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"sioners may then give their determination accord-
"ingly."

For Appellant, *William Adam, Wm. Robertson.*
For Respondents, *Ilay Campbell, Geo. Buchan Hepburn.*

NOTE.—Lord President Hope stated, in the case of Preston Kirk, in reference to the above case, "I know something of this case of Tingwall; and the circumstances attending it made some impression on my mind, as it was the first cause I pleaded in the House of Lords. The House of Lords felt no difficulty on the general point. They did not determine the case of Tingwall upon the specialities. These were no doubt noticed by the Lord Chancellor, when he delivered the opinion of the judges; but they were noticed for a very different purpose, and to a different effect. The doubt which the Lord Chancellor mentioned of the *ipsa corpora* of the teinds was, whether the possession of the *ipsa corpora* of the teinds, for more than 40 years, founded on the title of incumbency, was not sufficient to carry a prescriptive right to the whole teinds in all time coming. In deciding the Tingwall case, his Lordship stated most distinctly that it would be productive of the most pernicious consequences not to adhere to the decision in the case of Kirkden; and in consequence he did adhere, and did mean to adhere to the same principles, by reversing the decree."—Vide case of Preston Kirk.

[Mor. 2315.]

MISS FRANCES HAY, a Minor, and Her Curators. . . . } *Appellants;*
ROBERT HAY, Esq., of Drumelzier, *Respondent.*

House of Lords, 25th May 1789.

ENTAIL—SUCCESSION—HEIRS MALE.—Circumstances in which the words "*heirs male*" in an entail, received a strict technical interpretation, though they had been used with the same meaning, so far as appeared from the deed, as that of "*heirs male of the bodies*" of the substitutes, which had been used in other parts of the deed.

By settlement made in the form of an entail by Sir Robert Hay, he disponed his estate to himself and his sister, Mrs. Margaret Hay, in liferent, 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 his *third* " lawful son, and the lawful heirs male of his body," and so on to all the Marquis's sons, and the heirs male of their bodies; and then to the Honourable Charles Hay, his brother germain, and the lawful heirs male of his body, &c., whom failing, to " Alexander Hay, second son of Alexander Hay " of Drumelzier, *and his lawful heirs male*," and so on through other substitutes to the heirs female of the body of the said John Marquis of Tweeddale.

The heirs were taken bound to assume the surname and designation of Hay of Linplum, and to use the arms of the family. There was also this declaration, " That it shall not " be lawful to the said second son to be procreated of the said " Marquis, or the lawful heirs of his , (a word, supposed " to be *body*, awanting in the original), nor to any of the said " heirs of tailzie, *nor their descendants*, to alter, innovate or " change the destination, or course or order of succession " before written." Then follows a prohibition against contracting debt, or granting leases for any longer space than 19 years.

Sir Robert Hay died without issue in 1751. His sister Margaret died a few months thereafter; and no younger sons being then in existence of John Marquis of Tweeddale, the succession to this estate of Linplum, under the above deed of entail, devolved upon Lord Charles Hay, who also having died without issue, the estate devolved on the next substitute, Lord George Hay. This last individual afterwards succeeded to the honours and estate of Tweeddale, and died without issue in 1787. Alexander Hay, second son of Alexander Hay of Drumelzier, having predeceased his father without issue along with his elder brother William, the respondent his younger brother competes with the appellant. The appellant claimed as heir female of Marquis John, the intermediate substitutes having also failed. The respondent stated that he was heir male in general of Alexander Hay, his said elder brother, who is called immediately after Lord George Hay, (Marquis of Tweeddale) last in possession, and before heirs female.—And the appellant claimed, as daughter of Lady Charlotte Hay, and granddaughter of John, fourth Marquis of Tweeddale, who besides being heir general of Sir Robert Hay's family, claimed also as heir female of Marquis John.

The case came on for discussion, in a competition of brieves

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before Lords Monboddo and Ankerville assessors. And the question, which was reported to the whole Court, came to be, Whether the expression "lawful heirs male," as applied to Alexander Hay, was to be restricted to "heirs male *of the body*," or to have a more comprehensive interpretation, and to include collateral heirs male?

The Court preferred Robert Hay, the respondent, holding that judgment must be given according to the technical signification of the term, which they thought unambiguous, and not according to the intention, though that intention was obvious and manifestly adverse to such construction.

July 24 1788.
Nov. 25 1788.

Against these judgments the present appeal was brought.

Pleaded for the Appellant.—Though, to impose fetters, the maker of an entail must use certain *verba solemnia*, which courts of law can neither supply nor explain from collateral circumstances, yet a different rule holds where the question is, Who is entitled to succeed according to the description of heirs marked out by the deed?—every latitude of construction being allowed *ut effectum sertiatur voluntas testatoris;* and the question comes to be, *inter hæredis,* What heirs were meant, under the terms "lawful heirs male," in the substitution to Alexander Hay, second son of Drumelzier? The question ought not to be determined upon any supposed technical rule, but agreeably to the obvious intention of the testator, as this intention appears from the general tenor of the deed. In the present case, that intention is clear in favour of the appellant, from the whole words, clauses, and accidents of the deed. But further, in tailzied succession, where different nominatim substitutes are called in their order, the legal acceptation and meaning of the term heirs, or heirs male, or heirs female, is that the heirs of that description, who are descendants of each substitute, are alone admitted to the succession; whom failing, the next *nominatim* substitute and his heirs descendant. It is therefore to heirs male descendant of the *nominatim* substitute that are here meant; and as the respondent is merely a collateral heir male of his brother, Alexander Hay, second son of Drumelzier, he cannot succeed or be included within that description.

Pleaded for the Respondent.—The term "heirs male" is as much fixed and determined as any technical term whatever. It includes not only male *descendants* but *collateral males;* and as the respondent is heir male of

his elder brother Alexander, he is entitled to take the estate in that character. The term heirs male is not of a flexible nature. It has a distinct technical meaning, and includes all heirs male, whether of the body or collaterals. It cannot be applied to heirs of line, because then it would include heirs female, and it cannot be construed only to mean descendants, because then it would exclude brothers, for construction, or presumptions, just because there is on uncles, and nephews. Hence it follows that there is no room room for a *questio voluntatis.*

After hearing counsel, it was .

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Ilay Campbell, J. Scott, T. Erskine.*
For Respondent, *Alexander Wight, William Tait.*

ALEXANDER GRANT of Edinburgh, . *Appellant ;*
EARL of Morton, . . . *Respondent.*

House of Lords, 8th June 1789.

LEASE—REMOVING.—A lease, with a clause generally against subsetting, permitted the tenant to subset part of the subject, which was done accordingly. No rent was ever paid by the subtenant to the landlord, nor to the tenant from whom he had his sublease, while there was a clause in the lease that the tenant should be liable in payment of the rents of the whole subject. The tenant failed, and an action of ejection being raised and decree passed, Held that the decree of removing was a good decree, although only raised against the principal tenant, and clearly entitled the landlord to eject the subtenant from the part held by him.

The Earl of Morton set by lease to Alexander Rodger, his heirs, (excluding assignees and subtenants), the farm of Haggs, with the pertinents; the farm of Cumberland, with pertinents; the houses, lands, crofts, and acres, in the town of Dalmahoy, with pertinents; and, lastly, the farm of Burnwynd, with pertinents, all lying in the barony of Dalmahoy, and county of Edinburgh, and that for thirty years from Martinmas 1771, at a rent of £147. 10s.

There was this clause in the lease:—"That notwithstanding the prohibition to subset, the said Alexander Rodger and his foresaids shall have liberty to subset the pendicle