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quested or might thereafter be conquested by him: In consequence of which, the several heirs succeeding to George are subject to the limitations contained in the tailzies.

The lands of Inch being subject to the limitations in the tailzie of Balquhain, there is nothing in the marriage-articles between George Leslie and Margaret Elphinston that can import a discharge of the obligations by former deeds.

2do, Neither the positive nor negative prescription can avail the defender. The absolute property of the lands of Inch having been established in the person of Count Leslie, or George his son, their heirs cannot acquire such property by prescription, since, independent of, and antecedent to, any prescription, the same was fully in them.

The right claimed by the pursuer is not a right of property, but the performance of an obligation, which Ernest Leslie, being subjected to by the tailzies of the estate of Balquhain, could not, by a gratuitous deed, disappoint.

Could an immunity from such obligation be acquired by the positive prescription, the possession of the estate of Balquhain by George, upon the tailzies 1692 and 1700, and by Ernest, upon that of 1700, was an acknowledgement of the obligation upon the heirs, with regard to the lands of Inch, in virtue of that right by which they enjoyed the estate of Balquhain.

Prescription could not run till after the death of Count Leslie, in 1709, who, by his right, in 1699, to the lands of Inch, had full power over those lands; and it was interrupted, in 1746, by the process of Anthony Count Leslie.

The negative prescription has not run, as no action could arise before the deed executed by Ernest Leslie, at least before the death of Patrick Count Leslie, who was not subject to the tailzie; and the possession of the estate of Balquhain by the heirs in virtue of the tailzies is an effectual interruption of such prescription.

"The Lords sustained the defence, and assoilzied."

Act. *D. Græme.* Alt. *M'Queen.* Reporter, *Auchinleck.* Clerk, *Pringle.*

P. C. *Fac. Coll. No.* 88. *p.* 158.

1771. *June* 20. *and* 1772. *February* 19.

ROBERT HAY, Second Son of ALEXANDER HAY of Drumelzier, *against* GEORGE MARQUIS of TWEEDDALE,

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Effect and interpretation given to a clause of devolution in a deed of entail.

The Barony of Linplum, anciently a part of the estate of Yester, had been originally given off to a second son; and in the investitures which followed, a predilection had always been shown to the family of Tweeddale.

In the year 1748, Sir Robert Hay executed a deed of settlement of his estate of Linplum "to Mrs. Margaret Hay his sister, in life-rent, and to the second lawful son to be procreated of the body of John, present Marquis of Tweeddale, and the

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lawful heirs-male of his body, in fee; whom failing, to the said Marquis, his third lawful son, and the lawful-heirs-male of his body; and so on to all the said Marquis' younger sons, one after the other; and failing all the said Marquis' younger sons, and the lawful heirs of their bodies, to Lord Charles Hay, brother-german to the said Marquis, and the lawful heirs-male to be procreated of his body; whom failing, to Lord George Hay, brother-german to the said Marquis of Tweeddale, and the lawful heirs-male to be procreated of his body; whom failing, to Alexander Hay, second son to Alexander Hay of Drumelzier, and his lawful heirs-male; whom failing, to Hay of Belton, and Hay of Lawfield; whom failing, to Lord Robert Ker, second son of the Duke of Roxburgh, and his heirs-male."

The deed provided, that the whole heirs of entail above named shall assume and bear the arms, name, and designation of Hay of Linplum.

" And if it shall happen that the right of the subjects hereby entailed shall devolve to the said second son of the Marquis of Tweeddale before his existence, it shall be lawful to Lord Charles Hay, or the nearest heir of entail in being at the time, to establish titles in his person to the lands, and to enjoy the rents till the first Martinmas or Whitsunday following the birth of the said Marquis's second son; and then the said Lord Charles, or nearest heir, shall denude himself in favour of the said Marquis's second son, &c."

And " it is hereby expressly provided, 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 Drumelzier, or Duke of Roxburgh; then 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 hereby dispense with the said heir of entail his using my surname and coat-armorial; and then the right of the lands, and others foresaid, shall fall and devolve 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."

The deed contained the usual prohibitory, irritant, and resolutive clauses—but provided, that the irritancy shall not, in any event, be extended farther than to the contravener himself; so that if a nearer heir shall come to exist after the contravention, the right of the person who shall have succeeded shall cease, and the estate shall devolve upon such nearer heirs.

Of the same date, Sir Robert executed a deed, settling his personal estate upon the same series of heirs, and by a reference to the entail, under the same limitations as the land estate.

Sir Robert dying without issue in the year 1751, and John Marquis of Tweeddale having, at that time, but one son, the succession to the estate of Linplum devolved upon Lord Charles Hay, the Marquis' immediate younger brother; and upon Lord Charles' death without issue, the succession opened to Lord George Hay the defender. John, Marquis of Tweeddale died, leaving an only son; upon

whose death, in the year 1770, the defender succeeded also to the honours and estate of Tweeddale.

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Upon this event, the pursuer brought an action of declarator, concluding, that, by this junction of the two estates, the Marquis' right to the estate of Linplum had ceased; and that by the clause of devolution in the settlement 1748, the same had devolved upon him as the nearest heir existing at the time under the settlement, and that the Marquis should denude accordingly.

In support of his action, the pursuer pleaded:

1mo, It was a general rule in the construction of all deeds, particularly settlements and last wills, that the *voluntas testatoris*, the ultimate object of the deed, whether expressed or implied, should be observed.

This was more especially a fixed principle, where the words made use of were either defective or doubtful; so that if Judges were not allowed *ex præsumpta voluntate* to supply defects, and to construe doubtful clauses in the manner most consonant to evident intention, the main object of settlements might be overthrown. The authorities from the civil law, in support of this rule, were numerous. L. 19. D. De Condit. et Demon. Vinnius, Part Juris, C. 62. Voet. De Condit. Instit. § 3. Franc. Mantua, L. 3. Tit. 19. § 4. De Conject. Ultim Volunt. L. 4. D. De Vulg. et Pupill. Substit. L. 102. D. De Condit. et Demonstrat. In the practice of this country, the same principles had been uniformly followed; 21st November, 1728, Magistrates of Montrose against Robertson, (see APPENDIX); 18th July, 1729, Anderson against Anderson, (see APPENDIX); February, 1734, Sutherland against Murray, No. 38. p. 14931.; 2d January, 1708, Mackenzie against Lord Mountstuart, No. 32. p. 14903. And a question similar to the present, occurred in the competition betwixt Count Anthony Leslie and Leslie of Pitcaple.

2do, From an attentive examination of the clauses of the deed, the intention of the maker unquestionably was, in the *first* place, To settle and secure the whole estate, in the form a strict entail, in favour of a particular line of heirs; *2dly*, To establish a separate and distinct representation of himself and family, and with a remarkable anxiety to guard against its being sunk or absorbed in any of the more noble families and more opulent estates of Tweeddale, Drumelzier, or Roxburgh. This was an event which it was foreseen might very possibly happen, either by the heir in possession of Linplum succeeding to the titles and estase of any of these families, or *vice versa;* and the prime object in view was to guard against this contingency. The devolving clause was expressly to this purpose, providing that, whenever the events occurred, the right of such person to the estate of Linplum should cease and determine.

The subsequent part of that clause, by which an option was given to the heirs succeeding to both estates, to hold that of Linplum for a limited time, could not bear the construction the defender gave it. No more, it was plain, was either meant or intended, but that in case, at the time of the junction of the two estates, an heir in possession of the estate of Linplum should have a second son under the age of fourteen, he should have it in his power to retain that estate, with the rents

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and profits, till such time as such son should attain that age; but it never could be inferred that, after his right had been declared terminated, he should still hold the estate, merely because there was a possibility that some time or other he might have a second son.

The construction of the deed contended for would render the devolving clause elusory and ineffectual, and adverse to the obvious intendment of the entailer. Upon the principle assumed, and the bare possibility that the defender might have a second son who should attain the age of fourteen, would he not only hold the estate during his own life, but his eldest son again would, in like manner, and upon the same possibility of having a second son, be entitled to hold it during his life; and so on from father to son for generations, provided none of them ever had a second son who arrived at fourteen years of age.

The defender answered:

1mo, It was a rule in construing words in every deed whatever, that they were to be received in the plain, obvious, and common meaning. It was also a fixed principle, that Judges were not authorised either to add or to correct the terms of a solemn deed of settlement; and it was equally a just and solid maxim, "ubi in verbis nulla est ambiguitas, non debet admitti voluntatis questio." Upon these principles numerous cases had occurred, where the words alone in deeds had been attended to, and even strong presumptions or indications of intention adverse thereto entirely disregarded; 17th June, 1766, Bailie against Tenant, No. 46. p. 14941.; 24th November, 1769, Edmonston against Edmonston, No. 59. p. 4409.

But the defender was not under the necessity of pleading the present point so high; for it was a rule in law, that limitations upon property were not to be extended, that devolving clauses or forfeitures of the heir's right were to receive the strictest interpretation, and in no case to be gathered even from intention; and as the preference given to the heir by the first institution was certain, it was not to be destroyed by a clause, the import of which was doubtful. Minechius, L. 4. Presumpt. 67. § 1. Mantica, L. 7. T. 5. § 11. Peregrinus de Fidiecom. Art. 1. § 26. L. ult. Cod. De Rei Vind. Voet. in Tit. D. Ad Sen. Trebel. § 7. Molina, L. 1. C. 4. § 8. Coke on Littleton, Fol. 218. Vernon's Rep. v. 2. p. 339.

2do, When, according to these just principles of interpretation, the deed in question was considered, no doubt upon the subject could be entertained. The clause of substitution in the defender's favour was express; and though it might have been the wish of the entailer that his own family should not ultimately be merged and lost in the family of Tweeddale, he had evidently shown a predilection for, and it had been the chief object of his settlement, to vest a second son of that family in his estate.

The whole clauses of the settlement, and in particular the clause of devolution, sufficiently indicated, not only what was intended, but what was done. By the optional branch of that clause, the defender was authorised to hold his possession of Linplum, notwithstanding the conjunction of the estates, till he had a second law-

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ful son who had attained to fourteen years of age: That being the condition or indulgence, it was impossible that the entailer could mean, or that, according to the words of the clause, there was any ground in law to divest him before even he had a second son at all.

The entailer, by this clause, not only gave permission to continue the possession of the estate, but in an anxious manner provided for his doing so. Least any obstacle from the entail of the estate of Tweeddale should arise, a dispensation, as to using the name and arms of Linplum, was thrown into the deed; which was, in plain words, saying, that although the Marquis, holding the estate of Linplum, should succeed to the honours and estate of Tweeddale, and although he should have no second son at the time; yet that he should incur no irritancy of his right, but should continue to hold the estate till he had a second son, and even till that son arrived at fourteen years of age.

A great majority of the Judges were of opinion, That whatever might have been the intention of the entailer, as the words were clear and express, they were not at liberty to depart from their natural import, and the meaning they conveyed. Though they were called upon to give an interpretation to ambiguous or doubtful words, they could not assume the power of supplying what might appear to be a defect: That the rules also of interpretation were different where the case was entitled to favour, and where, as in the present instance, it involved a forfeiture. Two Judges were of opinion, That the case was a mere *quæstio voluntatis*, and that the intention had been to keep the two estates always distinct.

The Lord Ordinary had found, " That the said deeds of entail, upon which the question in debate arises, are not devised upon any regular or uniform plan, so must be taken as Sir Robert or his writer has chosen to express them; and as the defender succeeded to the estate of Linplum in consequence of the entail, and the clause by which his right to that estate is appointed to cease and determine upon his succeeding to the estate of Tweeddale, is under a special *proviso* that he have his option to hold it till he have a son of fourteen years of age, to whom alone he must denude; finds the defender is entitled to hold the estate of Linplum, and the pursuer has no right thereto; and therefore assoilzies the defender, and decerns." And upon advising informations, the Lords, on the 19th February, 1772, adopted the Lord Ordinary's interlocutor, sustained the defences, and assoilzied from the action.

Lord Ordinary, *Auchinleck*. For Robert Hay, *Adv. Montgomery, Lockhart.*
Clerk, For the Marquis of Tweeddale, *Sol. H. Dundas.*

R. H. *Fac. Coll. No.* 122. *p.* 360.

*** The case was appealed.—The House of Lords, (6th April, 1773) ORDERED and ADJUDGED, That the appeal be dismissed, and that the interlocutors complained of be, and are hereby, affirmed.