the present case the entailer has not used proper words to prohibit a sale or alienation, but on the contrary, has omitted such prohibition; and as he has not used the known technical words for such a prohibition, but has it omitted altogether, it must be held that such was his intention, and that by the entail, as well as by the disposition of law, the heirs should be at liberty to sell the estate.

After hearing counsel: "It is ordered and ad- Judgment, Feb. 14, 1750.
"judged, &c. that the interlocutor complained of
"be, and the same is hereby affirmed."

For Appellant, *C. York.*
For Respondents, *W. Murray.*

The Honourable FRANCIS CHARTERIS of Amisfield, - - - } *Appellant;*
The LORD ADVOCATE, - - *Respondent.*

22 February 1750.

IRRITANCY.—FORFEITURE.—A conveyed his estate to the second son of B, and appointed trustees, (three of whom were declared to be a quorum,) to direct his education. He at the same time left a sum of money to B's eldest son, on condition that B did not interfere with or hinder his trustees in the management of the second son. In a claim for repetition of the money on the ground of B's interference, it was found that the forfeiture was not incurred, a *quorum* of the trustees never having acted.

[Elchies *voce* Tutor, No. 22. Br. Sup. v. 772. Mor. 7283.]

COLONEL CHAPTERIS of Amisfield settled his estates, No. 88.
under the form of an entail, upon his grandson, (the

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appellant, the second son of the Earl of Wemyss, with the burden of L.10,000 Sterling, to be paid upon his death to Lord Elcho, Lord Wemyss's eldest son; which sum was to be laid out in purchasing preferable debts due by the family of Wemyss, the rights thereto being taken in the name of Lord Elcho. He also named tutors and curators to the appellant and his other heirs of entail, during their respective minorities. Of these he more particularly appointed four, (three being a quorum,) to have exclusively the full and only power to direct and order the education, residence, and travelling of his said heirs. "And I hereby "expressly will and appoint, that neither James, "Earl of Wemyss, their father, nor any of their "tutors, or any other persons whatsoever, except "always the persons above named for that pur- "pose, shall have any power or voice in the edu- "cation, residence, or travelling of my said heirs, "as aforesaid; and in case the said Earl of "Wemyss do interfere and endeavour to hinder "the same; then, and in that case, I hereby de- "clare, that the said Lord Elcho, and all other "the representatives of the family of Wemyss, "shall have no right or title unto, nor any claim "or demand for the sum of L.10,000 which, in "this deed, I dispone to the said Lord Elcho," &c. "and which disposition I, in the said event, re- "voke, recall, and annull, and hereby declare, "that the said sum shall remain with, appertain, "and belong to my own heirs of tailzie aforesaid."

Colonel Charteris died, leaving the appellant in minority; and the money being paid by his tutors and curators, (part of it upon a decreet of the Court of Session,) and applied in discharging debts due by the family, the earl granted, in corrobora-

tion, an heritable bond for L.10,000, upon which Lord Elcho was infeft.

None of the tutors and curators named by Colonel Charteris accepted the office, except the Earl of Islay, by whom, with the authority of the Court of Chancery in England, certain measures were taken for the care and education of the appellant, in terms of the settlement.

Lord Elcho, engaging in the rebellion, was attainted of high treason; and the appellant having, within four years after his majority, revoked the above payment and raised a reduction thereof, he entered a claim in the Court of Exchequer, as a creditor upon the confiscated estate, for the sum of L.10,000, with interest, on the ground of a breach of the above condition in the deed of settlement having been committed, inasmuch as the Earl of Wemyss had, contrary to the prohibition, directly and indirectly interposed in the ordering of his education, residence, and travelling.

Answered:—Upon the relevancy of the claim, 1. That although the interference of the Earl, by virtue of his parental authority, with directions for the management of the claimant given by the curators, might have afforded a good defence against payment of the L.10,000; yet after it had been paid, and an heritable security granted for it to Lord Elcho, such interference could not authorize an action of repetition, because the settlement provides, in such case, only against payment of the money, (by saying, that it shall 'remain' with the heir) but not for the return of it, when once paid. In point of fact, the curators never acted, or gave any directions about the claimant's education. 2. That whatever remedy the claimant might have

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against his guardians who paid the money, or against the Earl of Wemyss who received it, the action was not competent, in the first instance, against Lord Elcho. 3. That, supposing action could have lain at the claimant's instance against Lord Elcho, yet, not having been raised or a declarator of irritancy obtained before the forfeiture, it could not now be brought against the crown.

A condescendence was ordered, and thereafter, (22d December 1748) before answer, a conjunct proof was allowed relative to the alleged interference of the Earl; which having been reported, the Court, (5th July 1749) "having again advised "the claim, with the answers and objections there- "to, and having also considered the proof adduced "by the claimant in support of his claim, and de- "bate, they dismiss the said claim, and decern "accordingly."

Entered, Dec. 13, 1749.

The appeal was brought from the interlocutors of the 22d December 1748, and the 5th, 14th, and 18th July 1749.

Pleaded for the Appellant:—The condition is not only lawful, but founded on the most laudable motives; and being annexed to a pure gift, ought to be most liberally construed so as to effect the granter's purpose, and prevent the contemplated mischief. From the whole deed it was evidently his purpose, in charging his estate in favour of Lord Elcho, to purchase from Lord Wemyss the right of guardianship, which he could not otherwise be deprived of.

If the condition be lawful, the only question is, whether it has been broken by the Earl, either by an avowed exertion of his parental authority, or in any other manner; and that it has been, is fully es-

tablished by the proof. It was the plain intention of the granter to prevent any interposition at all; he has used the most distinct words to show that intention, and an actual hindrance and interposition has taken place.

The payment of the money cannot alter the nature of the case, the condition being clearly resolutive or subsequent; for the payment is directed to be made immediately after the granter's death; the money is to be invested in a permanent fund, over which the condition might always operate; the condition respects not only this minority, but the minority of the other heirs; and the words used in various parts of the deed show, that when the assignment was made to Lord Elcho, the trust followed it from the original settlement, and the money was as much subject to the conditions in his hands, as it would have been in case the debts had been assigned to trustees for that purpose.

If the appellant has a right to this money, as against Lord Elcho, the attainder and vesting of his estate in the crown cannot put the appellant in a worse condition than before; nor can the crown have a better right than Lord Elcho had; the plain intent of the act being to preserve all right and claims upon confiscated estates competent before the attainder to third parties.

As to the objection, that the condition is annexed to the acceptance of the trust by at least three of the trustees named in the deed, it is answered, that the condition is in itself substantive and independent of the appointment of trustees, and absolutely prohibits any interposition by Lord Wemyss. But even supposing it to be annexed to the performance of the trust, yet it is plain that, notwith-

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standing the appointment of a quorum of three, any one trustee had a right to act, so as to give effect to the condition in terms whereof no one was to act except the persons named; and therefore, while any one named would act, the prohibition was absolute. Moreover, the appointment of a tutor by Lord Islay, with authority of the Court of Chancery, was an execution of the trust, fully answering the intention of the Colonel, and preventing any devolution of the power upon the Earl of Wemyss; and consequently made his interference an express breach of the condition.

Pleaded for the Respondent:—By the clause in question, the forfeiture of the L.10,000 is put singly upon the Earl of Wemyss' interposing his authority to take the appellant's education out of the hands of the nominees, and control their directions.

In fact, the Earl never did break the condition.

As the case happened, it was absolutely impossible that he could break the condition,—the power being given to any *three* of the nominees; and that quorum never having acted, or given any directions at all, the Earl could not interpose to prevent or hinder them; and the clause of forfeiture is plainly applicable only to the case of a quorum taking upon them to manage the appellant's education.

By payment of the money and acquiescing under that payment till Lord Elcho's attainder, all concerned have given the strongest proof that they were satisfied the condition had not been broken.

Judgment, Feb. 22, 1750.

After hearing counsel, "it is ordered and adjudged, &c. that the appeal be dismissed, and that the interlocutors complained of be affirmed."

For Appellant, *Cha. Maitland, Paul Jodrell.*
For Respondent, *D. Ryder, W. Murray.*