

[28th May 1838.]

JAMES SHEPHERD, Esq., Appellant.—*Attorney General*
(*Campbell*)—*Robertson*.

ROBERT GRANT, Esq., Respondent.—*Sir William*
Follett.

Entail — Succession — Clause.—An entailer destined his estate to the “eldest son” of his first, second, and third daughters seriatim; then to the “second son” of each seriatim; and then to the “heirs male” of his “first, second, and third daughters in the same order of succession:”—Held (affirming the judgment of the Court of Session) that after the first and second sons of the three daughters had failed the heir male of the eldest daughter, though he was the fourth son, took before the heir male of the second daughter, posterior to her second son.

ON the 13th November 1761, Mr. John Leith of Blair executed a disposition and deed of tailie of the estate of Blair in Aberdeenshire, of which he was proprietor. At this period Mr. Blair had no sons, but he had three daughters, viz. Anna Leith, the eldest, married before the date of the deed to John Grant younger, of Rothmaise; Janet, married also before the date of the deed to the Rev. Thomas Shepherd, minister of Bourty; and Margaret, the third, who at the date of the deed was unmarried, but was afterwards married to Mr. Charles Grant of Tombrakeachie, afterwards of Deskie. Before the date of the deed Anna,

2D DIVISION.

Id. Cockburn.

SHEPHERD
v.
GRANT.

28th May 1838.

the eldest daughter, had five sons, viz. John, James, Alexander, Robert, and Peter.

Janet, the second daughter, had, at the date of the deed, four sons, viz. John, Alexander, Robert, and Thomas.

The deed was in these terms:—“ Forasmuch as I
 “ have taken into my serious consideration, that I have
 “ no heirs male of my own body to represent me and
 “ succeed to my lands and estate, and that I have
 “ grandchildren, and am desirous that my memory and
 “ surname of Leith should be preserved in the persons
 “ of my grandchildren and their heirs; therefore, and
 “ for certain other onerous causes and weighty con-
 “ siderations moving me, wit ye me, the said John
 “ Leith, to have sold, alienated, and disposed, likeas I,
 “ by the tenor hereof, from me, my heirs, assignees,
 “ and successors, sell, annallie, and dispone to and in
 “ favour of myself in life-rent, and to the heirs male
 “ lawfully to be procreate of my own body in fee;
 “ whom failing, to the eldest son living at the time of
 “ my decease, procreate betwixt John Grant younger of
 “ Rothmaise and Anna Leith my eldest daughter, and
 “ to the heirs male of his body, in fee; whom failing, to
 “ the eldest son of Thomas Shepherd, minister of
 “ Bourty, procreate betwixt him and Janet Leith my
 “ second daughter, and the heirs male of his body, in
 “ fee; whom failing, to the eldest son lawfully to be
 “ procreate of Margaret Leith my third daughter, and
 “ the heirs male of his body, in fee; whom failing, to
 “ the second son procreate betwixt the said John Grant
 “ and the said Anna Leith my eldest daughter, and
 “ the heirs male of his body, in fee; whom failing, to
 “ the second son of the said Thomas Shepherd, pro-

“ create betwixt him and Janet Leith my second
 “ daughter, and the heirs male of his body ; whom fail-
 “ ing, to the second son lawfully to be procreate of the
 “ body of Margaret Leith my third daughter, and the
 “ heirs male of his body, in fee ; whom failing, to the
 “ heirs male of my said first, second, and third daugh-
 “ ters, in the same order of succession : All whom
 “ failing, to me, my nearest heirs and assignees whom-
 “ soever : But with and under the express provisions,
 “ restrictions, reservations, clauses irritant, and others
 “ after mentioned, all and haill the town and lands of
 “ Nether Blair,” &c., as therein described.

SHEPHERD

v.

GRANT.

28th May 1838.

He then granted procuratory for resigning the
 lands for new infeftment of the same, to be made,
 “ given, and granted to me, the said John Leith, in
 “ life-rent, and to the heirs male lawfully to be procreat
 “ of my body in fee ; whom failing, to and in favours
 “ of the said eldest son procreat betwixt the said John
 “ Grant and the said Anna Leith my eldest daughter,
 “ and the heirs male of his body, in fee ; whom failing,
 “ to the eldest son of Thomas Shepherd, minister at
 “ Bourtry, procreat betwixt him and Janet Leith my
 “ second daughter, and the heirs male of his body, in
 “ fee ; whom failing, to the eldest son lawfully to be
 “ procreat of Margaret Leith my third daughter, and
 “ the heirs male of his body, in fee ; whom failing, to
 “ the second son procreat betwixt the said John Grant
 “ and the said Anna Leith my eldest daughter, and
 “ the heirs male of his body, in fee ; whom failing, to
 “ the second son of the said Thomas Shepherd, pro-
 “ creat betwixt him and the said Janet Leith my
 “ second daughter, and the heirs male of his body ;
 “ whom failing, to the second lawful son lawfully to

SHEPHERD
 v.
 GRANT.
 28th May 1838.

“ be procreat of the body of Margaret Leith my third
 “ daughter, and the heirs of his body, in fee; whom
 “ failing, to the heirs male of my said first, second;
 “ and third daughters, in the same order of succession:
 “ All whom failing, to me, my nearest heirs and
 “ assignees whatsoever without division: But with
 “ and under the express provisions, reservations,
 “ clauses irritant, and conditions after mentioned;
 “ viz., that the heirs of tailie who shall succeed to the
 “ said lands and estate shall be obliged to assume the
 “ surname of Leith simply, and no other; and in case
 “ any of the said heirs male shall happen to contravene
 “ the provision above written, they shall amit and lose
 “ all right of succession to the said lands, and the
 “ same shall devolve, accresce, and belong to the next
 “ heir of tailzie appointed to succeed, who shall fulfil
 “ and observe the condition aforesaid, and that without
 “ necessity of any declarator to be used for that pur-
 “ pose; and with and under this restriction and
 “ limitation, that it shall not be in the power of the
 “ said eldest son of the said John Grant, or any of the
 “ said heirs, whether male general or of tailzie, to
 “ alter, innovate, or change this present tailzie and
 “ nomination and order of succession before prescribed,
 “ or to do or grant any deed or act that may import
 “ or infer any alteration directly or indirectly.” The
 deed then contained an exception for the case of an ap-
 parent heir or after-substitute being by law incapable of
 succeeding by forfeiture, or attainder, or legal incapa-
 city:—“ And with and under this restriction and limita-
 “ tion also, that it shall not be in the power of the said
 “ John Grant, my grandson, or any of the heirs of
 “ tailzie, to sell, alienate, impignorate, or dispone the

“ lands and estate aforesaid, or any part thereof, either
 “ irredeemably or under reversion, or to burden the
 “ same in whole or in part with debts or sums of
 “ money, infestments of annual rent, or any other
 “ servitude whatever, excepting only as is herein-after
 “ expressed.” “ With and under this irritancy, that in
 “ case the said John Grant, his said eldest son, or any
 “ of the heirs of tailzie succeeding to my estate, shall
 “ commit the crime of treason, and shall be thereof
 “ lawfully convicted or attainted, the said heir so
 “ convicted or attainted shall irritate all right and title
 “ to my said lands, and the same shall descend and
 “ devolve to the next heir of tailzie in the same manner
 “ as if the heir attainted or convicted as aforesaid had
 “ been naturally dead at the time of committing said
 “ treason.” He then reserved his life-rent, with power
 to him “ to sell, burden, or affect the said lands with
 “ any sum or sums of money, or exchange the same
 “ with other lands, as I shall think fit, and also to set
 “ the same in tacks, long or short.”

SHEPHERD

v.

GRANT.

28th May 1838.

The next clause bears, that “ sicklike the said eldest
 “ son of the said John Grant, and the other heirs and
 “ members of tailzie above mentioned, are hereby
 “ burdened with all my just and lawful debts that shall
 “ be resting by me at the time of my decease to what-
 “ somever person or persons; and likewise with the
 “ payment of 4,000 merks to each of the eldest and
 “ second sons lawfully procreate or to be procreate of
 “ the body of the said Janet Leith, my second daugh-
 “ ter, at their majority or perfect age of twenty-one
 “ years complete, with faille and annual rent there-
 “ after during the notpayment of the same; as also
 “ with the payment of the like sum of 4,000 merks to

SHEPHERD

v.

GRANT.

28th May 1838.

“ the eldest son procreate or to be procreate of the
 “ body of the said Margaret Leith my third daughter,
 “ at his majority or perfect age of twenty-one years
 “ complete, with faillie and annual rent thereafter
 “ during the notpayment thereof, but with this express
 “ provision, that the said sons of my said second and
 “ third daughters shall be obliged to assume the name
 “ of Leith, or otherwise to lose the benefit of the sums
 “ of money above specified, provided to be paid to
 “ them in manner foresaid: And sicklike, my said
 “ heir of tailzie, and the other members of tailzie above
 “ expressed, are hereby expressly burdened with the
 “ payment of 3,000 merks Scots to the said Margaret
 “ Leith my third daughter, within year and day after
 “ she is married, with the annual rent of the said
 “ 3,000 merks yearly after my decease aye and until
 “ she is married, and in time coming aye and until
 “ payment.”

After certain other provisions, there is a clause declaring, that “ sicklike my heirs of tailzie are hereby
 “ burdened with the payment of any farther sum or
 “ sums of money I shall think proper to give either to
 “ my daughters or grandchildren or my natural
 “ children more than is provided to them by any
 “ write under my hand at any time either in liege
 “ poustie or upon death-bed;” and another clause, which provides that it shall not “ be in the power of
 “ any of the forenamed heirs of tailzie to burden the
 “ said lands above the sum of 4,000 merks, nor shall
 “ the eldest son be obliged to pay any more of his
 “ father’s debts after his death; and in case the said
 “ eldest son of the said John Grant, or any of the heirs
 “ of tailzie above mentioned, shall suffer the said lands

“ or any part thereof to be adjudged for payment of
 “ any of their debts or sums of money due by them,
 “ without purging the said adjudication within the legal
 “ term, before the expiry thereof, the said heir shall
 “ lose his right of succession and all benefit accrescing
 “ to him by virtue of this disposition, and that it shall
 “ be lawful to the next succeeding heir of tailzie to
 “ enter and possess the lands and others above dis-
 “ poned without any process of declarator, and the
 “ contravener and the heirs of his body shall amit and
 “ lose the right and benefit of their succession by
 “ virtue of these presents.” There is then a clause
 constituting and ordaining “ the said John Grant,
 “ his said eldest son, and the other heirs of tailzie
 “ above expressed, my cessioners” to the writs and
 evidents, mails and duties, &c., “ with full power
 “ to the said John Grant, his said eldest son, and the
 “ other heirs of tailzie,” to pursue for and recover or
 compound the said mails and duties, as therein speci-
 fied. Lastly, follows a precept of sasine, directing that
 sasine should be given “ unto me, the said John Leith,
 “ in life-rent, and to the heir male lawfully to be pro-
 “ create of my own body in fee; whom failing, to
 “ the said John Grant, his said eldest son, and the
 “ heirs male procreate of his body, in fee; which
 “ failing, to the other heirs of tailzie above specified.”

On the same day on which this deed was executed
 the granter made a testament, whereby he appointed
 Alexander Leith of Freefield to be his executor for
 payment, first, of his funeral expenses and debts, and
 then “ to apply the remainder of the sums of money
 “ due to me for payment of the several sums destinate
 “ and appointed by me to be paid to my grand-

SHEPHERD
 v.
 GRANT.
 ———
 28th May 1838.

SHEPHERD
v.
GRANT.

28th May 1838.

“ children, particularly mentioned in my disposition
“ of tailie, of the date of these presents, to be paid to
“ them upon the conditions and provisions mentioned
“ in the said disposition allenary and no otherways.”
He granted certain other legacies, and, inter alia,
one to Margaret Leith his third daughter, and Janet
Leith his second daughter, and also a legacy to his
whole daughters equally, of his furniture, &c., except
“ my own press, in which my papers are kept, which
“ is to belong to my heir of tailzie who shall succeed
“ to me in my estate.”

On 31st August 1763 Mr. Leith executed another
deed, containing additional provisions in favour of his
daughters. This deed, after narrating his love and affec-
tion to Jane and Margaret, “ his second and youngest
“ lawful daughters, and for their more comfortable sub-
“ sistence,” proceeded thus: “ and to prevent all con-
“ troversies or disputes that may happen to arise, after
“ my decease, betwixt them and Anna Leith my
“ eldest lawful daughter, spouse to John Grant of
“ Rothmaise, to whom the life-rent right of my estate
“ of Blairs and Kingoodie is provided, as hereafter
“ mentioned (the fee of the same being some time ago
“ made over to John Grant her eldest lawful son by
“ disposition granted by me in his favour), and being
“ resolved to make use of the powers and faculty
“ reserved to me by the said disposition or other
“ settlements made by me heretofore of my said estate
“ and others, my means and effects,”—therefore,
he conveyed all his moveable estate and effects which
might belong to him at his death, to Janet, her heirs,
executors, and assignees, and to Margaret, her heirs
and assignees, as after mentioned, equally between

them, under the conditions and provisions therein set forth. Farther, proceeding on the narrative that, by the “aforesaid disposition and settlement of my said lands and estate of Blair and Kingoodie, granted by me some time ago, as said is, in favour of the said John Grant, eldest lawful son procreate betwixt the said Anna Leith my eldest daughter and the said John Grant of Rothmaise her husband, and to the other heirs of taillie therein mentioned, whereby they were and are hereby likewise obliged to assume and take upon themselves the name of Leith, I had intended, but forgot and neglected, to provide her the said Anna Leith in the life-rent of the said estate; therefore, to supply the said defect (in virtue of the powers and faculties thereby reserved to me), and to make my intention now known, I hereby assign and transfer from me and my heirs and successors, to and in favour of the said Anna Leith, with the burden of a tack granted by me of this date in favour of the said Margaret Leith my youngest daughter, of the croft presently possessed by me for the space of eleven years from and after my decease for the yearly payment of the rent therein mentioned,—the whole rents, maills, farms, duties, kains, customs, and casualties of the said lands and estate of Blair and Kingoodie, with the tacks whereby they or any part of them are constituted, and that yearly and each year during all the days of her natural life, hereby secluding the said John Grant her son, or others my heirs of tailzie, or nearest heirs whatsoever, from having any share or right thereto, or troubling and molesting her therein during the said time.”

SHEPHERD
v.
GRANT.
—
28th May 1838.

SHEPHERD

v.

GRANT.

28th May 1838.

Again, he introduced a clause in these terms:—

“ Lastly, as it is my intention that what sum the said
 “ Margaret Leith’s half of the sundry goods, gear,
 “ debts, and sums of money, moveable and immoveable,
 “ and other effects hereby disponed and assigned in
 “ her and the said Janet Leith’s favour, shall amount
 “ to in the whole should be secured upon my estate of
 “ Blair and Kingoodie; therefore, I hereby order
 “ and require the before-mentioned John Grant my
 “ heir, or others my heirs succeeding to him therein,
 “ with consent of his or their tutors and curators, in
 “ case of not being major, to take up and receive from
 “ the said Margaret Leith what sum or sums she shall
 “ please from time to time to give, and to grant a
 “ sufficient security, either heritable or moveable, as
 “ she shall require for the same, bearing interest at
 “ five per cent., and penalty in case of faillie, the
 “ interest to be paid to her yearly, &c., and the prin-
 “ cipal sum or sums not to be given up or thrown in
 “ her hands without her own consent, but to be a
 “ lasting security to her during her own pleasure,” &c.,
 as more particularly specified in the deed. And it is
 added, “ the said lands and estate of Blair and
 “ Kingoodie shall and may be chargeable therewith,
 “ any thing contained in the disposition granted by
 “ me of the same notwithstanding wherewith I dis-
 “ pense for that effect.”

Mr. Leith died in 1763, without leaving any issue male of his own body, and was succeeded by John Grant, the eldest son of his daughter Anna. John Grant, who never made up his titles, died without issue, and was succeeded by John Shepherd, the eldest son of Janet, the second daughter.

Accordingly he made up titles under the entail, and was infeft in the year 1790, and possessed the estate till August 1832, when he died without issue.

SHEPHERD
v.
GRANT.
—
28th May 1838.

On his death the succession would, in terms of the destination, have opened to the eldest son of Margaret, the entailer's youngest daughter. She was married, and had one son; but he died without issue in 1794, so that this branch of the destination was exhausted before John Shepherd's death.

Failing the eldest sons of the entailer's three daughters, the estate accrued next, in terms of the destination, to the second sons in succession; and, first, to the second son of Anna, the eldest daughter.

But before this time her two sons, James and Alexander Grant (as to whom there was a dispute which was the second) had died; and Alexander Shepherd, the second son of Janet (the second daughter), took up the estate under the next branch of the destination, and was served heir in February 1834, under the entail, to his brother John, and was infeft on a crown charter in June thereafter.

On his death a competition arose between the appellant James Shepherd, the eldest son and representative of the Rev. Robert Shepherd, who was third son of Janet, and the respondent Robert Grant, the fourth son of Anna the entailer's eldest daughter.

Both parties took out brieves for being served, and brought advocations; which being reported to the Second Division of the Court, their Lordships pronounced the following interlocutor on the 1st December 1836:—

“ The Lords, on report of Lord Cockburn, ordinary,
“ having considered the cases for the parties with the
“ other proceedings, and heard counsel thereon, find that,

SHEPHERD
 v.
 GRANT.
 —
 28th May 1838.

“ under the destination of the deed of taillie founded on
 “ in the present competition, the claim made on the
 “ part of Robert Grant is preferable to that on the part
 “ of James Shepherd: find expenses due to the said
 “ Robert Grant, and remit to the Lord Ordinary to
 “ proceed accordingly.”*

After some farther proceedings necessary to exhaust the case, Mr. Shepherd appealed.

Appellant.—The construction of the clause embraces two points; viz., 1st, the meaning of it, so far as it relates to the first and second sons of the several daughters; and, 2dly, the meaning of that part of it which provides for the succession after the eldest and second sons of all the daughters are exhausted.

It is clear that the eldest and second sons of the several daughters in the deed alternately called to the succession must mean the eldest and second sons born of the several daughters, and not merely those who might become eldest or second sons, though not such originally by the predecease of others. There were five existing grandsons by the eldest daughter, and four by the second daughter, at the date of the deed, and the entailer had them distinctly in view as existing persons when he made the entail. At the same time he wished to give the sons of his third daughter, Margaret, if she had any, an equal chance of succeeding with the sons of the other daughters. But with reference to them all, priority of procreation and of birth is the leading criterion of priority of succession. The desti-

* 15 D., B., & M., 173.

nation is first to the eldest son procreat betwixt John Grant and the eldest daughter, and the heirs male of his body, then to the eldest son procreat betwixt Thomas Shepherd and the second daughter, and the heirs male of his body, then to the eldest son to be procreat of the third daughter, and so on in similar terms with regard to the second sons of the three daughters seriatim. Throughout the whole enumeration the eldest or second son procreat of each daughter is distinctly pointed out; and there is not the slightest hint of the destination referring to those who, though not procreat or born eldest or second sons, might become so through the predecease of their elder brothers. Any other construction is directly contrary to the words of the deed.

SHEPHERD
v.
GRANT.
—
28th May 1838.

The only sense which these words, “whom failing, “to the heirs male of my said first, second, and third “daughters, in the same order of succession,” can bear, is, that the third, fourth, fifth, and other sons of the several daughters, and the heirs male of their bodies respectively, are to take in an alternative series according to their seniority of birth, or at all events according to their seniority in their respective families at the time of the entailer’s death; or, in other words, that this clause is merely an abbreviated mode of carrying out as to third and other sons of the several daughters, and the heirs male of their bodies, the same destination which was provided in express terms with regard to the eldest and second sons.

The words, “the heirs male of my first, second, and “third daughters,” cannot mean heirs male general, for it may now be assumed as settled law that the word “heirs” or “heirs male” is a flexible term, and may

SHEPHERD
 v.
 GRANT.
 28th May 1838.

from the context of any deed be interpreted to mean heirs male of the body. This point was established after most careful argument and deliberation by this House in the Roxburghe competition.* The authority of that case has been followed since, in that of *Tinnoch v. Maclewnan*, 26th November 1817, where a destination to a certain person, “and his heirs and successors whomsoever,” was found, in consequence of a provision in the same clause, that on his failing “without a lawful child or children existing of his body,” the subject should return to the granter and his heirs whatsoever, to mean heirs of his body and not his heirs general. In a later case, *Mudie v. Anderson*, 11th June 1829†, a discharge of an annuity, which bore in the obligatory clause to be for the benefit of the granter’s two daughters, and their heirs and assignees, was held, in consequence of the narrative of the inductive clauses of the deed as contained in the preamble, to be limited to them and the heirs of their bodies. It is thus established that heirs or heirs male do not necessarily and inflexibly mean heirs or heirs male general, but admit of a more limited construction if required by the context of the deed. But it is evident from the deed in question, that the clause now quoted cannot mean the heirs male general of the several daughters. In the first place, the heirs male are called quite separate, and in contradistinction from each other, with reference to the several daughters; *i. e.* the heirs male of the first daughters are called as a set of persons quite distinguished from the heirs male of the second

* 29d June 1807, *Morr. App.* No. 13, voce *Taillie*; 15th to 19th June 1809, *Fac. Col. ante App.* to vol. vi.

† 7 S. & D., 743, and *F. C.*

daughter, and the heirs male of the third daughter as distinguished from both. The heirs male of the first, second, and third daughters are by the clause called "in the same order of succession" as the first and second sons of these three daughters, viz. in alternate series, and as persons clearly distinguished from each other in the mind of the entailer. But the heirs male general of the several daughters could not be distinguished from each other, because, failing the heirs male of their bodies, the same individuals would have been heirs male of them all.

If the words heirs male meant heirs male general, the heir male general of the eldest daughter would exclude the heirs male of the body of the second and third daughters, contrary to the preamble of the deed, which limits the succession to the entailer's grandsons, and their heirs or heirs male of their bodies. Thus, according to this construction, if all the sons of Anna the eldest daughter had died without male issue, any collateral male relation of the eldest daughter, say an uncle, or any of his male descendants, or any male relation of her's in the line of ascendants, would have excluded the claimant Mr. Shepherd, though a son of one of the entailer's grandsons. Such a construction therefore is inadmissible, because it leads to a result directly contrary to the entailer's intentions as expressed in this very deed.

From the whole structure of the deed, it is plain that, in this branch of the destination, as well as in the rest of it, the sons of the several daughters were intended as well as in the preceding clause. The preamble of the entail clearly indicates the granter's intention to destine the estate exclusively to his grand-

SHEPHERD

v.

GRANT.

28th May 1838.

SHEPHERD

v.

GRANT.

28th May 1838.

children and their heirs, or, as the context proves, to his grandsons and their heirs male. It is with this limited intention that the clause now in question, as well as the previous clause of the deed, was framed; and such an intention can be effectuated only by interpreting heirs male of the several daughters to mean heirs male of their bodies, or in other words their issue male. Perhaps the phrase here used, "the heirs male of my said first, second, and third daughters," may be held in itself to mean the heirs male belonging to them respectively and separately, or in other words the heirs male of their respective bodies. But at all events the limitation of the granter's purpose, as announced in the preamble of the deed, to his grandsons and their heirs, demonstrates that by the clause in question he could not mean to call any but the heirs male of the bodies of his three daughters respectively. Farther, the phrase heirs male here employed cannot mean all the heirs male of the bodies of the several daughters, because if it did it would involve a repetition of the previous clauses which had already called part of the heirs male of the bodies of each of the daughters, viz. the eldest and second sons of each seriatim, and the heirs male of their bodies, and would thus contradict the clause now in question, which declares that the destination in it shall only take effect when the first and second sons of the several daughters have failed. The clause must therefore mean heirs male of the bodies of the different daughters, distinct from those who had been already called, or in other words the remaining heirs male of their bodies, viz. the third, fourth, and fifth sons of the several daughters seriatim. This construction follows directly from the words of the

clause, combined with the previous clause, and with the context of the deed.

SHEPHERD
v.
GRANT.

28th May 1838.

In addition to the words “whom failing, to the heirs male of my said first, second, and third daughters,” there are the important words “in the same order of succession.” These words afford a key to the whole clause. Their evident meaning is, that the same principle of alternation and equality shall be followed with regard to the male representatives of the several daughters called in this clause, as had been specially pointed out before with regard to the eldest and second sons of all the three daughters. This must mean that when the second sons of all the daughters are exhausted there shall be taken, first the third son of the eldest daughter, and the heirs male of his body; secondly, the third son of the second daughter, and the heirs male of his body; and lastly, the third son of the third daughter, and the heirs male of his body; since this is the precise order of succession pointed out in the previous clause with regard to the eldest and second daughters. These words are quite inconsistent with the construction, that the whole heirs male of the eldest daughter’s body are to be exhausted first, then the whole heirs male of the second daughter’s body, and lastly, the whole heirs male of the third daughter’s body: that would not be to follow “the same order of succession” pointed out in the preceding clause, but an entirely different order of succession. The rule laid down and enforced from beginning to end of the deed, is that of equality between the male descendants of the several daughters, so far as compatible with seniority and with an undivided male

SHEPHERD

v.

GRANT.

28th May 1838.

succession. The "order of succession" by which this rule is followed out in the preceding clause is, that the estate shall go first to the eldest son of the eldest daughter, and the heirs male of his body; then, in like manner, to the eldest son of the second daughter, and the heirs male of his body; and then to the eldest son of the third daughter, and the heirs male of his body; and so in like manner to the second sons of the several daughters in their order of seniority, and the heirs male of their bodies respectively. To follow out, therefore, "the same order of succession" after the second sons of each of the daughters, and the heirs male of their bodies, are exhausted, it is necessary that the same rule of alternation should be followed with regard to the other heirs males of their bodies; viz., that after the second son of the third daughter, if any, and the heirs male of his body, there should come in the third son of the eldest daughter, and the heirs male of his body, then the third son of the second daughter, and the heirs male of his body, and lastly, the third son of the third daughter, if any, and the heirs male of his body; and so on with regard to the fourth, fifth, sixth, and other sons of the several daughters alternatively ad infinitum. It would be a complete violation of this order of succession, as well as of the rule of equality between the issue of the different daughters which runs through the whole deed, to say that the whole remaining heirs male of the body of the eldest daughter should take before any of the other heirs male of the body of the second daughter, and the whole of these again before any of the heirs male of the body of the third daughter. The words "in the same order of succes-

sion," are quite irreconcilable with such an arrangement.*

SHEPHERD
v.
GRANT.

28th May 1838.

Respondent.—In considering the question of construction, the respondent may assume, that in the ordinary case of a destination to the eldest son of a marriage, whom failing, to the second son, whom failing, to the third son, and to their heirs male respectively, the clause must be construed as carrying the estate to the children holding the character of first, second, and third sons at the time the succession respectively opens to them.

This is well settled in the practice of conveyancing; and the rule of law on which that practice is founded is a very simple one. Where a general term is employed in a deed, such as "the eldest son," or "the second son," the granter, in the absence of any other expression to control its meaning, is presumed to have in view the individual who holds the character at the time the donation in his favour is to take effect. If it is a particular individual who is to be singled out, as the donee, the course invariably adopted is to mention him nominatim. But wherever this course of specifying the individual by name is departed from, and the more general form of expression adopted, it is a presumption of law that the granter did not intend to single out a particular party, but to designate

* *Mowbray v Scougall*, 9th July 1834, 12, S., D., B., 910. F. C., and cases there referred to; *Fergus v. Fergus*, 7th Feb. 1833, 11 Sh., D., & B., 362; *Ramsay v. Ramsay*, 26th Feb. 1836, 14 M., D., & B., 570; *Kerr*, 10th March 1835, 13 M., D., & B. 652; *Smith v. Stewart*, 14th Dec. 1830, 9 S., D., B., 181, Fac. Coll.; *Campbells v. Campbell*, 17th May 1836, 14 M., D., & B., 770; *Red House Creditors v. Gloss*, 15th June 1743, Morr. 2306; *Ewing v. Miller*, 1st July 1747, Morr. 2308.

SHEPHERD
v.
GRANT.

28th May 1838.

generally the individual who, holding at the time the character pointed out by the general form of expression, was intended to be favoured.

The phraseology of the clause of destination, in so far as it is in favour of "the eldest" and "the second sons" of the entailer's daughters respectively, is employed in the ordinary language of conveyancing to denote the eldest or second sons at the time the succession opens to them; effect should be given to these terms according to their ordinary acceptation, unless there be something in the other provisions of the deed which, by express declaration, or plain implication, controls them.

But the entail in question contains nothing which is calculated to individualize the general form of expression; there is nothing to show that it was to his grandchildren, in the order of their birth, the granter intended his estates to descend. On the contrary, the leading object of the deed was to preserve a strict equality among the family of his three daughters, the children of the eldest being always preferred to those in the same degree of the younger daughters. It was clearly the entailer's intention that the eldest sons of his three daughters, whoever held that character, should have the beneficial enjoyment and possession of his property, in succession; and, in like manner, on their extinction without issue, that the second sons, and their heirs male, should enjoy the same privilege. This equality, however, can only be preserved by all the grandsons holding and possessing the estate respectively in their order. Any departure from this rule would evidently lead to an inequality in the enjoyment of the estate by the families of his respective

daughters, entirely at variance with the true intention of the testator.

SHEPHERD
v.
GRANT.

28th May 1838

This view is materially strengthened by the fact that the entailer refrained from calling his grandchildren nominatim, although those descended of his eldest and of his second daughters were all born at the time, seeing that the result of such a destination would have been to introduce the very inequality against which he was anxious to guard.

It is also confirmed by the peculiarity in the deed by which, after destining the estate to the heirs male of his own body in fee, he introduces this substitution, “whom failing, to the eldest son living at the time of my decease, procreated betwixt John Grant younger, of Rothmaise, and Anna Leith my eldest daughter.”

The qualification, “to the eldest son living at the time of my decease,” is merely annexed to the eldest son of John Grant; it is not added as a qualification to any of the other sons descended from any of his other daughters. If he had intended to call all the heirs in the order of their seniority, as they stood either at their births or at the time of his death, such intention would have been clearly expressed. But the application of this qualification to one of the substitutes shows that as to the others the ordinary rule of law was to receive effect.

But, independently of that rule, the clause of destination calls in the grandchild, who, on the death of the second sons of Janet and of Margaret, held the character of heir male of the eldest daughter. It declares that it is “the heir male of the first, second, and third daughters, in the same order of succession,” who is to succeed. But as the eldest and second sons of all

SHEPHERD
v.
GRANT.
28th May 1838.

the daughters are extinct without issue, can it possibly be maintained that the claimant is not the nearest and lawful heir male of the eldest daughter? All his elder brothers having died without issue, there is no one who can interfere with him in claiming that character. His brother Alexander, who, although born before him, died in infancy, cannot stand in his way; and there is no other member of the claimant's own family who can compete with him.

Being then the heir male of the eldest daughter, it is clear that in that character he stands preferred by the clause of destination to the heir male of the second and third daughters.

LORD CHANCELLOR.—My Lords, there was a case which was heard before your Lordships last week, in which I was desirous, before I stated to your Lordships the view I took of the case, to have an opportunity of reading the papers, not, certainly, from any doubt I entertained at the time of the discussion, but because in a case of ultimate appeal to your Lordships jurisdiction it is expedient to take every possible care that no error creeps in before your Lordships proceed finally to decide the right of the parties. My Lords, the re-perusal of these papers has only confirmed the very strong opinion I had formed at the time the argument took place.

The contest arose between an individual who claimed as the eldest heir male of Anna the eldest daughter of John Leith of Blair, and the son of the third son of Janet the second daughter. It appears that at the time the entail was made the entailer had three daughters, Anna, Janet, and Margaret; Margaret the third daughter was

not married, but Anna was married to Mr. Grant, and Janet was married to Mr. Shepherd, and both had several children. In that state of the family the testator made this entail. After disposing in favour of himself in life-rent, “and to the heirs male lawfully to be procreate of my own body in fee; whom failing, to the eldest son living at the time of my decease procreat betwixt John Grant younger of Rothmaise and Anna Leith my eldest daughter, and to the heirs male of his body, in fee; whom failing, to the eldest son of Thomas Shepherd, minister at Bourty, procreat betwixt him and Janet Leith my second daughter, and the heirs male of his body, in fee; whom failing, to the second son procreat betwixt the said John Grant and the said Anna Leith my eldest daughter, and the heirs male of his body, in fee; whom failing, to the second son of the said Thomas Shepherd, procreat betwixt him and the said Janet Leith my second daughter, and the heirs male of his body; whom failing, to the second son lawfully to be procreat of the body of Margaret Leith my third daughter, and the heirs male of his body, in fee; whom failing, to the heirs male of my said first, second, and third daughters in the same order of succession.”

SHEPHERD
v.
GRANT.

28th May 1838.

My Lords, it appears that Anna, the eldest daughter, had five sons. John, the eldest, succeeded upon the death of the entailer, and upon the death of that son John, the son of Janet the second daughter, succeeded. It appears that upon the death of that son, which took place, I think, in the year 1832, Alexander, the second son of Janet the second daughter of the entailer, entered into possession of the estate; but upon his

SHEPHERD
 v.
 GRANT.
 —
 28th May 1838.

death in 1836 the question arose whether Robert, who had been the fourth son of Anna the daughter of the entailer, but who, by the death of James the second son, Alexander the third son, and the death of John, became in fact the only son at the time living of Anna the eldest daughter of the entailer, was not entitled. The contest arose between him and James the son of Robert the third son of Janet.

Now, my Lords, the first question which the Court of Session had to decide was, which was the preferable title of those two? James the son of Robert, who was the son of Janet Shepherd, claiming through the third son, of course could not claim, and does not pretend to claim, under the words to be found in the deed, because here the direct succession is only to the eldest son of the three daughters in succession, and then to the second son of the three daughters in succession, and then generally there is a provision in favour of the heirs male of either of the daughters. But the descendant of the third son of Janet says he is entitled under those words, “whom failing,”—that is, the first and second son of the three daughters,—“whom failing, to the heirs male of my said first, second, and third daughters in the same order of succession.” Now the heirs male of Anna are unquestionably now existing; Robert is the son, and therefore the heir male, of Anna the eldest daughter; and if the heirs male of Anna are first to take, and then, whom failing, the heirs male of Janet, so long as there is an heir male of Anna no one can take as the heir male of Janet, inasmuch as the succession is between heirs male, and not between sons. But then James, the son of Robert, says, those words are not to be construed according to their obvious

meaning; that “they are not to be construed as heirs male, but that the limitation is to be expanded as having provided for the first and second sons, and so to be construed that the same species of limitation may be carried through all the successive sons of the three daughters, as if he had said, ‘failing the second son of the three daughters, then the third son of the second, then the third son of the third.’” My Lords, no authority has been quoted, and it would be very strange indeed if an authority could be found, showing that according to the practice of the law of Scotland the courts would be entitled so to deal with the words in the deed. The entailer has not said so; he has said the reverse. Instead of providing for the third son of the second daughter, he has provided for the heir male of the eldest daughter; and it is only on failure of the heirs male of the eldest daughter that any person can come into competition as an heir male of the second daughter. But supposing it possible so to construe the deed, supposing that the ordinary succession had taken place, and it was competent to your Lordships to put that construction upon the deed, what would be the consequence? The consequence would be, to continue the succession in the order in which he has described it, to the descendants of the first and second daughter. Then would not the effect of that be, that upon the death of John, the eldest son of Janet, it would go, if you can find a person answering the description, to the second son of Anna, the eldest daughter? Daughters being out of the question—one being born who did not live,—then we are to ascertain whether there is any person to answer that description. In point of fact, although Robert had

SHEPHERD
v.
GRANT.
—
28th May 1838.

SHEPHERD
 v.
 GRANT.
 28th May 1838.

been the third son, yet at the time of the death of John—at the time the succession opened,—at the time, therefore, which it is not material to look to, according to the construction I put upon this deed, when it is necessary to look for a person answering that description,—Robert was in fact the second son of Anna, inasmuch as James, originally the second, and Alexander, originally the third, had died before that period arrived. John the eldest son had enjoyed the estate. If, therefore, the testator meant to provide for the sons in succession, first, second, and third, in the order in which they would be found in being at the period when the succession opened, Robert would be the person entitled under the deed of entail; he would be the second, and it would not be necessary to consider the effect as to the third, he being the second.

The principal contest, or one of the great contests at your Lordships bar is, whether, in the principle of Scotch law, you are to look at the individual answering the description at the time the entail opened, or at the death of the testator. The Roxburgh case was cited for this purpose; it was cited on both sides, and arguments drawn on both sides. It was attempted to be shown that it was in the first place in favour of the appellant; that the limitation being to the eldest daughter, and the eldest daughter having died, and the party ultimately claiming, and who ultimately succeeded, not being the descendant of the eldest daughter, it was held by the Court of Session, and by your Lordships House, that under the particular terms to be found in that deed of entail the party claiming through a daughter not being the eldest daughter was entitled to succeed. The case was used on the

part of the appellant to show that it was competent to consider a limitation of that sort as expanded; and that though no expression was used in the Roxburgh case but "the eldest daughter and her heirs," it was to be considered as including in succession the eldest, and the second, third, and fourth.

SHEPHERD
v.
GRANT.
—
28th May 1838.

On the other side it was contended for the respondent that it was competent, taking a limitation so framed, and that in fact the Court of Session were compelled to inquire who answered the description at the particular time of the succession opening.

Beyond all question it is applicable for that purpose, taking that to be the rule which is established in the Roxburgh case; and looking to the words in this deed, it appears to me there is no doubt that the Court is to look, not to those who answered the description of first, second, and so on, at the time of the entailer's death, but to those who answered the description at the time the succession opened.

This appears to me to be the true way of construing the deed. The entailer provides, first of all, for the eldest son of his eldest daughter. It is quite clear that that refers to the eldest son at the time of his own death; for he says expressly, with reference to him, to the eldest son "living at the time of my decease." It is clear then that he did not mean to say, I do not leave it to the individual who may happen by birth to be first, or second, or third, but looking at the period at which the party would become entitled, I mean that that party who shall answer the description at the time the title applies shall be the party to take. By the appellant's way of reading the deed this most extraordinary intention would be imputable

SHEPHERD
 v.
 GRANT.
 28th May 1838.

to the intention of the party. You must look, not at the time the title accrued, but to the time of the death of the entailer, though all her issue might fail before the time to succeed arrived.

Where he comes to provide for the next party,—that interest was necessarily indefinitely postponed; it is of course uncertain whether the others will ever be interested at all, or if so, who will become the next taker,—there we find the expression varied,—“whom failing, “to the eldest son of Thomas Shepherd,” not “the “eldest son living at the time of my death.” The eldest son of the eldest daughter living at the time of his decease was the person to take, because that was the period at which the interest was to accrue; but when he looks forward to the future period, and the individual then to take, it is no longer “to the eldest “son living at my decease,” but it is “to the eldest “son;” and so it goes on till you come to Margaret, who had no son, and then it is “the eldest son to be “procreat,” there being no person to answer that description. All these persons must be known; they were all his own grandchildren, all persons in esse, and capable of personal description. Why does he not personally describe them? Because he does not mean them to take personally, but by the character of first, second, or third, at the time the succession opened.

My Lords, it appears to me to have been ascertained by the Roxburgh case that that is a construction which may, according to the law of Scotland, be put upon the deed. But this deed contains upon the face of it very remarkable evidence of an intention that they should take by the description they might answer at the time the succession opened. At the time the suc-

cession opened Robert was the party entitled, inas-
 much as he was the second of the sons of Anna who
 could come into the enjoyment of the estate, Alexander
 having died, and the question arising, Who is entitled
 to this possession? It cannot prejudice the title of
 Robert, that he might assert it against Alexander.
 When, therefore, my Lords, we look to the very terms
 to be found in this deed, if that be the true construc-
 tion, then there is an end of the contest.

SHEPHERD;
 v.
 GRANT.
 28th May 1838.

But if that were not so obvious upon the deed,—if it
 were considered that the series of the limitations to the
 first and second sons of the three daughters was
 entirely exhausted, which in my opinion it is not, but
 that Robert was entitled to come in as the second son
 of Anna,—but even if those limitations were considered
 as exhausted, we then come to the second limitation,
 which is, in case of the first and second sons of the
 three daughters being exhausted, “to the heirs male of
 “my said first, second, and third daughters, in the
 “same order of succession;”—and Robert is the heir
 male of Anna, the eldest daughter. There is no ground
 whatever, in my opinion, why the Court should put a
 construction upon those words different from that
 which is admitted to be their ordinary meaning; and
 taking it either way, it appears to me that the appel-
 lant cannot succeed.

On these grounds, my Lords, I am of opinion we
 should concur in the unanimous opinion of the Judges
 of the Court of Session, that the title of Robert must
 be preferred. And, my Lords, as the decision of this
 case was an unanimous decision of the Court of Ses-
 sion, and no argument can be adduced in support of
 a contrary judgment, I am of opinion that your Lord-

SHEPHERD
v.
GRANT.

ships must affirm the judgment of the Court below,
with costs.

28th May 1838.

The House of Lords ordered and adjudged; That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DEANS and DUNLOP—RICHARDSON and CONNELL,
Solicitors.