1801.

MENZIES, &c. *v.* BERESFORD, &c.

STEWART MENZIES of Culdares, an Infant, by the Honourable HENRY ERSKINE, and Others, his Guardians, . } *Appellants;*

MRS. ELIZABETH MACKENZIE BERESFORD, formerly Menzies, and her Husband, for his interest, . } *Respondents.*

House of Lords, 30th June 1801.

ENTAIL—FETTERS—INSTITUTE OR HEIR OF TAILZIE.—The question in this case was, Whether James Menzies was an heir of entail, and so included under the fetters of his great grandfather's entail, directed against the heirs of tailzie; or to be considered an institute, and free from the fetters thereof. The Court of Session held that James Menzies was not an heir of entail under the deed 1697, but a disponee, and, consequently, had powers to make a supplementary entail of the estate. In the House of Lords, the case was remitted to review the interlocutors, so far as complained of, and to consider, Whether James Menzies, being expressly nominated and appointed an heir of tailzie by the first part of the deed 1697, although made a disponee or institute by the latter part thereof, was not comprehended in the prohibitory, irritant, and resolutive clauses.

The following deed of nomination of heirs of entail was executed by Colonel Menzies of Culdares in 1697, with special reference to, and in exercise of the powers reserved in a previous entail (1675). In the first part of the deed there was a nomination of the heirs of the granter, thus:—"to have "nominated, designed, and constituted, likeas, by the tenor "hereof, *failing of heirs male lawfully to be procreated of "my own body*, I nominate, design, and constitute *James "Menzies*, my great grandchild, eldest lawful son to Cap- "tain Archibald Menzies, son lawful to the deceased John "Menzies, sometime of Stix, my brother germain," whom failing, to other heirs of tailzie therein mentioned, &c. "TO BE "HEIRS OF TAILZIE." In another part of the deed, namely, the dispositive clause, it ran in these terms:—"And for "further security thereanent, I hereby, with and under the "express conditions, burdens, restrictions, reservations, and "limitations above and under written, and failing of heirs "male of my own body, as said is, sell, annailzie, and dis- "pone to the said Captain Archibald Menzies in liferent, "during all the days of his lifetime, (for his liferent use al-

" lenarly, of the just and equal half of the rents, annual " rents, and other profits of my hail free estate, real and " personal, above and after specified, in manner after ex- " pressed), and to the said James Menzies, my great grand- " child, and the heirs male of his body; which failing, to " the next son to be procreated of the said Captain Archi- " bald his body, and the heirs male of his body," &c.

When the estate devolved on James Menzies, then a minor, his title was made up as if the fetters of the entail applied to him. But afterwards, and there being a prospect, from the failure of heirs male of his body, and other substitutes, of the estate going to John Stewart, the appellant's father, he executed a supplementary deed of entail, so as to open the succession to his female issue, being his own daughters. 1773.

The question then came to be, Whether, by the conception of the deed 1697, the conditions or fetters were imposed upon James Menzies, the respondent's grandfather, as well as upon the other persons or heirs of entail, so as to debar him from altering the order of succession? The discussion of this question chiefly turned on the point, whether James Menzies was a substitute heir of entail, or an institute, or rather, a conditional institute. It was maintained by the respondent, in defence, 1. That James Menzies, her grandfather, who was to be considered as the maker of the new entail under reduction, was not an heir of tailzie under the entail 1697, but an immediate disponee or fiar, against whom the prohibitions and irritancies were neither directed, nor could by implication, be extended. 2. That though he was to be considered an heir of entail under Colonel Menzies' deed of 1697, nothing therein could bar him, or any heir, from adding to that entail, and making a new one, to take effect when all the substitutions in the old were exhausted.

The appellant, in answer, maintained, 1. That by the clear language and meaning of the tailzie 1697, James, the institute, was included as an heir of tailzie; and that he was described as such in every part of the deed; and that his situation could not be different from that of the other substitute heirs. 2. That no person taking an estate under the fetters of a strict entail, could make a new entail of the estate, so as to have any effect against the substitute heirs in the original entail, who did not represent him in any other way than as heirs of entail.

The case was reported to the Court by Lord Monboddo,

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and thereupon the Lords pronounced this interlocutor:—"Find that an heir of entail under the deed 1697, had no "power to make such a supplementary deed of tailzie as the "one now in question; but find that James Menzies of "Culdares was not an heir of entail under the deed 1697, "but a disponee, and therefore had power to make the "deed 1773." On reclaiming petition the Court adhered.

Dec. 6, 1785.

Against these interlocutors an appeal was brought to the House of Lords.

Pleaded for the Appellants.—The judgment of the Court below proceeds upon the idea that James Menzies took the estate in fee simple, or as institute or disponee, upon the hypothesis, that whatever might have been the intention of the maker of the entail, he had not subjected James to the conditions thereof in clear and precise terms, the whole limiting clauses being so expressed as to apply only to heirs, and not to the institute, or person first named in the destinations; and, in support of this doctrine, the case of Edmonstone of Duntreath was referred to. But, when the circumstances of that case, as well as of all other cases, are referred to, and compared with those of the present, there appears a material difference. In the case of Duntreath, the entail was in the form of a direct disposition by the maker to his eldest son Archibald, in the first place, and where the conditions were in the sequel of the deed imposed upon him only, it was not unreasonble to presume that he omitted his son, the institute, *ex proposito*, yet as the deed itself contained indications of his including Archibald under the description of an heir, the judgment of the Court of Session was, finding *Archibald* bound by the conditions: and although a different judgment was pronounced by your Lordships' house, the ground of the decision was evidently that an entail was not to be raised up by implication, if the words were at all ambiguous, or did not clearly warrant such a construction. The judgment declared, "That the appellant being fiar and "disponee, and not an heir of tailzie, ought not by implica-"tion from other parts of the deed of entail, to be constru-"ed within the prohibitory, irritant, and resolutive clauses, "laid only upon the heirs of tailzie." The present appellant has no occasion to combat the principle so laid down; He does not require the aid of implication, or inference drawn from disconnected parts of the deed, in order to bring James Menzies within the fetters of the entail. He proceeds upon the language of the entailer used in his entail, ex-

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pressed from beginning to end, with sufficient clearness, and which clearly includes James Menzies within the fetters as an heir of entail. The deed here is not a disposition direct to James Menzies, as in the Duntreath case, but a nomination of heirs; and, beyond all question, James Menzies, in this nomination, is called as an heir of entail among the rest, and an heir too who is only to take *after preceding heirs.* He lays the fetters on all his heirs without exception, and, of consequence, on James Menzies as an heir. He cannot be distinguished from the rest without interpolating—without annihilating, or without imagining a clause; but as this would be contrary to every principle of construction, and contrary to the words of the deed, such a proceeding cannot be resorted to. These words in the nomination clause are, "*Failing* heirs male of my own body, I nominate, design, "and constitute James Menzies, my great grandchild, and "the heirs male of his body; which failing, &c. *to be my* "*heirs of tailzie and provision;*" nothing can be more clear, more free from ambiguity than this. The *first heir of entail* called *per expressum* of this entail and nomination, is James Menzies, and he is included as an heir of entail, and, consequently, the prohibitions and irritancies apply to him. The only thing in the deed, therefore, which raises the present question, is a variation of expression when you come to the dispositive clause. This clause was not a necessary part of the deed, and appears *ex superabundante,* put inaptly into it, though expressly, "for their further security;" he did thereby "failing of heirs male of my body, as said is, sell, annailzie, "and dispone to the said Captain Archibald Menzies in life-"rent, and to the said James Menzies, my great grandson, "and to the heirs of his body, which failing," &c. in fee. The utmost effect of this clause was, to save a service and retour as heir of tailzie.

Pleaded for the Respondents.—James Menzies, the respondent's grandfather, was in no shape an heir of entail under the deed 1697, fettered with the prohibitory, irritant, and resolutive clauses therein contained, but a disponee or institute, against whom these clauses were neither directed, nor could by implication be extended. As such disponee or institute, he had full powers to have defeated the entail 1697 in toto, and much more so was he entitled to execute the supplementary entail now in question, agreeing in all respects with the original entail, and only adding to the substitution thereof, a certain series of heirs to succeed when the former should be exhausted.

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After hearing counsel,

LORD CHANCELLOR ELDON said,—

"My Lords,

"The present appeal is brought against two interlocutors of the Court of Session, of the 24th of June and 6th of December 1785. [Here his Lordship read the words of the interlocutors.]

"It appears, that by a charter in 1697, certain estates were settled by Colonel Menzies, under clauses prohibitory, irritant, and resolutive, which were to be binding on his heirs of tailzie; but it has been contended, in the present case, that James Menzies, one of the persons mentioned, was a disponee, and not an heir under this deed, and consequently had power to execute a subsequent deed in 1773. This last mentioned deed purports to carry on the entail in continuation after the limitations already made by the former entail should expire; and the appellant contends that such prolongation, if effectual, would narrow his powers over the estate.

"It has been stated, that the construction of the deed 1697 is involved with that of certain other instruments. By one of these, a charter in 1651, Colonel Menzies and his eldest son take the estate, to the Colonel in liferent and to his son in fee, with certain other substitutions, reserving a power to the Colonel to dispose of the estate without consent of his son. By another charter in 1675, a settlement of the estate was taken in the following terms.—[Here his Lordship read the destination in the charter, the reserved powers to nominate heirs of tailzie and provision, &c.]—These two charters relate only to the estate of Culdares, since disposed of by the family, and on which they have only retained a feu-duty of £20 Scots.

"But the family had also acquired other property before the date of the deed 1697, by several instruments of conveyance, which it is unnecessary to state particularly to your Lordships. The investitures, as to this other property, were taken to Colonel Menzies, "and the "heirs male of his own body, whilk failing, to his heirs of tailzie, "nominate or to be nominate," &c.

"Colonel Menzies having thus, by the charter 1675, and other deeds, such an interest in the estates in question, and such a reserved power of nomination of heirs, and of disposition, as I have stated, in 1697, after the death of his eldest son Archibald, executes the deed on which the present question arises.

[Here his Lordship read the recital and nomination of heirs contained in the deed 1697 at length.]

"Your Lordships will perceive, that so much as I have now read is a pure nomination of heirs of tailzie and provision. Colonel Menzies first recites his reserved powers to nominate, and then executes the nomination upon the ground of such reserved powers. And, as to all his estates, it is proper that I should state again, that he had these reserved powers of nomination.

[Here his Lordship read the dispositive clause, and the other clauses in the printed cases, founded on by the parties.]

"The words, "heirs of tailzie," in these clauses, are applied to James Menzies, as well as the others called to the succession; and it is impossible to entertain any manner of doubt that, under these words, Colonel Menzies meant to include the disponee.

"The questions arising upon this deed are, 1. Whether or not James Menzies was only a disponee? And, 2. If he was a disponee, Whether the cases already decided be not authorities applying here to show that the clauses prohibitory, irritant, and resolutive, do not apply to him, though expressly nominated an heir of tailzie?

"I need not mention many of these decided cases. That of Duntreath and others have gone this length; the authors of deeds had applied the words, "heirs of tailzie," in such manner as to leave no doubt of their intention to include the disponee; but your Lordships have held, that the fetters of an entail ought not to be extended by implication; and that, however strong the intention might appear, from a want of strict propriety in the use of legal terms, these fetters should not be applied to disponees.

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"Of these cases, it would not be proper to speak. I have always held it to be improper that judges should interfere to loosen restraints upon property that are deemed fit to be continued by the Legislature. I entertain great doubt if it be a wholesome mode of proceeding, instead of submitting the consideration of the law, in its proper place, to the Legislature, thus to frown upon it in courts of justice.

"Upon the case now before your Lordships, in that view which I entertain of the manner in which courts of law should proceed, as well as from its own circumstances, I incline to think that it should be submitted to the review of the Court of Session. The former decided cases have not its peculiarities. In none of these was there a reservation of adopting this mode of conveyance, an authority reserved over the property by prior deeds, of nominating *heirs* of tailzie. It was in execution of such an authority that Colonel Menzies names James Menzies an heir of tailzie.

"This authority applies not only to the estate of Culdares, but to all the other estates contained in the deed 1697. We find it slightly mentioned in the printed papers, that the disposition alone was effectual as to the bulk of the property, because a nomination *per se* was ineffectual, and the estate of Culdares, as remaining at the date of the deed, was of small value. But this is an erroneous view of this point, which does not seem to have been duly considered.

"He expressly nominates James Menzies, as well as the other persons, his heirs of tailzie and provision; and the prohibitive, irritant, and resolutive clauses apply to him directly, and not in any manner by implication. He afterwards goes on to dispone the property; but this, he says, is for the further security of the nominees, his heirs of tailzie.

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"Amongst other parts of the deed, I may refer to the clause directing the application of a part of the rents for the use of *his heirs of tailzie*. I think it was impossible to maintain that James Menzies was not entitled to those rents. This may also be illustrated by construction of the clause relative to the name and arms.

"From the case of Duntreath and others, I think it may be fairly inferred as established, that the fetters of an entail shall not be applied to the disponee by implication; but, in the present case, there is a nomination of certain persons to be *heirs* of tailzie and provision, and a direct application of the prohibitory, irritant, and resolutive clauses to them, including James Menzies.

"The present appeal has remained in this House for a great many years, the reason of which has not been distinctly explained. I think, upon a view of the whole matter, that it ought to be remitted to the Court of Session for farther consideration.

"I therefore move that the cause be remitted to the Court of Session, to review the interlocutors, so far as complained of, and to consider whether James Menzies, being expressly nominated and appointed an heir of tailzie by the first part of the deed 1697, although made disponee or institute by the latter part thereof, was not comprehended in the prohibitory, irritant, and resolutive clauses, imposed on the heirs of tailzie of the granter; and to consider such point, both so far as respects the estate contained in the charter 1675, and the other estates of the granter comprised in the deed 1697.

Ordered and adjudged that the cause be remitted back to the Court of Session in Scotland, to review the interlocutor complained of generally, and particularly to consider whether James Menzies, being nominated an heir of tailzie by the first part of the deed 1697, although made a disponee or institute by the latter part thereof, was not comprehended in the prohibitory, irritant, and resolutive clauses imposed on the heirs of tailzie of the granter, and to consider such point, both with reference to the estate comprised in the charter 1675, and the other estates of the granter comprised in the deed 1697.

For the Appellants, *W. Grant, Henry Erskine.*

For the Respondents, *R. Dundas, J. Montgomery.*

NOTE.—*Vide* subsequent appeal in this case, for what was done under this remit, both in the Court of Session (18th Jan. 1803 not reported,) and in the House of Lords (20th July 1811.)