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Transcription

Source: Scottish Court of Session Decisions

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The 1741 Entail of John, Earl of Wigtown

Order of succession, later holders of Biggar and Cumbernauld, and the court cases

About this note. The terms of the entail come from William Morison's report of the 1804 case, as you supplied it (see Morison, p. 15559). I have not seen the entail itself. The later history draws on the Scottish Court of Session archive, the National Library of Scotland catalogue and genealogical and reference websites, each linked in the text and listed in full at the end. Points I could not confirm are marked.

1. Background

John Fleming, 6th Earl of Wigtown, died on 10 February 1744 at Cumbernauld. His testament (Glasgow Commissary Court, CC9/7/58, held on ScotlandsPeople) deals with his moveable estate, which passed to trustees under a Disposition and Settlement of 25 January 1742. The entail described here is a separate deed of 1741 and deals with the heritable lands of Biggar and Cumbernauld. How the two deeds relate is not clear from the sources I have seen.

2. The 1741 entail

What it settled

In 1741 the Earl executed an entail of his estates of Biggar and Cumbernauld, by which he bound himself to resign them in favour of himself and a chain of substitute heirs. It contains the usual prohibitions against changing the order of succession, contracting debt and alienating the estate, backed by irritant and resolutive clauses.

Order of succession

Rank	Heir called	What happened
1	The Earl himself, and the heirs-male lawfully procreated of his body	He died in 1744 without sons.
2	Mr Charles Fleming, his brother-german, and the heirs-male lawfully procreated of Charles's body	Charles succeeded as 7th Earl in 1744 and died on 16 May 1747 without issue, and without making up titles. The earldom became extinct.
3	The heirs-female lawfully procreated of the Earl's body, the eldest always succeeding without division, and the heirs-male of the body of the said heirs female	His only daughter, Lady Clementina Fleming, was served heir of tailzie and provision to her father in 1751.
4	The heirs-female lawfully procreated of Mr Charles Fleming, his brother-german, the eldest always succeeding without division, and the heirs-male of the body of the said heirs female	
5	The heirs-female lawfully procreated of the heirs-female of the Earl's body, the eldest always succeeding without division	
6	Other substitutes	Not named in Morison's summary. The entail itself would show them. Not listed in the Court case either!

Conditions on the heirs

- **Name and title.** The heirs-male of the Earl's body, and Charles Fleming and the heirs-male of his body, had to take the surname Fleming and the title and arms of the Earls of Wigtown, and no other.
- **If the earldom failed.** Where Charles's male line failed and the title became extinct, any heir of tailzie with a right to the title of Lord Fleming had to take that title. Failing such a right, the heirs had to take the surname Fleming and the title, cognisance and arms of the family of Fleming of Biggar and Cumbernauld.
- **The peerage clause.** If any heir of tailzie, other than the heirs-male of the Earl's body or of Charles's body, succeeded to a peerage, he was to give up all right to the estate. It would pass, *ipso facto*, to the next heir of tailzie, as if the peer-heir were naturally dead.
- **Other estates.** An heir succeeding to another estate burdened with similar conditions about name, arms or title had to give up either that other estate or this one, so the Fleming name would not be sunk or confounded.
- **Irritancies.** An heir who contravened these conditions lost the estate, which passed to the next heir of tailzie. The contraventions could not be purged once incurred.

3. Who held the estate

Years	Holder	Notes
to 1744	**John Fleming, 6th Earl of Wigtown**	Born c. 1673; died 10 February 1744. The entailer. Cumbernauld House was built for him in 1731.
1744 to 1747	**Charles Fleming, 7th Earl**	His brother, aged 69 at succession. Died 16 May 1747 childless; the earldom became extinct.

Years	Holder	Notes
1751 to 1799	**Lady Clementina Fleming** (c. 1719 to 1 January 1799)	The Earl's only daughter. Married Charles Elphinstone, 10th Lord Elphinstone (1711 to 1781), in 1735. Served heir in 1751 and infeft on a Great Seal charter of resignation.
1799 to 1840	**Admiral Charles Elphinstone Fleeming** (1774 to 1840)	Her grandson, second son of John, 11th Lord Elphinstone (1737 to 1794), who died before her. Took the additional name Fleming/Fleeming. Established as heir by the 1804 decision.
1840 to 1861	**John Elphinstone-Fleming** (born 11 December 1819)	The Admiral's son, a Lieutenant-Colonel. Became 14th Lord Elphinstone in 1860 and died unmarried in 1861.
1861 to 1875	**Cornwallis Maude-Fleming**	His nephew, son of Lord Hawarden (later 1st Earl de Montalt). Killed at Majuba Hill in 1881 as a captain in the Grenadier Guards. Sold the estate in 1875.
1875 onwards	**John William Burns** of Kilmahew	Bought Cumbernauld for £160,000. The house was gutted by fire on 16 March 1877. The Burns family sold the estate to the government in 1955 for the new town.

Sources for this table: Earls of Wigtown succession; Lady Clementina Fleming and her children; Lords Elphinstone; Admiral Charles Elphinstone Fleeming; Cumbernauld House; and the National Library of Scotland Fleming papers. Chalmers's *Caledonia*, quoted on Our Cumbernauld, describes Clementina as the last Earl's niece and heiress.

Two points to check. Wikipedia dates the Admiral's lairdship from 1799, but the 1804 case (section 4) shows his right was still being decided after his grandmother's death. I also haven't confirmed Cornwallis Maude-Fleming's mother. She was presumably Lady Clementina Elphinstone-Fleming, the Admiral's daughter and a pioneer photographer (see Clementina Maude, Viscountess Hawarden), but I haven't read that article.

4. The court cases

1760: Grant and Fleming v. Fleming and Elphinstone

A case in which Lady Clementina and her husband, Lord Elphinstone, were defenders and Robert Fleming was pursuer, with John Grant of Rothmaise acting for him. It is reported in Morison at p. 6724. The archive says its papers are scheduled for digitisation, and I have not read the report, so I cannot say whether it concerns the entail. See the archive record.

1798: Lady Clementina Fleming v. the heirs of entail

Lady Clementina sued as pursuer against "the Heirs of Entail of the late John Earl of Wigton". The archive holds Henry Erskine's information for her, dated 1 February 1798, of 35 pages (session paper), and records a counter-information for the Hon. Charles Elphinstone and the other heirs of entail "called by the Deed of Tailzie executed by the late John, Earl of Wigton". From the titles alone, the case concerned the deed of tailzie. It may have concerned her power to alter or revoke it, which would fit her 1788 deed, but I haven't read the papers, so that is an inference. They are the most likely place to find the entail's terms quoted.

1803 to 1804: Elphinstone v. Fleming (Morison No. 116)

The decisive case, argued as an action of declarator between two brothers. It was decided on 19 January 1804 and is reported in Morison, p. 15559, as No. 116 (also Fac. Coll. No. 136, p. 303). The archive's record is the case page.

- **The parties.** The pursuer was the Hon. Charles Elphinstone Fleming, the younger brother. The defender was John, Lord Elphinstone (the 12th Lord), the elder. Lord Ordinary: Polkemmet. Counsel for the pursuer: Hay and Cathcart, with James Gibson, W.S., as agent. Counsel for the defender: H. Erskine and Campbell, with Ra. Hill, W.S., as agent.
- **The facts.** The Earl died without male issue and left one daughter, Lady Clementina. Charles Fleming succeeded him and died without issue. In 1751 Clementina was served heir of tailzie and provision to her father and was infeft on a Great Seal charter containing all the entail's conditions. Her son John, Lord Elphinstone, died before her, leaving two sons, John and Charles. When she died, John took possession as heir of entail.
- **The claim.** Charles sought a declarator that he was entitled to be served heir of tailzie and provision to his grandmother, because his elder brother, being a peer, was excluded by the entail.
- **The pursuer's argument.** The maker's intention governs. The peerage clause turns on two things coexisting, so it makes no difference whether an heir in possession later succeeds to a peerage or a peer succeeds to the estate. He cited *Lockhart v. Sir Alexander Gilmour* (25 November 1755, No. 34, p. 15404) and *Bruce Henderson v. Sir John Henderson* (20 January 1790, No. 54, p. 15439).
- **The defender's argument.** Entails are read strictly. The clause forfeits an heir who is already in possession and then succeeds to a peerage, but says nothing about a peer who succeeds to the estate. He pointed to the words "how soon" and to the future tense, which suggest the peerage comes after the estate.
- **The result.** The Court decerned in the declarator, so Charles was entitled to be served heir and his brother, as a peer, was excluded.
- **A difference between the sources.** The archive's summary adds that in 1788 Clementina executed a deed revoking the entail so that her eldest son could take possession despite his peerage, and that John, the grandson, took possession under that deed. The Morison text as supplied to me does not mention the deed. The archive also gives the two parties' session papers, each of 24 pages: the information for Lord Elphinstone (29 November 1803) and the information for Charles Fleming (2 December 1803). The archive's one-line descriptions of these papers appear to describe other matters, but the papers' own titles show they belong to this case.

5. Sources and links

- Morison, Decisions of the Court of Session (1811), p. 15559: No. 116, 19 January 1804 (BAILII; the text I used was supplied to me, and the link is as given on the archive's case page).
- Scottish Court of Session Digital Archive: Fleming v. Lord Elphinstone (1803 to 1804) (University of Virginia Law Library).
- Session paper: information for Lord Elphinstone, 29 November 1803
- Session paper: information for Charles Fleming, 2 December 1803
- Session paper: information for Lady Clementina Fleming, 1 February 1798
- Archive record: Grant and Fleming v. Fleming and Elphinstone (1760)
- National Library of Scotland: papers of the Fleming family of Cumbernauld and Biggar (MSS.20770 to 20800)
- Cumbernauld House (Wikipedia)
- Admiral Charles Elphinstone Fleeming (Wikipedia)
- Clementina Maude, Viscountess Hawarden (Wikipedia)
- Earls of Wigtown: succession (Twentytrees)

- Lady Clementina Fleming and her children (thepeerage.com)
- Lords Elphinstone (Irvine McLean)
- Our Cumbernauld, quoting Chalmers's Caledonia
- ScotlandsPeople (for the testament, CC9/7/58, images 502 to 507; a login is needed to view images).

6. Open questions

- The entail itself. I haven't located the deed or its record. An entail like this would normally have been recorded in the Register of Tailzies at the National Records of Scotland, which is worth checking, and the 1798 and 1803 session papers may quote it.
- How the 1741 entail relates to the 1742 settlement in favour of Panmure, Maule and the other trustees, which governed the moveables.
- The names of the "other substitutes" in the fourth rank of the entail.
- The subject of the 1760 and 1798 cases, and the 1788 deed that the archive says revoked the entail.
- When the Admiral actually took possession, since Wikipedia gives 1799 and the case was decided in 1804.

John Lord Elphinstone v Charles Elphinstone Fleming Nov 29 1803

John Earl of Wigtown made a charter of resignation and novodamus in 21 June 1707 for the estates of Biggar and Cumbernauld. He resigned in favour of:

- Himself; thence
- The heir-male of his body; whom failing
- Mr Charles Fleming his brother german and the heirs-male of his body;
- Heirs-femail of John the said Earl, the eldest always succeeding without division, and the heirs-male of the said heirs-female;
- Heirs-femail of Charles Fleming;
- Heirs-female of the heirs-femail of John the said Earl;
- Certain other heirs

Sasine followed in favour of the Earl on 27 Oct 1707.

He married Lady Mary Keith, eldest daughter of William Earl Marischal of Scotland, contract dated 8 Feb 1711

Only child was Lady Clementina Fleming, who married Charles Lord Elphinstone

6 Dec 1738 the Earl granted a bond of provision of 30,000 merks in favour of Clementina (because she was not the heir)

24 June 1741 the Earl executed another entail – new order of succession

- Himself; thence
- The heir-male of his body; whom failing
- Mr Charles Fleming his brother german and the heirs-male of his body;
- Heirs-femail of John the said Earl;
- Heirs-femail of Charles Fleming;
- Mrs Jean Maule, relict of the deceased Lord Ramsay and her heirs male; thence her heirs-female;
- William Fleming of Barrochan and his heirs-male;
- James Fleming, brother of the said William Fleming and his heirs male;
- The nearest lawful heir-male of the said John Earl of W;
- His heirs or assignees whatsoever.

1751 Clementina was served heir of tailzie

1788 Clementina conveyed her estate to her eldest son John Lord Elphinstone. He was infest in 1790

Her son predeceased her, leaving his son John the new Lord Elphinstone and HIS younger brother, Charles.

So her heir was her grandson John Lord Elphinstone. He was sued by his younger brother Charles on the grounds that the older brother could not succeed as he breached the clause that disbarred existing peers from the succession. Charles won.

Morison, Decisions of the Court of Session (1811), p. 15559: No. 116, 19 January 1804

Date: 19 January 1804

Case No. No. 116.

A clause forfeiting the heir at entail if he succeed to a Peerage, applies to the case of a Peer succeeding to the entailed estate.

In the year 1741, John, Earl of Wigton, executed an entail of his estates of Biggar and Cumbernauld, by which he became bound to resign them in favour of himself, and the heirs-male lawfully procreated of his body; which failing, to Mr. Charles Fleming, his brother-german, and the heirs-male lawfully procreated of his body; which failing, to the heirs-female lawfully procreated of the body of the said Earl; which failing, to other substitutes. This entail contains the usual prohibitions against changing the order of succession, contracting debt, or alienating the estate, under the usual irritant and resolutive clauses.

Among other conditions contained in this entail, it is provided and declared, “That the heirs-male of my body, and the said Mr. Charles Fleming, and the heirs-male of his body, who shall Succeed to my said lands and estate by virtue hereof, shall be holden and obliged to assume the surname of Fleming, and the honour, title, and dignity of the Earls of Wigton, and to bear, use, and carry the cognisance, arms, and coat armorial of the Earls of Wigton, and no other title, name, or arms, in all time after their succession.”

It is also provided, that upon the failure of heirs-male of the body of Mr. Charles Fleming, his brother, whereby the title and dignity of the Earl of Wigton might become extinct, “if it shall be found that any of my other heirs of tailzie above mentioned have right, as representing me, to the title and dignity of Lord Fleming, then, and in that case, the heir so succeeding, and having right as aforesaid, shall be bound and obliged to assume and carry the foresaid title, name, arms, and designation, of Lord or Baron of Fleming, and none other.”

But in the event of their not having right to that title or dignity, then it is declared, that the heirs of tailzie shall be holden and obliged to assume the sirname of Fleming, and “to use and carry the title, cognisance, and arms of my family of Fleming of Biggar and Cumbernauld, and ao other name, arms, title, or designation, after their said succession.”

There is then the following condition: “And farther, providing, That in case it shall happen any of the heirs of tailzie above mentioned, other than the heirs-male of my body, or of the body of the said Mr. Charles Fleming, to succeed to the title and dignity of Peerage, then, and in that case, and how soon the person so succeeding, or having right to succeed to my said estate, shall also succeed, or have right to succeed to the said title or dignity of Peerage, they shall be bound and obliged to denude themselves of all right, title, or interest, which may be competent to them of my said estate, and the same shall from thenceforth, ipso facto, accrue and devolve upon my next heir of tailzie for the time being, sicklike as if the person so succeeding, and bound to denude, were naturally dead: And also providing, that in case it shall happen any of the heirs, male or female, succeeding to my said lands and estate, as said is, also to succeed to any other estate burdened with the like resolutive, prohibitory, and irritant clauses, as to using the name, arms, or title thereto belonging, so that it might happen my said family to be sunk, suppressed, or confounded with the said other name, estate, or title to which the said heir may happen to succeed; in that case, the said heir, whether male or female, so succeeding, shall be holden and obliged either to relinquish the said other name, title, and estate, in all time after his or her succession to my said lands and estate, and to bear, use, and carry my said name, title and arms ailenarly, as said is, or otherwise they shall be holden and obliged to denude themselves of my said lands and estate in favour of the next immediate heir of tailzie, who shall happen to be in life for the time, and that with and under the burdens, reservations, provisions, limitations, and irritancies, contained in the present tailzie.”

The irritant and resolutive clauses in support of these prohibitions, are as follows: “And further providing, as it is hereby further expressly provided and declared, that if it shall happen any of the heirs of tailzie above mentioned to contravene the provisions and limitations above-written, or any of them,

as the same are above expressed, then, and in that case, all such acts and deeds of contravention are not only hereby declared to be void and null to all intents and purposes, sicklike as if the same had never been made, but also the heir so contravening shall, ipso facto, amit, lose, and tyne all right to the said lands and estate above-written, and the same and hail right thereof, shall fall, accresce, pertain, and belong to the next heir of this present tailzie substitute to the contravener who shall happen to be in life for the time; to whom it shall be lawful to serve himself heir to the contravener's immediate lawful predecessor, who died last vest and seised in the said lands and estate before the contravention, sicklike as if the contravention had never existed, or otherwise to prosecute and establish the right of the said lands and estate by reduction and declarator, or ex capite contraventionis, or by adjudication or any other manner of way, as accords of the law"; nor shall it be competent for the person so contravening, and incurring the irritancies in manner above expressed, to purge the same after once duly incurred."

The entailer died without male issue, but left one daughter, Lady Clementina, who was married to Charles, Lord Elphinstone.

The entailer was succeeded by his brother Charles Fleming, who died without issue, and without having made up titles.

In the year 1751, Lady Clementina Elphinstone was served heir of tailzie and provision to her father. She expeded a charter of resignation under the Great Seal, containing all the conditions in the entail; upon which she was infeft.

Her son John, Lord Elphinstone, predeceased her, leaving two sons, John, now Lord Elphinstone, and Charles.

On her death, Lord Elphinstone took possession as heir of entail, and his brother brought an action of declarator, that he is entitled to be served heir of tailzie and provision to Lady Clementina Fleming, his grandmother, upon the ground that his elder brother being a Peer, is expressly excluded by the terms of the entail.

The question was reported to the Court.

The pursuer

Pleaded: In all deeds containing a destination of heirs, the intention of the maker must be the governing rule. By this entail, it is provided, that when any of the heirs other than the heirs-male of the entailer's body, or of his brother's, shall "succeed to the title and dignity of a Peerage, then, and in that case, and how soon the person so succeeding, or having right to succeed to my estate, shall also succeed or have right to succeed to the said title or dignity of Peerage, they shall be bound and obliged to denude." This is truly and substantially a quality affecting the destination or order of succession amongst the different heirs called by the entail.

Now, Lord Elphinstone certainly stands in the situation of an heir of entail having right to succeed to this estate, and he has also succeeded to a Peerage; he cannot therefore bear the name and arms of Fleming of Biggar alone, which it was the entailer's intention, so anxiously provided for, should never be sunk in any other.

It makes no difference in this view, Whether an heir of entail in possession succeed to a Peerage, or a Peer succeed to the estate. The question depends upon the co-existence of the two events, without regard to the priority of the one before the other; Lockhart against Sir Alexander Gilmour, 25th November 1755, No. 34. p. 15404.; Bruce Henderson against Sir John Henderson, 20th January, 1790, No. 54. p. 15439.

Answered: Entails are to be strictly interpreted, both with respect to the extent and validity of the fetters imposed, as well as with respect to the order of succession pointed out. Effect must always be denied to any alleged restrictions, which the terms of the deed do not expressly warrant. Now, though there be a clause irritating the right of an heir of entail, to whom the succession has opened, in the event of his afterwards succeeding or having right to succeed to a Peerage; yet there is rib irritancy in the case of a Peer succeeding to those estates as heir of entail. These are two distinct cases; the one

made the foundation of a declarator of irritancy; the other is not provided for at all. Those words in the prohibiting clause, “how soon,” denote an interval between the succession of the estate and the succession to the Peerage; besides, the succession to the dignity of Peerage is described as a future event, as one that shall also take place, and not as one which had previously taken place.

The two cases may be essentially the same, and the entailer may have had the one as much in view as the other; but he has not so expressed himself: The words apply to a commoner succeeding to the estate, and a Peerage afterwards devolving to him; but they do not apply to the case of a Peer succeeding as heir of entail. There must be an express and pointed declaration in such terms as must compel a court of law to enforce it, and to forfeit or exclude from his right the person who is declared to have his right forfeited, or to be excluded from the succession.

The Court decerned in the declarator.

Lord Ordinary, Polkemmet. Act. Hay, Cathcart. Agent, Ja. Gibson, W. S. Alt. H. Erskine, Campbell. Agent, Ra. Hill, W. S. Clerk, Menzies. Fac. Coll. No. 136. p. 303.

[1760] Mor 6724

Subject_1 IMPROBATION.
Subject_2 SECT. VI.

Title to Exclude. - When Proponable. - What Title Sufficient. - What the Effect.

John Grant younger of Rothmaise, and Robert Fleming, great-grandson of John Fleming of Board,
v.
Lady Cementina Fleming, and Charles Elphinston, Esq; her Husband

Date: 23 December 1760
Case No. No 150.

Not competent, in a reduction-improbation, to allow a proof of possession, in order to found prescription upon titles produced, as sufficient to exclude, after acts have been extracted for the first and second terms.

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Upon the 24th of August 1374, King Robert II. confirmed a charter granted by Robert Lord Erskine, to Patrick Fleming, of the lands of Board, and others, to be held de Domino Baroniæ de Lenzie, in feodo et hæreditate. These lands were possessed by Patrick's descendants, and were in 1583, disponed by John Fleming of Board, to John Fleming then younger of Board, his eldest son.

John Grant younger of Rothmaise, having got a trust-bond from Robert Fleming, great-grandson of the said John Fleming younger of Board, charged him to enter heir to his predecessors in these lands; and in the year 1741, obtained a decreet of adjudication; upon which title a process of reduction, improbation, and declarator, was brought against Lady Clementina Fleming and her Husband, in order to set aside any claim they might pretend to the property.

In this process, days were assigned to the defenders for satisfying the production, and acts for the first and second terms were extracted; but when certification was craved for not-production on the second act, they produced certain writs vesting the barony of Lenzie in the person of Lady Clementina; and alleged, That although the lands of Board were not particularly mentioned in these writs; yet as she and her predecessors had possessed them for more than 40 years, as part of the barony of Lenzie, they had acquired right to them by the positive prescription; and had therefore produced sufficient to exclude the pursuers.

Objected by the pursuers, 1mo, It is not competent to a defender, in a process of this nature, to resort to the plea of an exclusive right, after the pursuer's title has been sustained, acts for the first and second terms extracted, and the time assigned for satisfying the production is elapsed. The taking a day to produce, imports a contract judicially entered into between the pursuer and defender, whereby the latter solemnly engages to produce the whole writs called for, or to allow them to be reduced as forged; and after both terms are elapsed certification must be granted contra non producta.

2do, The writs produced are insufficient, without a proof of possession; whereas a production to exclude should be sufficient of itself, without the aid of parole evidence, which ought not to be allowed until a full production is made.

3tio, Possession for the years of prescription upon the rights produced, would not establish a title to the property of the lands in question, exclusive of the pursuer's. For though the infeftment of the superior, containing these lands, would be sufficient against all others; yet it will not exclude the vassal; and before any prescription can run against him, the superior must shew some title by which the property might have been consolidated with the superiority. Could the defenders produce a disposition, or a resignation ad remanentiam, of these lands, even though granted by one who was not truly the

vassal, prescription might have taken place; but the grants of the superiority, in which the lands fall to be narrated, will by no means afford any title for prescription.

"The Lords found it incompetent to allow a proof of possession, in order to found prescription, in hoc statu."

Act. Rae. Alt. Hamilton-Gordon. Fol. Dic. v. 3. p. 311. Fac. Col. No 264. p. 490.