

1758. February 14. *ERSKINES against HAY BALFOUR.*

No. 66.

The first member of entail being *disponee*, is not bound by the restrictions laid on *heirs of entail*.

*Fac. Coll.*

\* \* This case is No. 58. p. 4406. *voce* FIAR, ABSOLUTE, LIMITED.

1762. March 3. *LIVINGSTON against NAPIER.*

No. 67.

One called to the succession as heir substituted to the tailzier, who had died without being infest, found obliged to take up the succession by general service to the person last infest.

\* \* See this case, No. 43. p. 15418. (See APPENDIX).

1769. November 24. *EDMONSTONE against EDMONSTONE and Others.*

No. 68.

Edmonstone of Duntreath, who was bound by his contract of marriage to settle his Scotch estate on the heirs-male of the marriage, executed a strict entail, disposing the estate to Archibald Edmonstone his eldest son, and his heirs-male; whom failing, to his second son, &c. with a *proviso*, "That the said Archibald Edmonstone, and the other heirs of entail," shall discharge his debts and provisions to younger children. This entail contained the usual irritant and resolute clauses; and the mode of expression in all the several obligations was, binding "Archibald Edmonstone, and the other heirs of tailzie." On the entailer's death Archibald brought a declarator against his brother, and the other substitutes in the entail, to have it found, that he, as *disponee*, and complete *fiar*, was not subject to any of its limitations. Answered, The powers of the entailer to bind the pursuer are undisputable; and both the general import of the settlement, and the particular expressions used, where his name is always conjoined with those of the other heirs of tailzie, are demonstrative, that it was the intention of the entailer to subject him to the same fetters with the remoter heirs. On the other hand, the pursuer urged, that the omission of his name in the restraining clauses was a proof, that his father did not intend to fetter him; which besides would have been contrary to the faith of the simple destination in the marriage-contract. The Lords found, That in respect it appeared from several clauses in the entail, that the pursuer was comprehended under the description of heir of entail, he was thereby subjected to all the limitations and restrictions of the settlement. But this decision was reversed on appeal; and it was declared, that the appellant