

APPENDIX.

PART I.

SERVICE OF HEIRS.

1806. December 16.

SNODGRASS *against* BUCHANAN.

MIS WALLACE BUCHANAN, who had inherited from her father certain subjects in Glasgow, made a settlement, in which, upon the narrative, that in the event of her decease, 'it is my earnest wish, that my brother, who is now abroad in the army, should return and settle at home, so as my said subjects may go to the heirs of his body, or be disposed of by him; but failing the heirs of his body, and in the case of his neglecting to dispose of my subjects, I am resolved, from respect to the memory of my dear mother, that her relations should be substituted to part thereof, the more especially, because the greatest part of my father's subjects were derived from her,' she conveyed these subjects, together with the whole of her other effects, to her brother General Buchanan, 'and the heirs of his body, or assignees; whom failing, to such of my mother's relations, as my kind and much respected friend Mrs. Margaret Buchanan, widow of Dougal Buchanan, Esq. of Craigievern, shall appoint, by a writing under her hand.' This deed contained several small legacies, and, in particular, a legacy of £25. to the granter's half sister, Mrs. Graham.

General Buchanan succeeded to the property on the death of his sister. He made up his titles, by entering heir to his father, in whose *hereditas jacens* the feudal right of the burgage tenements still remained, and was infeft upon his service. Several years afterwards, when he was in Ireland, he executed a settlement in the English form, in which, after leaving a legacy, he disposes of his property in the following manner: 'I do leave, devise and bequeath all my lands and tenements, situated in Trongate Street, in the city of Glasgow, North Britain, and all other my real estate, wheresoever situate, unto my half sister Mary Graham otherwise Buchanan, wife of George

No. 1.

Service as heir of investiture, does not vacate a substitution in favour of heirs of provision.

No. 1. 'Graham of the city of Edinburgh, writer, and unto the lawful heirs of her body, and their heirs for ever; and failing the heirs of the said Mary Graham, I do leave and devise my said real estate unto my own right heirs for ever.'

Upon the death of General Buchanan, his sister Mrs. Graham made up her titles by cognition and service *more burgi*, as heir to her brother; and Mrs. Buchanan of Craigevern conceiving, that there was room for the operation of the substitution in Wallace Buchanan's settlement, executed a deed of nomination in favour of Neil and William Snodgrass, who were relations of Wallace Buchanan's mother, appointing them to succeed as substitutes to General Buchanan. Upon this, Neil and William Snodgrass raised an action against Mrs. Graham, subsuming, that both the titles made up by General Buchanan, as heir to his father, and by Mrs. Graham, as heir to her brother, were erroneous, and concluding, that she should denude by a disposition in their favour: And

Pleaded: The power of disposal conferred by Miss Wallace Buchanan upon her brother, must be exercised according to the legal mode recognised in the law of Scotland, for disposing of heritable property; and in the event of his neglecting to exercise that power in the regular way, it was provided that her property should descend to the relations of her mother, in the same manner and according to the nomination pointed out in the deed. Now, the deed executed by General Buchanan in Ireland, being altogether of a testamentary nature, is insufficient to convey heritage; Dundas against Dundas, February 25, 1783, No. 124. p. 15585.

The circumstance of General Buchanan having made up his titles as heir to his father, cannot defeat his sister's disposition of the property under her personal right. Every disposition or settlement containing a destination of heirs, must continue in force until it be altered by a new settlement by the heir in possession at the time. It does not imply such an alteration, if a substitute, instead of making up his titles on the disposition, should serve himself heir of line or investiture to the person who died last feudally vested in the fee; for it is often necessary, in order to carry into effect the destination, that the disponent shall complete his titles as heir of the investiture. If an heir has different ways of making up his titles, it is of no consequence to third parties which of these he prefers; Smith and Bogle against Gray, June 30. 1752, No. 89. p. 10803. Robson against Robson, February 18, 1794, No. 52. p. 14958; Cathcart's Trustees against Earl of Cassillis, November 16. 1802, No. 29. p. 14447. (*et infra.*)

Answered: Although a direct conveyance of heritage cannot be made in a deed of a testamentary nature, the succession of heritage may be indirectly affected by deeds conceived in that form; Kennedy against Arbuthnot, July 13, 1722, No. 22. p. 1681. The deed executed by General Buchanan in Ireland, though not a formal conveyance of heritage, affords sufficient evidence of the mode in which he wished this property to be disposed of, and precludes

the operation of the substitution by Mrs. Buchanan, which was only to take place in the event of General Buchanan neglecting to dispose of the subjects.

No. 1.

But, independently of the Irish will altogether, the manner in which General Buchanan made up his titles to those subjects must be held as a virtual discharge and renunciation of the personal right competent to him under his sister's disposition. He had two titles in his person. The feudal right taken up by him, as apparent heir of line to his father, who had died last seised, and the personal right bestowed upon him by his sister. It was certainly competent to him to renounce the latter; and the mode in which he made up his titles, must be regarded as a virtual and implied discharge of the personal right, so as to leave the subject open to the heir of the investiture; Edgar against Maxwell, July 6, 1736, No. 10. p. 3089.

The Lord Ordinary sustained the defences, and assoilzied. But the Court (7th March 1808) upon advising a petition with answers, altered the interlocutor, and found, that the defenders, at the expense of the pursuers, must make up titles to the subjects libelled, and thereafter denude thereof in favour of the pursuers, in implement of the disposition and settlement libelled on.

To which interlocutor the Court unanimously adhered, on advising a reclaiming petition with answers.

Lord Ordinary, *Methven*. Act. *Boyle*. Agent, *W. Patrick*, W. S. Alt. *Cranstown*.
Agent, *Robinson and Ainslie*, W. S. Clerk, *Scott*.

J.

Fac. Coll. No. 263. p. 586.

1807. November 24.

SIR ANDREW CATHCART'S TRUSTEE, *against* EARL OF CASSILLIS.

This case is already reported, 16th November 1802, No. 29. p. 14447.

On appeal to the House of Lords, that Honourable House pronounced this judgment: 'It is ordered, &c. that all the interlocutors complained of in the said appeal, so far as the same relate to the lands and subjects contained in the charter of 1774, or in any similar titles, be, and the same are hereby affirmed: And it is further ordered, that the cause be remitted back to the Court of Session, to review all the interlocutors as far as they respect the effect of the service of Earl David in 1776, with regard to the lands of Enoch and Little Enoch, the lands of Portmark and Polmeadow, the tenements of Maybole, and teinds conveyed by Crawford of Ardmillan, or any other lands or subjects, the title to which is in dispute in this cause, if any such there be, not ruled by the foresaid affirmance; and to hear the parties again as to the effect of the said service as to the said lands and teinds, and as to the right to

No. 2.

Decision that a general service as heir of line and heir-male is equivalent to a service as heir of provision, where it appears from the service that the party serving had both characters in him—reversed.