

1773. for many. But in truth, the acts of homologation pleaded are ineffectual as such. They were not the Earl's acts. The rents were not received, nor the discharges granted by him; and he merely received the money, without knowing the particular source; but whatever may be the effect of receiving such rents otherwise, surely it can never have the effect of converting a contract, unsubscribed by one party, into one regularly subscribed by both parties. *Separatim*, The Countess had acquired the liferent of these lands by her marriage contract; and as, after the constitution of this right, the Earl's own power over these lands was reduced to the nature of a naked liferent, he could not grant a lease so as to affect her liferent, although he might have done what he pleased with reference to his own.

After hearing counsel, it was

Ordered and adjudged that *that* part of the interlocutor of 23d July 1772, complained of by the *cross* appeal be affirmed. And it is further ordered and adjudged that the interlocutor of the 29th January 1772, and also so much of the interlocutor of 23d July 1772, as are complained of by the original appeal, be reversed; and it is hereby declared, that, under all the circumstances of this case, the lease in question is as effectual and binding as if it had been signed by James, late Earl of Moray, deceased; and it is further ordered, that the reasons of suspension be sustained.

For Appellants, *Al. Wedderburn, Andrew Crosbie.*

For Respondents, *Ja. Montgomery, Thos. Lockhart.*

(M. 15,425.)

ROBERT HAY, Esq. second Son of Alexander	}	<i>Appellant;</i>
Hay of Drummelzier, Esq.		
GEORGE MARQUIS OF TWEEDDALE,	-	<i>Respondent.</i>

House of Lords, *6th April* 1773.

ENTAIL.—Clause of Devolution in a Deed of Entail.

Sir Robert Hay was proprietor of the estate of Linplum, and having no issue of his body, but being attached to his family and name, he executed a deed of entail in regard to

his heritable estate, having two objects: First, To secure the estate in favour of a particular line of heirs; and, second, To establish a separate and distinct representation of himself and family; and being related to the noble families of Tweeddale, Drummelzier, and Roxburgh, he anxiously provided against his own estate being sunk in theirs. For that purpose, he disposed his estate of Linplum to his sister Margaret in life, “and to the second lawful son to be procreated of the body of the Most honourable John Marquis of Tweeddale, and the lawful heirs male of his body in fee; whom failing, to the said Marquis’ third lawful son, and the lawful heirs male of his body; and so on to all the said Marquis, his younger sons, one after the other; and failing all the said Marquis his younger sons, and the lawful heirs male of their bodies, to the Right honourable Lord Charles Hay, brother german to the said Marquis of Tweeddale, and the lawful heirs male to be procreate of his body; whom failing, to the Right honourable Lord George Hay, brother german to the said Marquis of Tweeddale, and the lawful heirs male to be procreate of his body; whom failing, to Alexander Hay, second son to Alexander Hay of Drummelzier, and *his lawful heirs male*; whom failing, to the Honourable John Hay of Belton, Esq., and *his lawful heirs male*; whom failing, to the Honourable John Hay of Lawfield, Esq., and *his lawful heirs male*; whom failing, to Lord Robert Kerr, second lawful son of the present Duke of Roxburgh, and *his lawful heirs male*,” &c.

Besides the usual prohibitory, irritant, and resolute clauses and conditions of using arms, &c. there followed this clause of devolution, upon which the present question arises:—“That if any of the heirs of entail before mentioned, or their descendants, shall happen to succeed to the estates or titles of Marquis of Tweeddale, Hay of Drummelzier, Duke of Roxburgh, then and in that case, the right of my lands and others before mentioned in the person of such heir of entail, so succeeding to any of the foresaid other estates or titles, shall cease and terminate, and that from the Whitsunday or Martinmas next after he shall have so succeeded; or in his option, next after he shall have a second lawful son attained to the age of fourteen years, during which space I herewith dispense with the said heir of entail his using my surname and coat armorial; and the right of the lands and others foresaid shall fall and devolve

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“ to his said second lawful son, and to his heirs male, and
“ so on, as often as the same case happens, in all time
“ thereafter.”

When Sir Robert Hay died, the Marquis of Tweeddale had then but *one* son; and, in consequence, the succession to Linplum estate, under the above destination, devolved upon the next heir called in the entail, namely, Lord Charles Hay, the Marquis' immediate younger brother, he being the first substitute called after the younger sons of his brother the Marquis;—Upon Lord Charles' death without issue the succession then devolved on the respondent, Lord George Hay, his younger brother next called in the deed, who, upon the death successively of the Marquis of Tweeddale and his only son without issue, also thereafter succeeded to the titles and estates of Tweeddale. Both estates being thus united in him, the present action was raised by the appellant. Alexander Hay of Drummelzier's second son was at this time dead, without issue, but the appellant, his brother, and heir male, being advised that, by the respondent's succession to the titles and estate of Tweeddale his right to Linplum had terminated, he claimed the same as the next substitute called, and entitled to succeed on that event.

The respondent resisted this, on the ground that as his own heirs male had not failed, and as it was more than probable he would have a second son, he was entitled to hold the estate during his life, until he should have a second son arrived at the age of fourteen.

June 20, 1771. The Lord Ordinary, of this date, found that, under the special proviso in the deed, the respondent had the option to hold the estate of Linplum until he should have a second son entitled to succeed. On representation, the case was
Feb. 19, 1772. reported to the Court; and the Court, of this date, adhered.

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

Pleaded by the Appellant.—From the whole frame and tenor of the deeds in question, it was manifest that it was Sir Robert Hay's fixed and determined purpose to secure his estate of Linplum limited to a particular series of heirs different from the persons who should succeed to any of the other three estates of Tweeddale, Drummelzier, or Roxburgh. This intention is fortified by an entail, containing prohibitory, irritant, and resolute clauses, to prevent every

heir in the right of the estate from doing any act destructive of the succession so arranged. In discovering and ascertaining who is the heir entitled to succeed, the VOLUNTAS TESTATORIS is the supreme law, and must govern. The grand intention of this entail was, to prevent his estate of Linplum being united or absorbed with those of Tweeddale, Drummelzier, and Roxburgh. He had a strong attachment to John Marquis of Tweeddale: and, in regard to *him*, he provides, that if the estate shall devolve to the second lawful son of the said Marquis of Tweeddale before his existence, then it shall be lawful to the said Lord Charles Hay, or to the nearest heir of entail in being at the time, to enjoy the rents and profits thereof, until the first term of Martinmas or Whitsunday, inclusive, following the birth of the said Marquis' second son, "when he is to denude;" but having so favoured John Marquis of Tweeddale, it did not follow that any subsequent Marquis of Tweeddale, who should succeed to both estates, was to enjoy the same privilege; which privilege was entirely confined to John Marquis, and to be an option to hold the estate until his right should terminate by the birth of his second son, or in his option, until he attained the age of fourteen years complete. Any other construction than this would entirely frustrate the chief object the entailer had in view, because, as the estate is devised to the respondent *nominatim*, and *the heirs male of his body*, according to this destination the respondent's eldest son would be entitled to succeed, and so destroy the whole intention of keeping the Tweeddale and Linplum estates disunited.

Pleaded for the Respondent.—The second son of the family of Tweeddale was the *prædilecta persona*, and the intention of the entail was, to give to John Marquis of Tweeddale, or the Marquis of Tweeddale for the time, the enjoyment of Linplum during the non-existence or non-age of his second son. The words used to express this are too plain to admit of doubt, and no evidence of contrary intention will warrant departure from the strict words of an entail. All construction, therefore, with the view to expiscate the intention of the maker is excluded, where the words are clear and express, and where the departure from this is fenced by irritant and resolute clauses, and the penalty of forfeiture. The Marquis (respondent) has the power of holding "till the term of Whitsunday or Martinmas next after he shall have a second lawful son, attained to the age

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of fourteen years." These words are positive and express, and unless the appellant can shew they were different from what they mean, any inquiry into intention is so much labour futile and vain. Nor was it in the contemplation of the maker that the second son should be in *esse* at the time of the junction of the two estates. On the contrary, it plainly appears that a second son born after this event was in his view; and it would be irrational to suppose that he was to be deprived of his right merely because he accidentally happened to be born a day or two after the conjunction.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

For Appellant, *J. Montgomery, Al. Wedderburn.*

For Respondent, *Henry Dundas, Al. Forrester.*

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 (M. 14,179.)

JOHN HEPBURN of Edinburgh, Surgeon, and	} <i>Appellants ;</i>
WILLIAM CHEAP, - - - - -	
GEORGE AIKMAN of Glasgow, Merchant,	<i>Respondent.</i>

House of Lords, 30th April 1773.

SALE—EXCEPTIONABLE TITLE.—Circumstances in which held, that a purchaser, according to the terms of the sale, was bound to take the title as it stood, or give up the bargain.

The premises rented and occupied by Cheap as a ware-room, in the High Street, Edinburgh, were advertised for sale, referring for particulars, &c. to George Jeffrey, writer in Edinburgh. In answer to this advertisement, the appellant Hepburn wrote Jeffrey, offering £150 entry at Whitsunday then next, and obliging himself to stand by this offer, under a penalty of £30. On the same day, this offer was accepted of, in the following terms: "I have yours of this date, offering me the sum of £150 sterling, for the ware-room presently possessed by William Cheap, Linendraper, which I am empowered by George Aikman, merchant in Glasgow, the proprietor, to dispose of; and I hereby, on the part of Mr. Aikman, accept of your offer, and shall execute