1811.

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

"As to the alleged inconveniencies of literary property, the clearest principles of law may be attended with inconveniencies; but that consideration belongs not to us, but to the Legislature. Here, however, I see no inconveniencies; on the contrary, were there not such a property, such a right, there would be great inconveniencies, great injustice. I think it would be very hard, and much to the discouragement of literature, if an author, after spending a laborious life in composing a book, did not provide by it, not only for himself, but also for his family: Nor is the remedy in the statute against this evil sufficient; for the best books may be twenty years published without having their merit known, and afterwards have a great and universal sale. The copy of Milton's Paradise Lost was sold for fifteen pounds, and it is probable that the bookseller lost by it; for it is certain, that the book was in no repute or estimation, till my Lord Somers let the people of England know that they had in their language the best heroic poem of modern times.

"Upon the whole, therefore, I am of opinion, 1mo, That authors had a right of property in their works before this act was made; 2do, That such right was not taken away by the act."

STEUART MENZIES of Culdares, an Infant, and the Hon. HENRY ERSKINE and Others, his Guardians, ... } *Appellants;*

MRS. ELIZABETH MACKENZIE BERESFORD (formerly MENZIES), and JOHN CLAUDIUS BERESFORD, of the City of Dublin, Esq., her Husband, ... } *Respondents.*

House of Lords, 20th July 1811.

ENTAIL—FETTERS—INSTITUTE, OR HEIR OF TAILZIE.—Here the question was, whether the party first called in the entail was an institute or an heir of tailzie? In the first part of the deed (nomination of heirs of tailzie) he was called expressly as an heir of tailzie; but in the latter part of the deed of disposition he was called as an institute or fiar. Held him not subject to the fetters of the entail. Affirmed in the House of Lords.

The particulars of this case are reported, ante vol. iv. p. 242.

The case was remitted from the House of Lords to the Court of Session, to review the interlocutors which the Court had pronounced, and which were appealed from.

On resuming consideration under this remit, the Court of Session ordered mutual memorials on the whole question.

After these were given in, the Court pronounced this interlocutor:—" The Lords having, in obedience to the remit " from the House of Peers of the 30th day of June 1801, re- " viewed the interlocutors of the 24th day of June and 6th " December 1785, heard counsel for the parties in presence " thereon, and advised the mutual memorials and other " writings, and proceedings in the cause; they find that " James Menzies of Culdares, although nominated as heir of " tailzie by the first part of the deed 1697, being 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 grantor, and " that this is the case as to the whole estate comprised in " the deed 1697, including such part thereof as was com- " prised in the charter 1675, and therefore adhere to the " foresaid interlocutors of the 24th day of June and 6th day " of December 1785."

The appellants conceiving themselves aggrieved by the judgment, brought the present appeal, not only against the former interlocutors, but also against the one above quoted.

Pleaded for the Appellants.—It is perfectly clear, from the general tenor and conception of the deed 1697, as well as from various passages in it, that it was the intention of the maker to subject James Menzies, the person who was first to take, to the observance of the conditions prescribed, and to lay him under the restrictions specified, as much as any other person or substitute who was to take after him, and that the maker did conceive that he had so subjected James Menzies, as well as the rest, when he imposed the conditions and restrictions *upon the heirs of tailzie generally. Thus he begins by nominating the said James Menzies, and the heirs male of his body*, whom failing, the other persons favoured to be his (the granter's) *heirs of tailzie and provision.* Then, for farther security of the heirs so nominated, he conveys to the said James Menzies and the substitutes, the different estates. He next appoints a moiety of the rents to be paid to Captain Archibald Menzies during his life, and the other moiety, after payment of his debts, to the *heirs of tailzie above mentioned*, to whom the fee is hereby appointed to belong, in their order, which must either be applied to James Menzies, or it must he held that the granter meant to give James nothing in fee of the estate. He then reserves power to burden the heirs of tailzie above mentioned, not meaning surely to exclude James Menzies,

1811.

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

the first to take, from a share, and the principal share, for sustaining the burdens. Then comes the restrictions: "It "shall not be lawful to any of the heirs of tailzie contained "in the foresaid nomination, James Menzies being express-"ly called as an heir of tailzie in the nomination." And in this clause it will be observed, that the word *heirs* and the word *persons* are used indiscriminately, and applied as well to James Menzies as the rest. And the deed concludes with the following clause: "And which persons *successive* "aforesaid, I design, nominate, and appoint to be served and "retoured, and to have right to my said whole lands, &c. "*as heirs of tailzie and provision to me.*" On the part of the respondents, it is not denied that the granter meant to comprehend James Menzies; but they say intention is nothing unless it is properly executed; and they refer to a variety of decided cases, where it was adjudged that restraints imposed upon heirs of tailzie did not reach the disponee or institute, who is not, technically speaking, an heir of tailzie. They rest on the doctrine laid down in the noted case of Edmonstone of Duntreath. "That the appellant "being fiar and 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 reso-"lutive clauses laid only upon the heirs of tailzie." The appellants certainly have no wish that your Lordships should unsettle any decided case, or give a different judgment in a similar case, however much the justice and propriety of the principle which governed those decisions, may now be doubted; but the appellants submit that the present case is essentially different from any one that has gone before. Here there is no attempt to subject one, who, by the terms of the deed, is only *a fiar, disponee, or institute, and not an heir of tailzie*, to the prohibitory, irritant, and resolutive clauses, by *implication* from other parts, but here is a person expressly named heir of tailzie, and, as such, expressly subjected. He is rightly and technically so called in one part, though perhaps not with perfect propriety so denominated in another part, while undeniably meant to be described by that denomination in every part. Your Lordships cannot put the first part of the deed wholly out of view, and decide on the after part of it. The first part is the nomination of heirs of tailzie, and James Menzies is called there as an heir of tailzie.

Pleaded for the Respondents.—1. James Menzies, the

respondent's grandfather, was in no shape an heir of entail, under the deed 1697, fettered by the prohibitory, irritant, and resolutive clauses therein contained, but disponee, or institute, against whom these clauses neither were directed, nor could by implication be extended. 2. That as such disponee or institute, he had full power to have defeated the entail 1697 *in toto*, much more was he enabled to execute the supplementary entail now in question, agreeing in all respects with the original entail, and only adding to the substitutions thereof a certain series of heirs to succeed when the former should be exhausted.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellants, *Wm. Adam, John Clerk.*

For the Respondents, *Sir Sam. Romilly, Jas. Abercromby.*

NOTE.—Unreported in the Court of Session.

[Fac. Coll. vol. xiii. p. 339.]

JOHN KIRKPATRICK, Esq., Advocate, Residuary Legatee of JOHN SIME, Ship-builder in Leith, deceased, and MRS. ISABELLA KIRKPATRICK, Mother of the said John Kirkpatrick, ... } *Appellants;*

MARGARET SIME, Sister consanguinean of the said John Sime, deceased, and only surviving child of the deceased John Sime, Senior, Ship-builder in Leith, } *Respondent.*

House of Lords, 22d July 1811.

LEGITIM—HOMOLOGATION—HERITABLE OR MOVEABLE—PARTNERSHIP.—(1.) A father, in his settlement, left all his heritable and moveable property to his son, who was in partnership with him as a ship-builder. This settlement was burdened with an annuity of £50 to his only daughter. The daughter never received her annuity; but for twenty-one years resided with her brother in family. After her brother's death, and twenty-one years after the death of her father, she claimed her legitim as due at his death. Held her entitled to it, and that she had not homologated or approved of the deceased's settlement.

(2.) In computing the legitim: Held that certain heritable subjects, though vested in the father's name, as an individual, belonged to