1769. *June* 28. ARCHIBALD EDMONSTONE of Duntreath *against* CAMPBELL EDMONSTONE, Esquire.

TAILYIE.

Found, by the House of Lords, that the prohibitory, and other clauses of an entail, being directed against *the heirs of entail*; the institute, being fiar or disponee, and not an heir of entail, ought not, by implication, to be affected by them.

[*Faculty Collection, IV. p.* 386; *Dictionary*, 4409.]

HAILES. I have no doubt of the tailyier's intention. The clause, "Archibald Edmonstone and the other heirs of entail," is a governing clause, and seems perfectly clear. It is in Latin, *hæredesque cæteri talliæ*, not *cæteri qui hæredes talliæ sunt*: "Other heirs" not "others' heirs." My difficulty is as to the decision in the case of *Randeston*, where the clauses were very similar to those in the present case, and yet the Court found the first member, call him heir or disponee, not bound.

GARDENSTON. The decisions quoted seem to be in point. The principle is, an entail must not be made by implication.

KAIMES. I am of opinion that an institute is not an heir; and, if the decisions say so, they say well. But still an entail must be explained according to the meaning of the entailer, and even from collateral circumstances. It is plain that here the entailer understood his eldest son to be an heir of entail.

AUCHINLECK. Whatever apprehensions judges may have as to the expediency or inexpediency of entails,—entails, while the law authorising them subsists, are to have a fair trial. All that I want to know is the meaning of parties. The case of *Findrassy* does not affect me, for it was an absurd deed. The case of *Randeston* does not apply; for there was a dubiety in that deed, and no phrase in it irreconcilable with the idea of James Balfour being a free man. Here the intention is plain from beginning to end.

KENNET. If a meaning may be gathered from words, it is hard to disappoint the disponer by criticisms. There is some difficulty arising from the decisions; but no two deeds can be so precisely similar that a judgment as to the one will apply to the other.

BARJARG. There is no doubt as to intention; but then a different rule has been established as to entails.

PITFOUR. The thing which weighs with me is this,—in the construction of fetters the Court liberally explains words in order to free from them. But, on the other hand, fetters are never put on by construction. It is the entailer's business to entail his estate, not ours. The cases of *Keith* and *Carlowrie* were determined contrary to plain intention. There are many cases which I have met with where a man only ties up the heirs of entail, and then speaks

of his son and other heirs of entail. This was supposed to tie up the son; but, upon inquiry, lawyers, at consultations, held the contrary. It is of no moment whether the clauses in other cases were the same, if the principle is the same. The procuratory is taken by the person who survives the entailer, whoever he be, and the obligations of the entail must be thrown into it; but still they will have the same effect there as in the entail, and no other.

KAIMES. The cases of *Keith* and *Carlowrie* are not similar: there a fetter was omitted from inattention; it was a *casus incogitatus* which had escaped the observation of the entailer. Here, words are clear, though not altogether formal. How can we get free of the words?

MONBODDO. Entails ought to have fair play. This testator meant to lay his son under fetters, and he has done it. Meaning, by itself, is not sufficient, as was found in the cases of *Keith* and *Carlowrie*: difference between what prohibition is laid upon heirs, and who are the heirs upon whom the prohibition is laid. The eldest son is bound by the leading clause. It is true he was not properly an *heir*; but every one succeeding to an estate by an entail, is said to be an heir of entail. Besides, Archibald Edmondstone was no more than a nominal fiar or heir. I was puzzled with the decisions, but I am much relieved by what I have heard from the Bench. In a *quæstio voluntatis*, as in a question of fact, one case is never exactly like another.

PRESIDENT. For the reasons given, I do not think the case of *Carlowrie* in point: besides, that decision was doubted. The cases of *Pitritchie* and *Balnagown* were more liberally determined. It is agreed that fetters cannot be imposed by implication; but, if the entail is once found to subsist, you must inquire what was the intention of the entailer. Was it Duntreath's intention to leave his son free? No. Do not the words imply fetters? The form of the provision to the younger children, and the obligation to infeft, show that there are words to bind the son. The case of *Findrassy* went very far; and, besides, the Court was very much divided.

On the 28th June 1769, "The Lords sustained the defences, and assoilyied."

Act. Ilay Campbell. *Alt.* A. Murray.

Reporter, Monboddo.

Diss. Pitfour, Gardenston, Elliock, Barjarg, Hailes.

[A petition was presented against this interlocutor, on advising which, with answers, the following opinions were delivered:—]

1769. *November* 23.—GARDENSTON. The tailyier had no power, being tied up by his marriage-contract. I also doubt of his intention to bind his son. In clauses beneficial to the son, he names him; in others he does not. Although the power were certain, and the will clear, yet, as there are no express words limiting, the power and the will go for nothing.

MONBODDO. The question of power is not before us, as is admitted on all sides. I am fond of the interlocutor, as proceeding on principles, without regard to the favour of creditors or odium of entails. I would wish that the

words, favourable and odious, were blotted out of our books of law. The question is not, whether fetters are imposed, but whether imposed upon the son. Some judgments seem to require technical words as necessary for imposing fetters; but, in the case of *Pitlurg*, that was found not necessary: however, that is not the question here. It is plain that the entailer meant to subject Archibald Edmondstone;—he was no more than a nominal fiar;—he was in effect an heir of entail. I would not conclude thus, were there only circumstances without words; for the rule of the Roman law is an admirable one, *nemo sine verbis dixisse videtur.* This probably was the foundation of the judgments in the cases of *Keith* and *Carlowrie*, where there might have been intention, but there were no words.

PITFOUR. I differ as to the rule of interpretation. In a question,—Who is heir?—we must take in intention, because we must give the estate to some one or other. In England, every thing is taken literally and strictly. Upon such occasions, with us, in imitation of the civil law, a greater latitude of interpretation is admitted. I do not inquire whether the English practice or ours is most laudable. The case, here, is of a different nature: we are desired to limit a man, which is a forfeiture in so far, and that upon intention. In not limiting, we do no harm; for every man knows, or may know, that he is to entail by words. I will judge upon entails made, but I will make an entail for no man. Upon the faith of the decisions in the cases of *Findrassy* and *Randieston*, lawyers may have given their opinions, and creditors may have contracted.

COALSTON. Limitations in entails are to be strictly interpreted: They are not to be extended from one case to another, nor *de persona in personam.* Question, here, whether there are words sufficient to include the eldest son? If there is no limitation upon him, I should be clear that he is not comprehended; but there are words explanatory in the entail, which show that the entailer meant to comprehend his eldest son. The difficulty is as to the decisions. It is a serious consideration if the lieges have proceeded upon the faith of former decisions.

AUCHINLECK. Every case is to be examined upon its own circumstances. If lawyers draw a wrong conclusion from any particular decision, who can help it? There are words, here, sufficient to comprehend Archibald Edmondstone.

JUSTICE-CLERK. My opinion may be erroneous, but it is honestly given; for every body knows that I am no favourer of entails. I cannot hesitate in pronouncing, that the entailer had an intention of comprehending Archibald Edmondstone, and that he, by words, expressed it.

BARJARG. I am now satisfied as to the interlocutor. It is a forfeiture of a man's right if you do not allow him to limit his estate when he uses words to that effect. If the entailer did not tie up his eldest son, then he made no entail at all; which is contrary both to his intention and his words.

KENNET. In five or six different places of the entail, he speaks of Archibald Edmonstone as an heir of entail.

HAILES. I have no doubt of the intention of the entailer. I am also of opinion, that he has expressed his intention in words sufficient to bind his eld-

est son: but, then, I make no doubt that *Randieston* had a like intention, and that he expressed his intention in words sufficient to bind James Balfour, his gratuitous disponee; and yet the Court found that James Balfour was not limited by the entail. Here lies my difficulty to reconcile the present decision with that of *Randieston*.

PRESIDENT. The case of *Randieston* is different: in it the institute was only mentioned as an heir of entail in the last clause, whereas the first clause in the entail of *Duntreath* mentions the institute as an heir of entail, and all the following clauses refer to it. There is some difficulty, from this circumstance, that Archibald Edmonstone is mentioned *nominatim* in so many of the clauses, and not in the rest.

On the 23d November 1769, "The Lords, in respect that it appears, from the entail, that the entailer mentioned Archibald Edmondstone as an heir of entail, found that he is subject to the limitations and restrictions of the entail, and therefore assoilyied from the reduction."

Act. Ilay Campbell, R. M'Queen. *Alt.* A. Murray.

Reporter, Monboddo.

Diss. Pitfour, Gardenston, Hailes.

Reversed on appeal.

1769. *June* 29. MR JOHN HASTIE *against* PATRICK CAMPBELL of Knap and OTHERS.

PUBLIC OFFICER.

Schoolmaster of a Royal Burgh removable summarily by the Council, upon just cause.

[*Faculty Collection*, p. 351; *Dictionary*, 13,132.]

BARJARG. This is a mater of administration, but not of jurisdiction, and is subject to review.

MONBODDO. Were the question, Whether Hastie was properly tried?—I should be clear that he was not: but the question is singly as to administration. The Magistrates have the power of turning out, both by public policy and by the decisions of the Court.

STONEFIELD. There is a contract, between the Magistrates and the schoolmaster, that he shall enjoy the office while he behaves properly.

PITFOUR. We now lay greater stress on freeholds than in former times. If a man is named a schoolmaster, his office is understood to be for life. The law has given to Presbyteries a jurisdiction over schoolmasters. I therefore think the proceedings before the Magistrates void, and am moved with the keenness showed by the Magistrates.

AUCHINLECK. The office of a schoolmaster is a small but an important of-