second son of the third earl, or the second son of the fourth Earl of Bute, was entitled to succeed to the estate of Rosehaugh. Held, that the second son of the third Earl was entitled to be preferred, as the person nearest to the maker of the entail. Affirmed in the House of Lords.

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Sir George Mackenzie of Rosehaugh was twice married. By his first wife he had two daughters, Agnes, married to James Stuart, hereditary Sheriff, and afterwards Earl of Bute, and Elizabeth, married first to Mr. Cockburn of Langton, and secondly, to Sir James Mackenzie, Bart. By his second wife Sir George had issue—one son, George.

In these circumstances, Sir George made a settlement of June 4, 1689. his estates under a strict entail, whereby they were conveyed to his son George, and the heirs male of his body; whom failing, to the heirs male of his own body; whom failing, to any person, or persons, that he (Sir George) had then, or should thereafter nominate and appoint to be heirs of tailzie to succeed to his estate, failing heirs male of his son's body, or of his own, by any writing under his hand.

Accordingly, of this same date, Sir George executed a deed of nomination, which, after reciting generally the deed of entail, proceeded thus:—

“ And being now resolved to condescend upon the persons whom I design to succeed to my lands, heritages, and other estate, failing heirs male of my said son's and my own body. Therefore, and in regard that I have sufficiently provided the daughters of my first marriage, and that the greatest part of my estate has been conquest by me since my marriage with the said Dame Margaret Haliburton, my present spouse, Wit ye me to have nominated, designed, and appointed. Likeas I, by these presents, nominate, design, and appoint, to succeed to my lands, baronies, teinds, and all other heritage whatsoever, particularly and generally mentioned in the foresaid disposition and assignation, the heirs female lawfully to be procreate of the body of the said George Mackenzie, my son, the

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“ eldest heir female always secluding the rest, and succeeding without division, and the heirs male to be procreate of the said heir female her body; which failing, the heirs female to be procreate of her body; which failing, the heirs female to be procreated betwixt me and the said Dame Margaret Haliburton, my spouse, the eldest heir female secluding the rest, and succeeding without division as said is; which failing, the heirs female to be procreate of my body in any other lawful marriage, the eldest always secluding the rest, and succeeding without division, and the heirs male to be procreate of the said heir female her body; which failing, the heirs female to be procreate of her body.”

Then follow limitations to the issue male of his daughters, in the following terms:—“ Which failing, the *second son*, procreate, or to be procreate, betwixt Agnes Mackenzie, my eldest daughter, spouse to James Stuart, Sheriff of Bute, and the heirs male of that second son’s body; which failing, the third son lawfully procreate or to be procreate of her body, and the heirs male of her body; which failing, *the fourth and remanent* sons to be procreate of her body, and the heirs male of their bodies, in order after others, according to the priorities of their births.”

No. 1.

“ Which failing, the *second son* procreate or to be procreate of Elizabeth Mackenzie, my second daughter, spouse of Archibald Cockburn, younger of Langton, and the heirs male of that second son’s body; which failing, the third son to be procreate of her body, and the heirs male of his

No. 2.

body; which failing, *the fourth and remanent* sons to be procreate of her body, and the heirs male of their bodies, in order after others, according to the priority of their

No. 3.

births.” “ Which failing, the eldest or only son procreate, or that shall be procreate of the said Agnes Mackenzie, Lady Bute, my eldest daughter; and failing of him by decease, his *second son*, and the heirs male of the said second son’s body; which failing, the *third and remanent* sons of the said eldest or only son, and the heirs male of their body, *successive*.”

No. 4.

“ Which failing, the eldest and only son procreate, or to be procreate, of the said Elizabeth Mackenzie, Lady Langton, my second daughter; and failing of him by decease, *his second son*, and the heirs male of the said second son’s body; which failing, the third and remanent sons of the said eldest or only son, and the heirs male of their body *successive*.”

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Then followed the limitation, on the construction of which the present question of competition arose.

“ Which failing, the eldest son of my eldest daughter’s
 “ eldest son, and his sons, and male descendants of the
 “ masculine line, without interruption of female, in manner
 “ and according to the order above written ; which failing,
 “ the eldest son of the said eldest son of my second daugh-
 “ ter, and his sons and male descendants of the mas-
 “ culine line, without interruption of female, in manner and
 “ according to the order foresaid ; the second and other
 “ younger sons, and the heirs male of their body, succeed-
 “ ing to my said estate *successive ; and they failing, the*
 “ *eldest succeeding in the last place,* and his second and other
 “ sons, and their foresaids, in the order above specified,
 “ from time to time, so long as there shall be any sons or male
 “ descendants of my said daughters to succeed to my estate.

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“ *And which all failing,* Simon Mackenzie, only lawful
 “ son to the deceased Simon Mackenzie, my brother ger-
 “ man, and the heirs male lawfully to be procreated of
 “ his body ; which failing, to Mr. Colin Mackenzie, advo-
 “ cate, one of the commissaries of Edinburgh, my brother
 “ german, and the heirs male lawfully procreate, or to be
 “ procreate, of his body ; which failing, the said George
 “ Mackenzie, my son, his other nearest and lawful heirs male
 “ whatsoever, which all failing, his heirs and assignees
 “ whatsoever.”

No. 6.

“ *With and under* the provisions after specified ; viz. in
 “ case it shall happen the second sons of my eldest or se-
 “ cond daughters, or their descendants, to succeed to the
 “ estate of Bute or Langton *respective,* or if my estate shall
 “ fall to either of their eldest sons, according to the substi-
 “ tution and order of succession before mentioned, then,
 “ and in these cases, or any of them, and for the preserving
 “ of my estate entire and distinct, without confounding with
 “ theirs, it is hereby provided, That when one and the same
 “ person shall happen to succeed both to my estate and the
 “ Sheriff of Bute’s, or to Langton’s, then, and in that case,
 “ if the person so succeeding have a second, or shall hap-
 “ pen to have a second son, he and his heirs shall be holden
 “ to denude themselves of my estate in favours of the said
 “ second son, and the heirs male of his body ; which fail-
 “ ing, to the other heirs male and of tailzie, in manner and
 “ according to the order above written.”

“ Likeas, in the case foresaid, when my estate, and one of
 “ the other estates shall fall, and be settled on one and the
 “ same person, it shall be lawful to the second or younger

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 " estates, to obtain themselves served, retoured, and insert
 THE MARQUIS " in my estate, contained in the foresaid letters of disposition
 OF BUTE, &c. " and assignation, as heirs of provision thereto, and the per-
 v. " son succeeding to both the said estates, his right, retour,
 THE HON. J. " and infeftment of my estate shall become void and extinct
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" And, further, with this express provision, that if my
 " eldest daughter shall have no second or younger son when
 " the estate would fall to him, and if my other daughter
 " shall have a second son for the time, in that case the estate
 " shall fall to the second or younger son of either of my
 " daughters who shall exist for the time; and if thereby the
 " estate shall fall to the second or younger son of my se-
 " cond daughter, in that case he shall have right to the
 " said estate, and to the mails, profits, and duties thereof,
 " ay and while the existence of a second son of my eldest
 " daughter, and upon whose existence he shall be holden
 " to denude in favours of the said second son of my eldest
 " daughter, and his heirs of provision, according to the
 " order contained in this nomination, and always under the
 " reservations," &c.

1692. Upon the death of Sir George Mackenzie, the entail and
 deed of nomination were registered in the register of tail-
 zies; and George Mackenzie, his only son, the institute,
 made up his titles to the estate in terms of these deeds.

1707. George Mackenzie died in 1707 without issue, and thereby
 the succession opened to the issue of Sir George Macken-
 zie's daughters, Agnes and Elizabeth.

Agnes, Countess of Bute, had issue only one son, James,
 called Lord Mountstuart, who afterwards became the second
 Earl of Bute.

1708. On the death of George Mackenzie, son to Sir George,
 Lord Mountstuart took out a brieve from Chancery to serve
 himself heir of tailzie to his grandfather, Sir George. This
 was opposed by Sir George's second daughter, Mrs. Eliza-
 beth Cockburn of Langton, then recently married to Sir
 James Mackenzie, Bart., on the ground that, by the entail,
 her second son was preferable to Lady Bute's eldest, or
 only son, and therefore, that Lord Mountstuart could not be
 served till it should be certain whether Lady Mackenzie
 should have a second son or not. The Court of Session,
 however, unanimously found that Lord Mountstuart was en-
 titled to proceed in his service.

But Lady Mackenzie, having soon after been delivered of

a second son, George, a process was brought in his name, and in name of his father, concluding for reduction of that service, and for having it found that Lord Mountstuart was bound to denude in favour of this second son.

The Court of Session, of this date, found that Lord Mountstuart was bound to denude in favour of such infant son. A reclaiming petition was presented; but before it was disposed of, the infant son of Lady Mackenzie having died, a fresh petition was presented, stating this fact, and of course the estate remained in Lord Mountstuart as before.

On his father's death, of this date, he became the second Earl of Bute, and succeeded to these estates, both of Bute and Sir George Mackenzie, and enjoyed them until his death in 1722.

He had two sons, John, the respondent's father, afterwards the third Earl of Bute, and the late James Stuart Mackenzie, afterwards Lord Privy Seal. And, in terms of the entail of the Mackenzie estate, he was bound to denude himself of that estate in favour of James Stuart Mackenzie, his second son. But somehow or other he was allowed to possess both estates until his death in 1722, when he was succeeded in his honours and estate of Bute by his eldest son, John.

The second son, James Stuart, then Lord Privy Seal, succeeded to Sir George Mackenzie's estate, and completed titles under the entail, and held and possessed his estates until his death in 1800.

The Lord Privy Seal was married to Lady Elizabeth Campbell, daughter of John, Duke of Argyle and Greenwich. There was no issue of this marriage. John, then Earl of Bute, his elder brother, had died in 1792, leaving several sons, John, now Earl and Marquis of Bute, the Hon. James Stuart Wortley, the respondent, and second son of the said third Earl, and other younger sons.

But when the Lord Privy Seal died in 1800, the then Marquis of Bute (fourth Earl) had also several sons; and the question which arose was, whether Sir George Mackenzie's estate should go to the second son of the third Earl of Bute, or to the second son of the fourth Earl, now Marquis of Bute, who was Lord Herbert Stewart, one of the other appellants.

It seems that the Lord Privy Seal had executed various deeds in regard to his estates, whereby he adopted the destination in the entail of Sir George Mackenzie, and, it was alleged, manifested a conviction that the respondent was the heir of entail entitled to succeed to him, failing the heirs

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of his own body, under the last of which he was called under the description of second son to the last Earl of Bute.

Thus, the Lord Privy Seal having paid off and taken conveyances, in the name of trustees, to certain debts owing by Sir George Mackenzie at his death. His Lordship, of this date, executed a discharge of these debts in favour of the respondent nominatim, and the other heirs of entail. After enumerating the debts and conveyances, and his intention of relieving the estate of these burdens, he adds, "Therefore, and for the love, favour, and affection I have and bear to the Hon. James Stuart Wortley, my nephew, second son of the deceased John, Earl of Bute, my brother german, and *presumptive heir to me* in the said entailed estate, and for the regard I have to the other heirs of entail," &c., and therefore discharges, &c.

In the application made to the Court of Session, Lords Bannatyne and Balmuto were appointed assessors to the macers, in deciding upon the merits of the question which might be stated to them in the competition of brieves; and parties having been heard by counsel, the macers, by the advice of their assessors, made avizandum to the Court, and appointed the parties to give in informations upon the merits of the question in dispute.

Dec. 3, 1801. On advising these, and the arguments of parties, the Court unanimously pronounced this interlocutor:—"Upon* report of Lord Bannatyne, one of the assessors in the competition of brieves presently depending before the macers, purchased from His Majesty's Chancery, by each of the Honourable James Stuart Wortley, second son of John, the last Earl of Bute; the Most Noble John, present Marquis of Bute; and the Right Honourable Herbert Windsor Stuart, commonly called Lord Herbert Stuart, second son of the said Marquis, for being respectively served heir of tailzie and provision to the Right Honourable the late James Stuart Mackenzie of Rosehaugh, Lord Privy Seal of Scotland; and having advised the informations given in for the said Marquis of Bute and Lord Herbert Stuart on the one part, and for the Honourable James Stuart Wortley on the other part, the Lords find that the succession in question devolves upon the said James

* LORD PRESIDENT CAMPBELL said,—“This case arises out of the construction of the terms of a destination of succession. The true and probable meaning of the terms used in the deed favours Mr. Stuart Wortley's claim; for the maker of the tailzie, by using the word

“ Stuart Wortley, and therefore remit to the macers to pre-
 fer his claim in the competition, and to proceed in his
 service accordingly.”

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellants. The succession must be regulated by what appears to have been the intention of Sir George Mackenzie, in a case, or under circumstances, like the present, and that intention must be gathered from the scope and terms of the deed of nomination alone. The respondent, in the Court below, attempted to bring, in aid of that construction which he contended for, the opinions said to have been entertained by members of the family and others; and the terms of certain deeds executed relative to the estate by the late Mr. Stuart Mackenzie. But the appellants trust that such extraneous and irrelevant matter will not be introduced here; or, if it is, they are confident it will be disregarded by your Lordships.

The words of limitation in the deed itself must be alone looked to; and the words of limitation, under which one of the present parties must take the estate, or be served heir, are, “ The eldest son of my eldest daughter’s eldest son, “ and his sons and male descendants of the masculine line, “ without interruption of female;” a description directly applicable (in the course of events) to the late Earl of Bute and his family. But the late Earl having died before the succession opened, the limitation is confined to his sons and male descendants; and the question is, which of them must take?

The sons and male descendants of a certain person in the destination of real estate, is precisely synonymous with the more technical phrase of the heirs male of the body of that person; and were there no more in the limitation or deed in question, the appellant, the Marquis, would unquestionably both take and keep the estate, as the heir male of the body of the person described. He trusts it will appear that the additional words in the limitation cannot prevent him from taking. Whether he is entitled to keep it, is a separate question, depending on the after condition, which imposes an

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‘ sons,’ and ‘ sons of sons,’ seems to have a predilection for those nearest to himself, rather than those whom the law prefers. Yet if the question had not occurred until another generation had become extinct, there would have been great difficulty.”

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obligation on those who possess the family estate of Bute, and who, at the same time, have more sons than one, to divest themselves in favour of the second son, but under no such obligation in favour of any other person.

The respondent says that the limitation is not simply to the sons and male descendants of Sir George Mackenzie's eldest great grandson by his eldest daughter, but to such sons and male descendants, *in manner, and according to the order before written*; and, referring to the prior limitation, he says, the order alluded to was, that the younger, or second sons of the person described should take in preference to the eldest.

But this construction rests upon two fallacies: 1st. In taking the case precisely as it has occurred, and supposing the limitation descriptive of the late Earl of Bute, and his immediate issue male, just as if he and they had been named. 2dly. In taking the word sons only, and sinking the more comprehensive term male descendants. The maker of the deed, in limiting the estate to the eldest branch and main stock of the Bute family, after a variety of substitutions or remainders should be exhausted, must have had it in view, that when the succession opened (if it ever did), there might, and probably would be, several or many generations or branches existing, all sprung from the same stem. It could not then be his meaning that, in such a case, the Rosehaugh estate should go to a remote (perhaps an obscure) cadet of the Bute family, in preference to the actual representative of that family and his sons, unless he was guided by singularity and whim, which is not to be supposed. Without going out of the deed, the term used, male descendants, seems decisive of the intention. The estate is to vest in the heir male or representative of the family, subject to an obligation of divestment in favour of his second son, if he had, or should come to have one. It will be observed, that, in the former substitutions, the word sons only is used, evidently because the maker of the deed could with certainty state the ramifications at that early stage; but when he comes to the more distant, the term is, sons or male descendants.

If the late Earl of Bute had survived his brother, Mr. Stuart Mackenzie, it is indisputable that he would have taken the Rosehaugh estate under the limitation "to the eldest son of Sir George Mackenzie's eldest daughter's eldest son," and he would have been entitled to keep it but for the operation of the condition attaching on those

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who held the Bute estate at the same time. For it will be attended to, that the exclusion from the Rosehaugh estate, or obligation to give it up, is not in respect of being the representative of the Bute family, but in respect of being the holder of the Bute estate; so that if this latter estate had been out of the family, or out of the person of the last Earl, he would have been entitled to retain the Rosehaugh estate so long as he lived. If such was the condition, or the right of the late Earl, it seems impossible to figure a difference in the condition and right of the present Earl, the appellant, who stands in the place of his father; and, being his heir and representative, is, without any forced construction, the person entitled to take, under the limitation in question.

Even if it were allowed that the words annexed to the limitation in question, which the respondent relies on, make out the proposition, that in every case of there being two or more brothers, descendants of the tailzier's daughters in the male line, the second and younger are preferable to the eldest; or, in other words, that the eldest must rank as if he were the youngest, which is the utmost length the words can go, still it does not determine the question, Whether, in the case of there being two or more generations of male descendants from the tailzier's eldest great grandson, when the succession opens to them by the failure of the younger branches of the family, is the second son of the *last*, or the second son of the *first* holder of the Bute estate, the person favoured, or who was intended to take the Rosehaugh estate? The appellants flatter themselves that it must appear that there is nothing in the words used to confine the meaning to the *earliest* generation; that it is more natural or reasonable to construe them to mean the *latest*, and that this construction does the least violence to the legal course of succession.

2. Independently of the words used in the limitation, the meaning is to be collected from other parts of the deed. From the whole, it is perfectly clear that Sir George Mackenzie's object was to vest his estate, failing issue male and female of his second marriage, or the *nearest cadet* of the Bute family, and so favour that family, as far as was consistent with another object, viz. that of making a distinct family to represent his own. It runs through the whole deed that he was chiefly guarding against *his estate* and the *Bute estate* being held by the same person. If that was impossible, by his having no person to represent him but the

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holder of the Bute estate, the provision is, that the representation should so continue till the head of the Bute family had a second son. In the case of the estate going to the younger branches of the Langton family, because of there being no younger branches of the Bute family at the time, the provision is, that immediately on the existence of a second son of Bute, the holder of the Langton family shall divest himself. And another case deserves the greatest weight, as proving what the tailzier meant by the substitution in question, because it is impossible but it must have occurred to his mind. A second son of the Bute family might take the estate, and then become the representative of Bute, by the failure of his elder brother without issue male; the second son who took might have younger brothers; and, according to the respondent's hypothesis, the Rosehaugh estate ought to have been directed to pass to those younger brothers. But there is no such direction in the deed. The direction is, that if the person so taking and becoming possessed of the Bute estate, has a second son of his own body, he shall divest himself of the Rosehaugh estate in favour of that second son; but if he has no second son, he shall keep the estate, along with that of the Bute, till one exists. Not a syllable of the brother's taking appears, or a preference of the younger branches of the first generation to the younger branches of the second or later generations.

Pleaded for the Respondent.—The question between the parties comes to a very short and simple issue. There are no difficult points of law to be discussed; there are none of those perplexing ambiguities which sometimes occur in deeds containing long substitutions; there is no occasion even to resort to any of those rules which lawyers have laid down for discovering the meaning of a testator, where doubtful. The distinguished and eminent person upon whose deed the present question arises, as he was fully able, so he has, in the branch of the substitution now under consideration, expressed himself with such clearness and precision, as to leave no room for serious doubt. Indeed the respondent cannot but admire the ingenuity discovered in forming any thing that wears even the smallest semblance of an argument on the other side.

As the heirs male of George Mackenzie, the entailer's son, and of Sir George Mackenzie himself, called by the original deed of entail, have failed; as the heirs female of the body of George Mackenzie and of the marriage between Sir

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George and Dame Margaret Haliburton, his second wife, called by the first clause of the deed of nomination, have also failed; as the second, third, fourth, and remanent sons of Sir George's two daughters, and the heirs male of the bodies of these sons, called by the next clause in the deed of nomination, marked No. 1, have likewise failed, as well as the heirs called under the clause No. 2; James, second Earl of Bute, the only son of Agnes Lady Bute, succeeded, and, after him, his second son, the late Lord Privy Seal; but he having died without heirs male of his body, and there having been no third or younger sons of James, second Earl of Bute, and Mrs. Cockburn's sons having also failed, the substitutions in this last clause, as well as in the former ones, came to an end, and were completely exhausted, and of consequence the person called in the clause No. 3, must succeed to the estate; so that the only question is, Who is the person called by that clause? Which is, in these words, "which failing, the eldest son of my eldest daughter's eldest son, and his sons and male descendants of the masculine line without interruption of female, in manner and according to the order above written." When this is taken in conjunction with the clause No. 4, declaring that "the second and other younger sons, and the heirs male of their body, succeeding to my estate successive; and they failing, *the eldest succeeding in the last place*, and his second and other sons and their foresaids, in the order above specified, so long as there shall be any sons or male descendants of my said daughter's to succeed to my estate;" there can remain no doubt, it is humbly conceived, of the respondent's right to succeed to the estate.

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Although, by the clause in the deed No. 3. to the eldest son of the eldest daughter's eldest son, and his sons and male descendants, the late Earl of Bute, if he had survived his younger brother, the Lord Privy Seal, might have succeeded, yet he would have done so under an obligation contained in the clause No. 5, to denude in favour of his second son, the respondent; but the late Earl having predeceased, the succession of consequence opened to his sons, a term which no doubt may be descriptive both of the Marquis of Bute, the appellant, and of the respondent. But, in order to discover what was thereby intended, it is proper first to consider the expression merely by itself, and, secondly, to take it in conjunction with the other parts of the clause in which it is introduced.

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Sir George Mackenzie was no stranger to the style of deeds of settlement, or to the technical language uniformly used in them. If he had meant that the eldest son, or eldest male descendant of the eldest son of his daughter's eldest son should succeed, it is impossible to suppose that he would not have made use of the common technical expressions, so familiar to him, as well as to every lawyer and conveyancer much less experienced in matters of this kind, namely, the *heir male of the body*; and this observation derives additional force from the circumstance that, in the preceding branches of the substitution, where Sir George did mean to call the eldest son, he never failed to make use of the proper and ordinary technical term; for example, in the clause No. 1. the estate was given to the second son procreated or to be procreated between Agnes Mackenzie and the heirs male of that second son's body; which failing, the third son lawfully procreated, or to be procreated of her body, and the heirs male of his body, and so on invariably in every one case without exception, where the eldest son was in view. But, on the other hand, where Sir George did not mean to call the eldest son exclusively, or under the character of heir male of the body, he used the very same expression as in the present case. Thus in the clause No. 4, after pointing out the order of succession, he adds, "so long as there shall be any sons or male descendants of my said daughters." At any rate, if Sir George intended to depart from the established technical language in a deed so important, and to him so interesting, it is unquestionable that he would have used the obvious phrase, which was equally expressive of his meaning, viz. the eldest son, or eldest male descendant. Nothing was further, however, from Sir George's intention than such a course of succession. Every line of his deed of nomination shows, in the clearest manner, that its leading object, and the most anxious purpose of the granter, were to call the younger sons in preference to the eldest. Even the younger sons of his youngest daughter were called in preference to the eldest son of his eldest daughter, and, indeed, the eldest son is never allowed a place in the succession while there is another male descendant to compete with him; and when the eldest son is thus admitted in some measure from necessity, he is allowed to hold the estate no longer than till he has a second son. As soon as such second son exists, he is entitled to call upon his father to denude in his favour, or to take

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the estate independently of his father, if he should decline to denude.

Though, therefore, the matter rested upon the expression *sons and male descendants*, the respondent would hold the destination to be clearly in his favour; but Sir George has taken care not to leave the matter upon that footing; for, as he did not intend, where there was more than one son, that the eldest son should succeed, not satisfied with making use of another expression than *heirs male of the body, or eldest son*, and adopting that of *sons and male descendants in the masculine line*, he was anxious to point out the order in which those sons, or male descendants, were to succeed. He did so, accordingly, by adding, *in manner and according to the order above written*. But Sir George was not satisfied even with a general reference to the order of succession laid down in the preceding clauses, however clear that might seem: for, to obviate every possibility of doubt, or room for question, he further declared, in the most pointed and direct terms, what the order was, by adding “the second and other younger sons, and the heirs male of their body succeeding to my said estate successive: and they failing, the eldest succeeding in the last place, and his second and other sons, and their fore-saids, *in the order above specified*, from time to time, as long as there shall be sons or male descendants of my saids daughters to succeed to my estate.” The result of this is submitted to be indisputably in favour of the respondent; for though both the appellant and he were sons of the eldest son of the eldest son of Agnes Mackenzie, Lady Bute, yet it being declared that the second must take first, and that it was only failing him, and the heirs male of his body, with his younger brothers, and the heirs male of their bodies, that the eldest, that is, the Marquis, could take; the conclusion in favour of the respondent seems in no degree more fallible than if he had been called by name.

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After hearing counsel, it was

Ordered and adjudged that the interlocutor complained of be, and the same is hereby affirmed.

For the Appellants, *Samuel Romilly, Wm. Alexander.*

For the Respondent, *Sp. Perceval, Wm. Adam, Charles Hay, J. H. Newbolt.*

NOTE.—Unreported in the Court of Session.