1785. *June* 22. JOHN MENZIES of CULDAIRS *against* ELIZABETH M'KENZIE MENZIES.

TAILYIE.

Powers of an Heir of Entail, not being the last Substitute, to impose new fetters.

[*Fac. Coll. IX.* 337; *Dict.* 15,436.]

JUSTICE-CLERK. If it had been understood that any substitute could interpolate another line of succession, this would not have been the first case of the kind; for substitutes have often a temptation to extend their powers. In the case of *Cassillis*, John, Earl of Cassillis was also heir whatsoever of Lord Kennedy, and that circumstance had weight in the House of Lords. If the last substitute has a right to infringe the entail, a prior substitute cannot deprive him of that right.

BRAXFIELD. It has been said that, when a man gets an entailed estate, he must transmit it to other heirs, *tantum et tale* as he got it. This is very true, in a certain sense; but it is also a rule, that a man may do what he pleases with his estate, if he be not limited. If a tailyier only ties down to certain conditions, every thing beyond those may be done by the heirs of tailyie. If an heir of tailyie has a power left to sell, he may prohibit the after heir from selling. If he has power to grant leases for an endurance of five hundred years, he may limit the endurance of leases to be granted by the after heir to what term he pleases. Supposing *heirs whatsoever* not to be creditors, as was found in the case of *Cassillis*, James Menzies might have done all that he did.

ESKGROVE approved of Lord Braxfield's opinion. The pursuer can have no interest to plead on the right of the heirs whatsoever as creditors.

SWINTON. If James Menzies was an heir of entail, he could not make a new entail. *Testamenti factio* is not the law of nature, but by an act of legislation. So it was in the Roman law; and this came to be a principle with us. The terms of the Act 1685 ought also to be considered "*their* estates." Here James Menzies is not disposing of his *own* estate, but of a contingent reversion. It is asked, where are the *fetters?* I ask, where are the *powers?*

MONBODDO. I do not like the making entails eternal. I do not think that an heir of entail can do anything to infringe the entail; but James Menzies has attempted this, by limiting some of his successors. By the Roman law, no institute could take away what was given to a substitute. James Menzies is naming heirs to one who is not *his* heir, but the heir of the entailer.

HENDERLAND. An heir of entail in Scotland has every power that he is not deprived of. One heir of entail is not trustee for another. It is true that no man can entail anything but his own estate; but still the question occurs, what is that estate?

ROCKVILLE. It is strange that a man should have the power of limiting the succession of a person with whom he has no connexion. Every heir of entail has an interest to see to its execution, according to the will of the entailer. If this is not held to be the case, a new clause will be inserted in all future entails, prohibiting, under an irritancy, any addition or supplement to them.

PRESIDENT. The acknowledged novelty of the case satisfies me that James Menzies had no power to make a new and an additional entail. Many instances must have occurred, where the heir in possession would have wished to add new substitutes; but, so far as appears, James Menzies is the first who ever attempted it. I am a friend to entails, but I am a moderate friend. So far as the entail does not tie down the heir of entail he may act; but still he must act as an heir of entail: he cannot impose fetters on any other heir. An intermediate heir of entail cannot oblige any after heir of entail to bear name and arms, by a new clause, which obligation might infer the forfeiture of another estate by such after heir. As to the decision in the case of *Cassillis*, I never approved of it. Many of the most eminent judges were against the decision; and a judge who voted for it [Lord Coalston, as the President told me,] took occasion, in an after case, to declare that his judgment was founded on the specialties in the case of *Cassillis*, and not on the general point.

On the 22d June 1785, "The Lords found that an heir of entail cannot impose additional fetters on after heirs of entail; but found that James Menzies was an institute, and not an heir of entail."

Act. Al. Wight. *Alt.* H. Erskine.

Hearing in presence.

1785. *June* 23. GILBERT M'MICKEN *against* HUGH M'ILWRAITH.

WRIT.

Signing by initials not valid, no witnesses being present, where the party is ignorant of writing.

[*Faculty Collection, IX.* 333; *Dictionary*, 16,820.]

JUSTICE-CLERK. The woman is said to have divested herself of her all by indorsing a bill with her initials. The indorsation might have been granted for a different cause, in order to enable her to claim amongst creditors.

ESKGROVE. There is no circumstance to support the credibility or the verity of the subscription.