

But the opinion of the majority was, that the words, "failing of me by decease," referred to the possession or enjoyment of the estate, and not to the fee; and therefore that Robert was to be considered as *nominatim* disponee or institute.

The Lords repelled the defence.

Reporter, Lord Justice Clerk. Act. Maconochie. Alt. Wight. Clerk, Home.
S. Fac. Coll. No. 167. p. 339.

1791. February 23.

WILLIAM GORDON against DAVID MACCULLOCH.

Edward Macculloch of Ardwell executed a deed of entail, by which he disposed the estate thus: "To myself, and to David Macculloch, my only lawful son, and the heirs-male of his body, &c; which failing, &c.; reserving not only my own life-rent of the said lands, but also full power and liberty to alter," &c. And the same expression of "myself and David Macculloch," is repeated in the obligation to infest, and in the procuratory of resignation.

In the prohibitory clauses he is named thus: "The said David Macculloch, and my said other heirs:" or thus: "Neither the said David Macculloch, nor any of the heirs of tailzie." But the irritant and resolute clauses mention only, "my said heirs of tailzie," without introducing his name.

David Macculloch made up titles to the estate by service, as heir of tailzie and provision to his father; but afterwards, in contravention of the entail, he granted certain deeds tending to alienate or to burden the lands.

On this account, Mr. Gordon, one of the substitute-heirs, instituted against him an action of declarator of irritancy. His defence being founded on the above-mentioned conception of the entail, he

Pleaded: The defender is a *nominatim* disponee, and not an heir of entail. It is true, the disposition is also "to the granter himself;" but if the fee had not been really conveyed to the former, the reservation of life-rent in favour of the latter would have been superfluous.

Were it even considered as a conjunct fee, the defender would take the estate by infestment on the entail, without any necessity of service as heir; Bankton, vol. 1. p. 658. § 6.; *IBID.* p. 576. § 116. January, 1734, Ballantine. See APPENDIX.

But if he be not an heir of entail, he is not subject to any of those irritancies which by the deed in question are directed against heirs of entail alone; the law in regard to this point being now established.

Answered: The fee of land-property must remain in the person of those who are vested in it, or in their *hereditas jacens*, until it be taken away, either by a deed of the proprietor, or by service.

As in the present case the terms of the settlement were not such as to divest the granter, the disposition being "to himself," as well as to the defender, it is by

No. 70.

No. 71.

A destination of fee to the granter himself, and to a *nominatim* disponee, does not carry it out of the person of the former.

No. 71. service alone, as heir of entail, that the right of the former could be transmitted to the latter. Such was the determination of the Court, in the case of Lord Napier against Livingstone, 3d March, 1762, affirmed in the House of Lords, 11th March, 1165, No. 43. p. 15418. See APPENDIX.

Replied: In that case the destination was, "to us the Countess of Findlater, (the granter), and James Earl of Findlater, our husband, and longest liver of us two, in life-rent and conjunct fee, and for the said Earl his life-rent use thereof allenerly, and to James Livingstone, and his heirs," &c. Thus James Livingstone was not conjoined with the Countess and her husband in the fee; the clause relative to the conjunct fee being closed before his name was mentioned. But the present instance is the reverse of this; so that the two cases are not parallel.

The cause was reported on informations; when, without paying attention to the circumstance of the defender's being actually served heir, which, if erroneous, would have gone for nothing, except so far as it indicated the sense of parties,

The Court regarded the judgment in the case of Lord Napier as decisive of the present question, its application to which had been first suggested from the Bench; and therefore

"The Lords found and declared in terms of the summons of declarator;" and on advising a reclaiming petition and answers, adhered to this interlocutor.

Reporter, *Lord Stonefield.* Act. *G. Fergusson.* Alt. *Dean of Faculty, Cathcart.*
Clerk, *Menzies.*

S.

*Fac. Coll. No. 168. p. 341.*1797. *May 31.*

No. 72.

A destination in an entail being to the granter, "for his life-rent use only, during all the days of his life time, and failing of him by decease, to his nephew in fee," the latter was found to be a disponee or institute, not an heir of entail, although the restricting clauses were directed against "him and the other heirs of entail."

ISOBEL and MARY WELLWOODS *against* SIR CHARLES PRESTON and Others,
TRUSTEES of the late ROBERT WELLWOOD.

The circumstances giving rise to this case have been stated in the above report, 23d February, 1791, No. 70. p. 15463. It appears from that report, that the Court then found that Robert Wellwood was a disponee or institute, not an heir of entail; and that as such he was not subjected to the fetters of the entail made by Henry Wellwood.

Isobel and Mary Wellwoods, substitutes under an entail, after Mr. Wellwood's death, brought a reduction of the decree against his trustees.

The pursuers were called in the former action; but they were then minors, and they alleged that as no appearance had been made for them, it was still open to them to get the judgment set aside.

The Lord Ordinary took the cause to report, on informations.

The Court thought the former judgment right on the merits, and therefore had no occasion to decide on the competency of the action.

The Lords assoilzied the defenders.

Lord Ordinary, *Glenlee.* Act. *Turnbull.* Alt. *Hume.* Clerk, *Home.*

R. D.

Fac Coll. No. 30. p. 69.