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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 WILLIAM CHEAP, - - - - } *Appellants;*

GEORGE AIKMAN of Glasgow, Merchant, *Respondent.*

House of Lords, 30*th 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

" the deeds necessary with your first conveniency; your
" entry to be on Whitsunday 1771, and you to grant bond,
" with security to my satisfaction, payable at that term; the
" disposition to bear absolute warrandice; and I oblige Mr.
" Aikman to stand to this bargain, under the penalty of £30
" sterling, attour performance."

After this bargain was thus completed, Hepburn having been solicited by Cheap the tenant, to let him the wareroom, he declined, but offered to sell him the premises, which was accordingly done at £155. Upon this Cheap came in the room and place of Hepburn, and when the term of entry arrived, he made to Jeffrey a tender of the price, on his giving such a title as he himself might be expected to give, in case of his selling, or borrowing money thereon, failing which, the seller to dispone other estate of equal value, as a collateral security or warrandice against eviction. The respondent refused to accept the money under these conditions, and offered only personal warrandice. Cheap made a second tender, requiring a good and proper title, with absolute warrandice, but this was also refused. Having thus done every thing to fulfil their part of the contract, matters lay over in this state until the seller, respondent, brought the present action for the price, against Hepburn, and also concluding that he should be bound to accept a disposition to the same, containing absolute warrandice, or, in case it should be found that he is not bound to accept of the title as it stands in the seller's person, that the bargain should be declared void and null, and the defender, Hepburn, liable in the penalty stipulated. The appellant, Cheap, afterwards appeared as a party for his interest.

Of this date, the Lord Ordinary found, " That Hepburn Jan. 28, 1772.
" was not liable for the price, until a sufficient progress was
" produced. And, on representation, he again found, " That July 22, 1772.
" the respondents, (appellants Hepburn and Cheap,) are
" not bound, and cannot be compelled to give up the bar-
" gain which the respondent (appellant) John Hepburn
" made with the representer, and that they are not liable
" to pay the price of the subjects sold, till a sufficient pro-
" gress is produced. On reclaiming petition to the Court, Dec. 10, 1772.
" the Lords found, " That the defenders (appellants) are
" bound either to accept of the disposition and progress
" offered, or to depart from the bargain, and repone the
" petitioner (the respondent) to the possession, and in re-
" spect it appears that William Cheap knew the defect in

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"the progress, at the time when he made the bargain "with Hepburn; therefore, find him liable in the expense "of process; the account thereof to be given in to Court, "and remit to the Ordinary to proceed accordingly."

Dec. 19, 1772. On another reclaiming petition the Court adhered. And, in terms of the remit back to the Lord Ordinary, his Lord-

Jan. 4, 1773. ship, of this date, pronounced this interlocutor:—"Appoints "the defenders to declare their option whether they will "accept of the disposition and progress offered, or depart "from the bargain, in terms of the interlocutors of the "whole Lords, and that betwixt and the 22d current, with "certification."

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

*Pleaded for the Appellants.*—When the appellant Hepburn contracted with the seller, he was ignorant of any defect in the title, but relied on a good title being given. Whatever Cheap may have known about the title when he bargained is immaterial, as he came into the right and place of Hepburn, in Hepburn's contract with the seller; and Cheap was expressly told that it was incumbent on the seller, by that contract, to give an unexceptionable title, and on this Cheap, as well as Hepburn, relied and acted throughout. Besides, the seller is in a condition to give a good title, by obtaining the heir's consent, or proceeding by adjudication in implement. In any view, the expenses of this suit ought not to be thrown upon the appellants, who, on the contrary, ought, in the whole circumstances, to be held entitled to their costs.

*Pleaded for the Respondent.*—The terms of the bargain with Mr. Hepburn were, that the disposition should bear absolute warrandice, which was meant and understood to cover all defects in the title. When the flaw in the title was discovered, the parties agreed to refer the matter to a conveyancer for his opinion, whether any, or what security the seller should give Hepburn; and had he retained the purchase, the matter would have been settled long ago to the satisfaction of both. But the appellant Cheap purchased in the full knowledge of this defect in the title, and, therefore, cannot be heard to insist for a good title, or to insist on the purchase, and yet refuse payment of the price until that good title be produced. If the title be defective, his obvious course is either to give up the bargain, or pay the

price. He cannot refuse both, and at same time retain possession of the subjects purchased. The respondent's alternative claim is therefore fair and reasonable, that he accept the progress as offered, or void the agreement and possession.

After hearing counsel, it was

Ordered and adjudged that the said appeal be dismissed, and the interlocutors complained of be affirmed, with £100 costs."

For Appellants, *Al. Wedderburn, E. Perryn.*
For Respondent, *J. Montgomery.*

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Miss ANNA BRUCE, - - - *Appellant;*
JAMES BRUCE CARSTAIRS, Esq. - *Respondent.*

House of Lords, 11*th May* 1773.

ENTAIL—EXERCISE OF POWER—PROVISION.—In an entail power was given to the heirs of entail to burden the estate with provisions to their husbands, wives, and children, "such as the estate could conveniently bear and allow." In 1748 the heir in possession burdened it with a provision of £1000; and thereafter, in 1759, burdened it with a second bond of provision to the same party for £1000. Held, in an action for payment of both bonds, that the heir in possession had not exceeded his powers, and that by the first bond his powers were not so exhausted as to prevent him from granting the second.

Sir William Bruce entailed his estate of Kinross upon himself and the heirs-male of his body; whom failing, upon a series of substitutes. It contained the usual prohibitory, irritant, and resolutive clauses against alienation and burdening the estate, from which were excepted his own male descendants. But power was given to the "haill heirs of "taillie and provision, to provide their husbands, wives, "bairns, and children, to competent and convenient liferent "portions and provisions, such as the said estate may con- "veniently bear and allow, and shall be agreed to by two "of the nearest relations, one on the father's side, and one "on the mother's side, these not to exceed ——." A blank was left for the amount, but not filled up.