

No. 13. ' body of Lady Margaret Ker, in the foresaid competition of brieves relative to  
' the estates and honours of the family of Roxburghe, and to dismiss the  
' brieve at the instance of Brigadier-General Ker.'

And upon advising a reclaiming petition, with answers, (7th July 1807) the Court ' of new remit to the macers, with this instruction, That they prefer  
' the heir-male of the body of Lady Margaret Ker in the foresaid competition  
' of brieves relative to the estates of the family of Roxburghe, on his proving  
' his propinquity; and in that event, to dismiss the brieve at the instance of  
' Brigadier-General Ker; and with these explanations, they refuse the desire  
' of the petition, and adhere to the interlocutor reclaimed against.'

For Sir James Norcliffe Innes, *Dean of Faculty Blair, Solicitor-General Boyle, Craigie,*  
*Campbell, Horne.* Agent, *James Horne, W. S.* For General Ker,  
*H. Erskine, Gillies, Thomson, Cranstoun.* Agent, *Richard Hotchkis, W. S.*  
For Bellenden Ker, *Ross, Cathcart, Clerk, Monypenny, Moncrieff.*  
Agent, *Alex. Goldie, W. S.*

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Fac. Coll. No. 285. p. 643.

\* \* See a subsequent report, relative to this entail, *infra h. t.*

1807. June 23. **MACLAINE against MACLAINE.**

No. 14.

An effectual  
prohibition  
against alter-  
ing the order  
of succession.

ARCHIBALD MACLAINE of Lochbuy executed, of this date, (31st May 1776,) an entail of his estates, written by himself, containing this prohibitory clause: ' And it is hereby specially provided and declared, that it shall at no rate be  
' allowable for the heirs-male to be procreate of my own body, or to any others  
' of the heirs of tailzie above mentioned, to sell off or dispose of any part of  
' the above lands or estates, nor to contract debt, or to do any other deed  
' whereby it may be adjudged or evicted from the succeeding members, or their  
' hopes of succession thereto in any measure evaded; and if they do in the con-  
' trary, it is declared, in the first place, that the deeds of contravention shall be  
' absolutely void and null, and of no manner of strength or effect whatsoever;  
' and, in the second place, that the contravener, and the descendants of his  
' body, shall, *ipso facto*, forfeit the benefit of the succession to which they are  
' called by the present settlement, and the same shall forthwith accresce to the  
' next heir in the substitution, who immediately on the back of the contraven-  
' tion, may commence a declarator thereof, and serve heir to the person who  
' died last invested with the estate, passing by the contravener without repre-  
' senting him, or being any way liable to fulfil his obligation.'

Upon his death, his cousin Murdoch Maclaine succeeded, and in May 1785, made up titles under this entail, upon which he was infest.

He again was succeeded by his son Murdoch, who, after possessing for some time under the entail, raised a process of declarator against the substitute heirs, to have it found, that there is no prohibition against altering the order of succession, and therefore that he was entitled to hold the estate in fee-simple.

The Court considered whether there were distinct and specific words applicable to the case of altering the order of succession : It is not necessary that they be technical, provided they be precise. Now, here the entail contains, 1st, A direct prohibition against selling, ' that it shall at no rate be allowable ' for the heirs-male to be procreate of my own body, or to any others of the ' heirs of tailzie above mentioned, to sell off or dispose of any part of the above ' lands or estate.' It contains, 2dly, A clause against contracting debt, in these words : ' Nor to contract debts,' but it also contains, 3dly, A prohibitory clause against doing any deed whereby the estate may be evicted from the preceding heirs, ' or their hopes of succession thereto in any manner evaded.'

The Court considered this prohibition sufficiently specific for preventing an alteration of the order of succession ; although it was contended, that this was merely a relative clause for prohibiting deeds whereby indirectly the selling or contracting debt may take place ; and that in order to be descriptive of these indirect methods, it specifies them as those by which the estate may be carried off from the succeeding heirs, and their hopes of succession evaded.

The question was reported to the Court by the Lord Ordinary, when a hearing in presence was ordered.

Afterwards, this interlocutor was pronounced, (21st Jan. 1807:) ' The ' Lords, in respect of a hearing in presence in the question touching the estate ' of Roxburghe, wherein the arguments bearing on this case, have been fully ' stated, dispense with hearing counsel on this cause, in terms of their former ' interlocutor ; and having resumed consideration of the mutual informations ' for the parties, and advised the same, sustain the defence, assoilzie the de- ' fenders, and decern.

To which the Court (23d June 1807) adhered, by refusing a reclaiming petition, with answers.

Lord Ordinary, *Cullen.*

Agent, *Jo. Campbell, W. S.*

Clerk, *Mackenzie.*

Act. Lord Advocate *Colquhoun, Fletcher.*

Alt. *Cathcart, J. A. Murray.*

Agent, *Wm. Whyte.*