1769. *November* 24.

ARCHIBALD EDMONSTONE of Duntreath, Esq; *against* CAMPBELL EDMONSTONE, Esq; and Others.

No 59.
The terms of an entail seemed to class the first, with the other heirs of entail, and the Court gave effect to it, by holding him to be bound by the restrictions; but the House of Lords reversed the judgment.

THE late Archibald Edmonstone became bound, in his contract of marriage, to settle his Scots estates on the heirs-male of the marriage. Several years afterwards, he executed a strict entail of these estates, without the concurrence of his eldest son. In this deed, he disponed his lands 'to Archibald Edmonstone 'his eldest lawful son, and the heirs-male of his body; whom failing, to Camp-'bell Edmonstone his second son, and the heirs-male of his body; whom fail-'ing, to Charles Edmonstone his third son,' &c. He reserved his own liferent, with power to alter, *etiam in articulo mortis*. He then provides, that 'the said 'Archibald Edmonstone, and the other heirs of entail above named,' shall discharge his debts, &c. and the provisions to his younger children.

The entail goes on to declare, 'That it shall not be lawful, nor in the power 'of any of the heirs of tailzie and provision above named,' to alter the order of succession, contract debt, &c. And then it provides, 'That it shall be law-'ful to, and in the power of the said heirs of tailzie, to burden and affect the said 'estate with the sum of 40,000 merks, Scots money, which I the said Archi-'bald Edmonstone do hereby provide and ordain my heir of tailzie to pay my 'younger children unprovided,' &c.

It then orders, that all adjudications on debts which shall be contracted by the entailer, or 'by the foresaid heirs and members of tailzie,' shall be redeemed, &c. 'And that the said Archibald Edmonstone, or 'the first heir who 'shall succeed,' shall cause register the entail, &c.

The precept to infeft, is, 'to seize the said Archibald Edmonstone, and heir 'above named; whom failing, the other heirs of tailzie and provision above 'mentioned,' &c. The warrandice and the assignation of the mails and duties is 'to Archibald Edmonstone, and the other heirs of entail.' The deed was properly recorded.

On the entailer's death in 1768, Archibald Edmonstone brought a declarator against his brother, and the other substitutes in the entail, to have it found, that he, as disponee and complete fiar, was not subject to any of its limitations or restrictions.

The argument for the defenders amounted to this; the powers of the entailer to bind the pursuer are indisputable; and both the general import of the settlement, and the particular expressions used, prove, that it was his intention to subject him to the same fetters with the remoter heirs. The several limitations to the pursuer and his brother, are declared to be 'always with, and un-'der the burden of the provisions, conditions, &c. after expressed;' and the mode of expression, 'Archibald Edmonstone, or other heirs of tailzie,' so often repeated, demonstrates, that the pursuer was considered in no other light than

No 59. first heir of tailzie. The clause respecting the provision to the younger children, was particularly urged in this view.

As to the decisions quoted for the pursuer, it was observed, that the case of Leslie of Findrassie, 24th July 1752, (*See* TAILZIE) turned on a deed nearly unintelligible, and a deed where the institute was never coupled with the other heirs of entail; and that, in the case of Balfour of Randieston, No 58. p. 4406, the question was with onerous creditors, and not among donees, between whom the will of the common donor is the only rule of decision. Then the case of Gordon of Pitlurg, 29th July 1761, *voce* TAILZIE, was stated as an authority for the defenders.

On the other side, the pursuer argued, that the statute authorising strict entails, supports only restraints laid on the heirs of tailzie, not on persons vested with the whole fee; that the fiar possesses the full exercise of property; and that no sort of restriction of his powers will be received at common law, without the clearest intention of the donor signified in the most precise terms, applying directly to the disponee, without there being a possibility of doubt; that prohibitory, irritant, and resolutive clauses, owe their authority to positive statute, and not to common law. By not only limiting the rights of the proprietor, but exposing him to an entire forfeiture of them; by excluding the just claims of onerous creditors; and, by checking the improvement of the country in throwing lands *extra commercium*, they are not only in the situation of ordinary restraints on the fiar, (requiring clear evidence of intention to constitute them, and admitting only of strict interpretation when constituted,) but they are held to be *strictissimi juris*. The intention of the donor must not only be indubitable, but the restrictions will be of no avail, unless that meaning is expressed in the proper place, (not gathered from particular expressions, nor from the general scope of the deed,) and in legal technical language. That it was true, even in entails, the will of the donor was, in some cases, to receive a liberal interpretation; but these were only where the matter directed was attributed to the absolute disposal of will by the common law. Thus, in a question, which of two claimants should take the succession, a liberal interpretation of the will of the entailer would very properly direct the determination.

The destination to the pursuer, in the entailer's marriage contract, was mentioned as an argument, to show, that there could not, *in bona fide*, have been any intention to fetter him; and the omission of his name in the restraining clauses, was urged to prove, that this must have actually been the case. The decisions of Hepburn of Keith and Sinclair of Carlowrie were quoted, *voce* TAILZIE, as ascertaining the distinctions in construing entails which the pursuer contended for; and those of Leslie and Balfour were urged as directly in point, since there could be no doubt of the intention of the entailer, in both these cases, to impose the restraints on the disponee; and yet that intention was disregarded. As to the objection, that the case of Balfour was decided on a question with creditors, it was observed, that this circumstance made no difference

in point of law, since it was only in right of the disponee that the creditors could claim; and, in all cases like the present, the favour due to creditors must operate against entails as much as if creditors were actually litigating. The interlocutor of the Court was as follows: No 59.

'THE LORDS find, that, in respect it appears from several clauses in the entail executed by the pursuer's father, that the pursuer is comprehended under the description and designation of heir of entail, he is thereby subjected to the limitations and restrictions of the said entail; and therefore sustain the defences, and assoilzie, and decern.'

This cause was appealed. The House of Lords, April 15th 1771, ORDERED and ADJUDGED, that the interlocutors complained of be hereby reversed. And it is hereby declared, that the appellant being fiar, or disponee, and not an heir of tailzie, ought not, by implication from other parts of the deed of entail, to be construed within the prohibitory, irritant, and resolutive clauses laid only upon the heirs of tailzie.

N. B. The account of this decision is only taken from the appeal cases.

Fol. Dic. v. 3. *p.* 216. *Fac. Col. No* 114. *p.* 386.

With regard to provisions in favour of Heirs or Children, how far the Father is limited, *see* PROVISION to HEIRS and CHILDREN.

For the effect of different clauses limiting fees, *see* TAILZIE.

See APPENDIX.