

§ 17. It is quite immaterial, and they need not specify, by whom they are written. It is sufficient that the doquet bear *fideliter scriptum*. No. 7.

The Lord Ordinary reported the cause on Informations.

The Court decerned in terms of the libel; and the judgment was adhered to, upon advising a petition with answers.

Lord Ordinary, *Balmuto*.  
D. Douglas.

Act. *John Dickson*.  
Clerk, *Pringle*.

Alt. *R. Craigie*.

D. D.

*Fac. Coll. No. 221. p. 499.*

\* \* \* See case between these parties, APPENDIX, PART I. *voce* SUPERIOR AND VASSAL, No. 3.

1801. *February 26.*

MAJOR GEORGE SUTHERLAND *against* HELEN and CATHARINE SINCLAIRS,  
and ALEXANDER BAILLIE.

ROBERT MURRAY, in 1710, executed an entail, by which he disposed his estate of Pulrossie, 'in favour of John and George Murrays, sons to George Murray, brother-german to me the said Robert Murray, and the heirs-male to be procreated of their bodies; whilks failing, to James Sutherland of Clyne, and the heirs-male of his body; and failing heirs-male of the said James Sutherland his body, to John Sutherland, eldest son to the deceased Captain Alexander Sutherland of Little Torboll; whilks failing, to Kenneth Sutherland, second son to the said Alexander Sutherland; whilks failing, to Alexander Sutherland, third son to the said Captain Alexander Sutherland, and the heirs-male of his body; whilks failing, to William Sutherland of Hamme, and the heirs-male of his body.'

Although the heirs of John and Kenneth Sutherland are here omitted, yet the procuratory of resignation grants warrant for resigning the lands *seriatim* to John Sutherland, eldest son to the deceased Captain Alexander Sutherland of Little Torboll, and the heirs-male of his body; whilks failing, to Kenneth Sutherland, second son to the said Captain Alexander Sutherland, and the heirs-male of his body, &c.

The entail further provides, 'that it shall not be lawful, nor in the power of the said John and George Murrays, their heirs-male, and of tailzie succeeding them, as said is, to contract or take on sums of money, whereby the said lands and others foresaid may be affected or evicted from them, excepting for payment of the said debts resting by me the said Robert, in manner above mentioned.'

No. 8.

An omission in the dispositive clause of an entail found to be supplied by the terms of the procuratory of resignation.

Construction of certain clauses occurring in an entail.

No. 8. This prohibitory clause is fortified by a resolute, but no irritant clause. Neither does the deed contain any clause prohibiting the heirs of entail from altering the course of succession.

The deed was duly recorded in the register of tailzies.

In 1763, by the failure of the prior heirs, James Sutherland Murray, eldest son of James Sutherland of Clyne, one of the substitutes in the entail, succeeded to the estate.

At the entailer's death, the estate stood burdened with debts to the amount of £16,125 Scots. Some further debts were imposed on it by the succeeding heirs of entail; and other debts to a much larger extent were contracted by James Sutherland Murray, for payment of all which, the estate, in 1776, was sold for £6650 Sterling.

Several years prior to the sale of Pulrossie, James Sutherland Murray had conveyed to trustees an unentailed estate, and all other heritable and moveable property belonging to him; 1st, For payment of his debts; and, 2dly, That the trustees should account for the residue 'to his heirs and assignees whatsoever.'

James Sutherland Murray died in 1782, and his representatives, after payment of his debts, drew a small reversion.

On James Sutherland Murray's death, Major George Sutherland, the heir-male of the body of John Sutherland, eldest son of Captain John Sutherland of Little Torboll, brought an action against the representatives of James Sutherland Murray, and of the prior heirs of entail, for payment of the price of Pulrossie, *minus* the entailer's debts, on the footing, that, by their deeds of contravention, he, as the next heir of entail, had sustained damage to that amount.

In opposition to this claim, the defenders

Pleaded: 1st, Although John Sutherland is himself called by the dispositive clause of the entail, his heirs are not called. Consequently, the pursuer not possessing the character of an heir under the entail has no right to insist. It is true, that John Sutherland's heirs-male are mentioned in the procuratory of resignation; but, where an entail is framed in the shape of a disposition, it is the dispositive clause which is to be relied on as containing the will of the granter, the subordinate clauses being inserted merely to enable the heirs to complete the feudal investiture; 13th July 1722, Sir John Kennedy against Arbuthnot, No. 22. p. 1681.

2dly, The prohibitory clauses of the entail are directed only against John and George Murrays, 'heirs-male and of tailzie.' But although James Sutherland Murray was the heir of entail of the institutes, he was not their heir-male. Now the word 'and' being conjunctive, and the limitations of an entail being literally construed, (Judgment of the House of Lords, Edmonstone against Edmonstone, 24th November 1769, No. 68. p. 15461.), it follows,

that James Sutherland Murray was not subject to the prohibitions, and consequently, the present action is unfounded.

*3dly*, Although the entail prohibited the contraction of debts, it contained no clause prohibiting the heirs of entail from altering the succession. But if James Sutherland Murray could have altered the order of succession to the estate, it was equally competent for him to do so with regard to the reversion of its price, which was the surrogatum for it; 8th November 1749, Sinclair, No. 22. p. 15382. And this he did effectually by his trust-disposition, whereby he ordered the reversion of his heritable and moveable estate to be made over to his heirs and assignees whatsoever.

Answered: *1st*, The procuratory of resignation being the warrant of the new investiture, is the most important member of the entail; and therefore, any palpable omission in the dispositive clause, such as the one founded on by the defenders, may be supplied and corrected by the terms of the procuratory of resignation; 13th July 1722, Sir John Kennedy against Arbuthnot, No. . p.

*2dly*, The grammatical subtlety, on which the second defence is founded, is opposed by the obvious meaning of the granter, and by sound construction. The prohibitory clauses of the entail are evidently directed against all the heirs of tailzie, whether they were or were not at the same time the heirs-male of the institutes.

*3dly*, The trust-disposition was executed by James Sutherland Murray, merely as the easiest way of rendering his unentailed property divisible among his creditors. In fact, it did not convey the entailed estate, which was sold, not by the trustees, but in consequence of a judicial sale brought by the heritable creditors. It is vain, therefore, to found on the trust-disposition, as an alteration either direct or implied, of the order of succession established by the entail.

A great majority of the Judges were of opinion, that the omission in the dispositive clause was supplied by the terms of the procuratory of resignation, and that the other defences were ill-founded.

The Lords accordingly sustained 'the pursuer's title, and found, that he, 'as substitute heir of entail, is entitled to have the reversion of the price of 'said estate, after deduction of the entailer's debts, settled in terms of the en- 'tail; but found the defenders only liable *in valorem*.'

A reclaiming petition was refused without answers, 19th May 1801.

Lord Ordinary, Stonefield. Act. Solicitor-General Blair, Archibald Campbell, junior.  
Alt. Lord-Advocate Hope, M. Ross, Wolfe-Murray, Montgomery. Clerk, Menzies.

R. D.

Fac. Coll. No. 233. p. 504.