1776. *February* 23. GEORGE THOMPSON *against* WILLIAM CADDEL and SONS.

TACK.

[*Supplement, V.* p. 516.]

MONBODDO. If there was no obligation on the landlord to repair, I should think that he was not bound to repair. When a tenant takes possession of a particular farm, he takes it as possessed by the former tenant.

COVINGTON. Doubts as to the general doctrine laid down by Lord Monboddo, but thinks that in this case the master is not bound to repair.

KAIMES. Giving possession of a house is as necessary, from the nature of the covenant, as giving possession of the land. It is implied in the covenant that the tenant shall have possession, and shall have a house to live in. But here there is a special covenant. The repairing of the houses was a circumstance that could not have been overlooked: the omission therefore must have been intentional.

JUSTICE-CLERK. From the nature of the grant the general lessees had right to all obligations of outgoing tenants. I must presume that the outgoing tenants were bound to keep the houses in repair; for that is a common obligation on tenants all over Scotland. The lessees therefore must be presumed to have taken the houses as they were, or as the former tenants were bound to make them. It is plain that the intentions of the lessors were to stipulate a nett sum. The English creditors could not know the extent of the burdens, but the lessees did.

COVINGTON. I doubt greatly as to the grounds on which Lord Monboddo put this case.

On the 23d February 1776, "The Lords sustained the defences and assoilyied;" adhering to Lord Auchinleck's interlocutor.

Act. R. M'Queen. *Alt.* J. Swinton.

1776. *February* 29. ELIZABETH KIRKLAND and OTHERS, *Petitioners.*

TAILYIE.

Entail of houses within burgh—Registration of entails.

DAVID Cunninghame, baker in Edinburgh, executed three deeds: By the first, he disponed to David Cunninghame, his only son, and the heirs whatsoever of his body; whom failing, to his eight daughters, equally, share and share alike, and the heirs whatsoever of their bodies, respectively, a house and shop, part of a Temple tenement in the city of Edinburgh. By the second deed, Mr

Cunninghame disponed two dwelling-houses in Edinburgh, in favour of the petitioner Elizabeth Kirkland, his wife, in liferent, in the event of her surviving him; and, after her death, to his six unmarried daughters, or such of them as should be alive and unmarried at their mother's death, equally, share and share alike, under condition that, on the marriage or death of any one or more of them, their share should devolve on the surviving unmarried sisters; and, after the death or marriage of the last of them, to David Cunninghame his son, and the heirs whatsoever of his body, in fee; whom failing, to the disponer's eight daughters, equally, and the heirs whatsoever of their bodies, respectively; whom failing, to his own nearest heirs and assignees whatsoever.

Both of these deeds contained prohibitory, irritant, and resolutive clauses, by which David Cunninghame, the disponee, was debarred from selling, contracting debts, or altering the order of succession, without the consent of the disponer's two sons-in-law, until his son, the disponee, should attain the age of thirty.

By the third deed, Mr Cunninghame conveyed his personal estate to his wife in liferent, and to his son in fee; and he also appointed the petitioners tutors and curators to his children under age.

On Mr Cunninghame's death, the petitioners applied to the Court to have the deeds recorded in the register of tailyies. Doubts being entertained how far these deeds fell under the Act 1685, in regard the subjects therein contained were tenements in the city of Edinburgh, the Court appointed the case to be stated in a memorial. The petitioners argued, that the Act 1685 was not limited to *lands*, but, on the contrary, authorised the subjects "to tailyie their lands and *estates*,"—which last term must include all kinds of heritage. A search was made in the record of entails, and the petitioner subjoined a list of various instances in which tenements in royal burghs had been entailed, and the entails recorded. The legislature, in the Act 10th Geo. III. c. 51, viewed the Act 1685 in the same light. The title of that statute is, "An act to encourage the improvement of lands, *tenements*, and hereditaments, held under settlements of strict entail."

The following opinions were delivered:—

JUSTICE-CLERK. This is not an entail, but an interdiction to continue till the heir should attain the age of thirty, and then the fetters are to fly off. There was an easy method to make this effectual, without registering the deed as an entail. An inhibition might have been executed at the instance of the substitutes.

KAIMES. There are two things here,—1*st*, The subject; 2*dly*, The clauses. As to the *first*, our office is ministerial; and, if there is an entail, we must register it ministerially. But I reserve to myself the power of judging whether houses fall within the sense of the statute, when that question comes to be tried. As to the *second*, the question is, Whether there is here an entail? I think not. There was no occasion for an Act of Parliament enabling a man to limit his heir. The meaning of the Act of Parliament was to interpose, so as to

make such limitations effectual against creditors and purchasers; but the deed in question is not of that nature.

MONBODDO. A deed of settlement in favour of heirs *alioqui successuri*, if secured by clauses irritant and resolutive, is a deed in terms of the statute 1685. That these are for a limited time does not vary the case. The purpose of the deed is evident: the entailer considered his son to be prodigal, and has therefore restricted him until he arrive at the age of thirty. I doubt how far the method of inhibition proposed would be equally effectual.

GARDENSTON. I see great disadvantages as to the entailing of houses. The *second* question is very serious. This is the only rational entail that I ever saw. It is not the establishing perpetual limitations, but only limitations for a season, until the heir should come to mature judgment. An entail only limiting the substitute, first in order, would be good: Why should it be less good, when the entailer is more moderate in his ideas?

COVINGTON. I do not think that this Court is merely ministerial. The statute, as it has been interpreted, required registration of entails prior to the Act as well as posterior. Entails prior to the Act could not be registered in a register which did not exist; and therefore the particular interposition of a Court was necessary, and the legislature committed the power to this Court. An entail not in terms of the statute cannot be registered; for it is not such an entail as the statute requires to be registered. As to the *second* point, it is an odd construction of the law, that because an entailer has not done what he ought to have done, but has made the limitations temporary instead of perpetual, that therefore the entail is not good. In some entails one series of heirs is limited and another is free from limitations. Shall we refuse to register such an entail, because in some events it may be ineffectual? Or ought we to register it only as far as it can be effectual? The deed in question is a most rational entail.

HAILES. As to the *second* point, I am of the opinion delivered by Lord Covington and Lord Gardenston. As to the *first*, I think that the Court, in allowing the registration of entails, acts ministerially, and no otherwise. Hence it is that no relation, or interest of judges, prevents their sitting and giving judgment on such registration. When the entail of Blair Drummond was presented to be registered, Lord Kaimes was in the chair, and signed the interlocutor, though his lady was a near substitute, and soon after, by an act of Providence, became possessor of the estate under that entail. In another case, the late Earl of Morton applied to have his father's entail registered, but under a caveat that he might be heard to object to the entail. The Court would not receive the caveat, but ordered the entail to be simply registered. This shows that the Court acted ministerially. We have many examples of houses entailed, from the first volume in 1692, down to 1765: Why should we vary an ancient practice? The question, Whether *houses* are estates, in terms of the statute is still entire. Sir G. Mackenzie, an eminent lawyer, and who has wrote on entails, entailed his own house in Edinburgh. It is true that he also entailed lands, but they were totally disconnected from the house; and it is remarkable that the entailed house was afterwards sold in consequence of a special Act of Parliament. Inconveniences may arise from the entailing of houses, but they

have not been hitherto felt, for no question has been moved as to this. When the inconveniency is felt, the question will be tried. The registration of an entail *ministerially* will not hurt that question when it shall occur.

AUCHINLECK. I always thought that in this the Court acted ministerially. We have never read the entails produced before us. Were we to judge of the propriety of entails, we ought to order them all to be printed and lodged in our boxes. If we refuse to register an entail, and then the heir sells, or contracts debt, may we not be liable in damages in the event of the entail being proved a valid deed?

JUSTICE-CLERK. Gave up his opinion as to the first point.

On the 29th February 1776, "The Lords ordered the deed to be recorded."

Petitioner, A. Murray. *Alt.* Absent.

Diss. As to first point, Gardenston, Covington. As to second, Kaimes; but only one vote put, in general terms.

1775. *June* 29, and 1776, *March* 5. AGNES WATSON *against* AGNES MATHIE.

DILIGENCE.—TUTOR AND CURATOR.

Co-curators were not found obliged to recover, from one of their number, funds which had come into his hands *privato nomine*, as he had continued solvent until the expiry of the curatory.

[*Fac. Coll., VII. p.* 294; *App. I., Diligence, No.* 1.]

JUSTICE-CLERK. In the case of *Rae* the question has not been fully agitated, for this good reason, that Rae had the actual intromissions, and consequently would be liable at any rate. It seems pretty extraordinary that minors who may act for themselves, without curators, should be restored against an act which every major would rationally do. Here there was an election by minors, who were *majorennitati proximi*, made in terms of law, with this quality adjected, that the curators should not be liable for omissions. How are the minors lesed, or how can you get curators to act, if that quality is not adjected? I observe that every one authority stands on this side.

HAILES. I will not say that this question was fully agitated from the bar, but I am sure that it was deliberately considered by the bench. [Resumed the arguments as stated in the notes, 16th July 1773.]

COVINGTON. I do not see how the Court can, in decency, give a different judgment here than what it gave in the case of *Rae*. The only difference is as to greater or smaller intromissions. The arguments resumed by Lord Hailes are unanswerable. The contrary doctrine would be exceedingly dangerous to minors, for they act, as we all know, by the advice of those very persons who are named curators. How can we dispense with the making up of inventories?