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EDMONSTONE v. EDMONSTONE, &c.

(M. 4409.)

ARCHIBALD EDMONSTONE of Duntreath, - *Appellant;*
CAMPBELL EDMONSTONE, Esq. and Others, *Respondents.*

House of Lords, 15*th April* 1771.

ENTAIL—INSTITUTE—FETTERS.—Held, that where the prohibitory, irritant, and resolutive clauses in a strict entail, are directed against the *heirs of entail merely*, these terms do not include the institute, as he is not an *heir of entail*, but a special *disponee;* reversing the judgment of the Court of Session.

The appellant and the respondents were sons of the deceased Archibald Edmonstone of Duntreath, by his second marriage with Lady Anne Campbell, sister of the Duke of Argyle. In entering into this marriage, he, by marriage articles, became *bound to settle his lands and estate in Scotland upon himself and the heirs male of his marriage; whom failing, to the heirs male of any subsequent marriage; whom failing, to his heirs and assigns whatsoever.*

Many years thereafter he, by himself, and without concurrence of the appellant, his eldest son, executed a strict entail of these estates, conceived in the following terms: " to " and in favour of Archibald Edmonstone, eldest lawful son " procreated betwixt me and Mrs Ann Campbell my spouse, " and the heirs male of his body, whom failing, to Campbell " Edmonstone, my second lawful son, and the heirs male of " his body;" and so on, in the same terms of destination, through his whole sons and daughters. He reserved power to himself to alter and change the order of succession, even on deathbed, and also to sell and wadset the same. But prohibited the " *heirs of entail* and provision" from exercising these powers; and the whole prohibitions which were directed against the " heirs of tailzie only," were duly fenced with irritant and resolutive clauses. This deed of entail was recorded in the register of tailzies, but the maker died without any charter being passed, or infeftment taken thereon. The question which arose was, Whether, under the prohibitions against the "heirs of tailzie," the appellant, the maker's eldest son, was comprehended? and whether he was to take a fettered or a fee simple estate?

The appellant contended, upon the supposition that his father had power to make this entail, that as by that deed,

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he was the disponee or fiar, the limitations therein, directed only against the heirs of tailzie in general, without mentioning him expressly, either by name or by distinct character of fiar, were not meant, and could not be construed to apply to him, and therefore that he was free from the fetters.

In answer, it was maintained, 1st. That the prohibitions applied expressly to the appellant; and, 2dly. That the intention of the granter was clear that they should apply, because it was expressly mentioned that "the said Archibald "Edmonstone, *or the first heir who shall succeed to me in the* "*foresaid tailzied estate* shall be bound and obliged to "cause registrate the said tailzie in the register of tailzies."

June 29, 1769. The Court, of this date, and on report of Lord Monbodo, and having advised the memorials, *hinc inde*, sustained the defences, assoilzied and decerned. And on reclaiming petiNov. 24, 1769. tion, the Court further "Find that in respect it appears "from several clauses in the entail executed by the petitioner's father, that the petitioner Archibald Edmonstone, "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 the "Lords adhere to their former interlocutor reclaimed a-"gainst, and refuse the desire of the petition."

Against these interlocutors, (in pronouncing which the judges were almost equally divided) the present appeal was brought.

Pleaded for the Appellant.—The interest which the appellant has, is an estate in fee, qualified indeed by after conditions; but, in the first instance, the whole fee is vested in him. That entire fee, therefore, with all the full exercise of ownership, must belong to him, except in so far as the deed makes it expressly appear that all, or some, of its limitations apply to him. When these conditions are set up to establish a perpetuity, and for ever to restrain the free use of property, law does not sustain prohibitive, irritant, and resolutive clauses by mere implication, or by evidence of the intention of the maker. Nor when these clauses are aptly used, will they be held to apply to more than those against whom they are expressly directed. And in no case can they be held to apply to the institute or disponee under the general terms "heirs of tailzie and provision," because such a person is not an heir of tailzie, but one who takes as disponee. Where, therefore, the fetters are not expressly directed against him by name as institute, or by such terms

as clearly show that he was included under them, he will be entitled to take the estate as absolute fiar. Such was the law laid down in Leslie *v.* Leslie, and the case of Balfour; and the Court ought not to depart from the law laid down by these cases. Besides, the marriage articles which bound the father to settle the estate on the heir male of the marriage, joined to leaving the appellant out of the prohibitive, irritant, and resolutive clauses, support this construction of the deed.

Pleaded for the Respondent.—The powers of Archibald the father to execute the entail cannot be disputed. The question here, is not with creditors or purchasers, but between the heirs *inter se*, in which the will of the maker must form alone the only rule. From that deed the entailer's intention is clear to bind all the persons called to the succession by the entail, and it is equally certain that the terms used are apt and sufficient to make good that intention. After disponing the estate to the appellant and his other brothers and sisters, it is declared to be "always with and under the burden of the provisions, conditions, &c. after expressed." The obligation to infeft the appellant is *under the conditions before mentioned*, and the term "*other*," in this and other parts of the deed, plainly shows that the entailer considered the appellant as an heir of tailzie, and therefore that the whole conditions apply to him.

After hearing counsel,

Lord Mansfield moved the reversal of the judgment of the Court below, assigning his reasons expressly in the judgment, as follows:—

> Ordered and adjudged that the interlocutors complained of in the said appeal 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 prohibitions, irritant and resolutive clauses, laid only upon the heir of tailzie.

For Appellant, *Ja. Montgomery*.

For Respondents, *Tho. Lockhart*.

NOTE.—This is the leading case on this point, in conformity with which all the subsequent cases have been decided. Gordon *v.* Hay, 8 July 1777; M. 15462. Menzies *v.* Menzies, 25 June 1785; M. 15436. Wellwood *v.* Wellwood, 31 May 1791; M. 15463, &c.