

Wilkinson in Buccleugh Street in Hawick on the night of the 27th day of August 1883, by striking her with his fist upon or near her ribs, or on other parts of her person, and that he cursed and swore at her."

No objection to the relevancy of the indictment was taken up at the first diet. At the second diet the accused pleaded not guilty, but were convicted on evidence and sentenced to a term of imprisonment.

They brought this suspension, and argued—There was here no relevant charge of perjury. The facts set forth by the prosecutor as to the true state of facts were not inconsistent with the statement the suspenders were said to have made, but were quite consistent with that statement.

Argued by the respondent—The indictment presented a fair issue to the jury, and any objection which might have been stated to the relevancy at the first diet came too late after verdict. The verdict cured such defects.

Authorities—*Letters v. Black & Morrison*, 30th May 1848, Arkley 497; *Smith v. Lothian*, 2d May 1862, 4 Macph. 172; Alison, i. 467.

At advising—

LORD YOUNG—I am sorry to say that I think this objection must be sustained. Probably the reality was that the prisoners when examined as witnesses in exculpation denied that they had been present and witnessed the assault—the fact being just the opposite. We cannot, however, look beyond the indictment, and the indictment fails, for the reason that there is no case of perjury relevantly set out, and accordingly the conviction cannot stand. The rule of law that many objections can be cured by verdict after trial by jury—for example, objections to citation, and the like—is perfectly well settled; and the same rule holds in the Civil Courts. But this case does not come within the scope of that rule, for here we have really no crime charged.

LORD ADAM—I concur. It seems to me that the prosecutor might have proved every word set out in the indictment without proving a case of perjury. All that the suspenders are alleged to have sworn to was that they did not see any assault, and the indictment does not set forth that they did. There is not the least inconsistency between the fact as averred in the indictment and what the suspenders are said to have sworn.

The LORD JUSTICE-CLERK concurred.

The Court quashed the conviction, but found no expenses due, in respect the objection was not stated at the first diet.

Counsel for Suspenders—Campbell Smith.
Agent—W. Gunn, S.S.C.

Counsel for Respondents—R. V. Campbell.
Agent—Crown Agent.

COURT OF SESSION.

Saturday, November 3.

FIRST DIVISION.

[Lord Kinnear, Ordinary.]

BRUCE GARDYNE, PETITIONER.

Entail—Disentail—Clause limiting Duration—Substitute for whose Benefit Fetters are Conferred.

A deed of entail contained this clause—“The foresaid lands and estates hereby disposed shall upon the expiry of the term and period of sixty-eight years from and after the date hereof, and the lifetime of the person then in possession, become a fee-simple in the person of the next heir or substitute who shall succeed in virtue hereof.” On the expiry of the sixty-eight years the heir of entail then in possession presented a petition for authority to disentail the entailed estate without the consent of any of the heirs called after him, on the ground that he was the only heir of entail in existence, since the next heir would hold the estate in fee-simple. *Held* that the petitioner was still subjected to the fetters of the entail, the next heirs being proper substitutes called by special destination, any one of whom would on succeeding take as heir of tailzie and provision, and petition *dismissed*.

This was a petition presented by T. M. Bruce Gardyne, Esq., heir of entail in possession of the estate of Middleton in the county of Forfar, for the purpose of disentailing that estate.

The deed of entail under which the petitioner held the estate of Middleton was made by the deceased Thomas Gardyne, Esq., of Middleton, dated 2d May 1814, and recorded in the register of tailzies 25th May 1841, the destination being to the grantor “and the heirs whatsoever of his body, whom failing to Mrs Ann Gardyne, his eldest sister-german, relict of Captain James Bruce, sometime residing in Aberbrothock, in life-ferent, and to Captain William Bruce of the 37th Regiment of Foot, their only son, his nephew (afterwards William Bruce Gardyne of Middleton, the petitioner’s father), and the heirs-male of his body in fee, whom failing” to a series of other heirs.

The deed of entail was in ordinary form, and contained the usual clauses, and also the following clause, upon which the present question arose—“Declaring always, as it is hereby expressly provided and declared, that notwithstanding of the above destination and order of succession, and clauses irritant and resolute before prescribed, the foresaid lands and estates hereby disposed, shall, upon the expiry of the term and period of sixty-eight years from and after the date hereof, and the lifetime of the person then in possession, become a fee-simple in the person of the next heir or substitute who shall succeed in virtue hereof.”

The entail being dated 2d May 1814, the sixty-eight years specified in this clause expired on 2d May 1882.

The petition set forth, that in terms of the clause just quoted, the party who would succeed immediately after the petitioner in the said estate would hold the same in fee-simple, and that the petitioner was thus the only heir of entail in existence, and was entitled to disentail the estate, and acquire it in fee-simple, without the consent of any of the heirs called after him in the deed of entail.

Answers were lodged for J. W. B. Gardyne and J. M. B. Gardyne, the brother and nephew of the petitioner, who were, after the petitioner and the heirs of his body, the next heirs-male of the body of Captain William Bruce. The respondents maintained that they were thus heirs of entail called under the destination contained in the deed of entail, and that the respondent J. W. B. Gardyne was heir-presumptive of entail of the petitioner, that the petitioner was therefore not the only heir of entail in existence, and that he was not entitled to disentail the estate without the consent of any of the heirs called after him by the deed of entail.

On 31st July 1883 the Lord Ordinary (KINNEAR) pronounced this interlocutor—"The Lord Ordinary having considered the petition and answers for James William Bruce Gardyne and others, finds that under the deeds of entail set forth in the petition the petitioner is not the only heir of entail in existence, that he is not entitled to disentail the estate and acquire it in fee-simple without the consent of any of the heirs of entail called after him by the said deeds of entail: Therefore dismisses the petition, and decerns: Finds the respondents entitled to expenses, &c.

"*Note.*—The petitioner maintains that he is the only heir of entail in existence, and is therefore entitled to disentail without consents, because by the conditions of the entail the heir next entitled to succeed after him will be free from the fetters, and entitled to hold in fee-simple. His contention is that the case falls within the rule that an entail does not subsist in favour of heirs whatsoever, and is therefore held in fee-simple by the last heir to whom the estate is specially destined. The rule in question is well settled, but it is not in my opinion applicable to the case.

"It is unnecessary to refer in detail to the decisions, which are very numerous. But those specially founded on by the petitioner were *Henry v. Watt*, 10 S. 644; *Colville v. Colville*, 4 Bell's App. 248; and *Gordon v. Mosse*, 14 D. 269. The principle upon which they all proceed may be stated in the words of Lord Fullerton in the case last mentioned. After pointing out that the question how far the fetters of an entail should be available against the acts of the last fettered heir in favour of the heirs and assignees of the entailer called in the last destination, after the proper entailed substitution had expired, had been decided against the heirs and assignees in the case of *Cussillis and Others*, Lord Fullerton proceeded to state the reason of the decisions thus—"The term heirs and assignees is that technically appropriated to a class of persons in whom the disponent is supposed to feel no special interest, and who are thus distinguished from those called by special substitution. According to all the authorities, the general clause in their favour after the termination of the proper entail is ascribed, not to any special intention in their

favour, but to the necessity of some such appointment in order to exclude the claim of the Crown."

"But the respondents are not in the position of heirs whatsoever, but are all of them in the class of proper substitutes called by special destination. If either of them succeeds he will take as heir of tailzie and provision, and in no other character. The petitioner is the last fettered heir; but that is not because of his being the last person whom the entailer specially desired to favour, but because that will be the position of the heir coming after him, and for whose benefit the entailer intended that he should still be subjected to the fetters. There can be no question that the entailer intended that the heir who should be in possession on the expiry of the term of sixty-eight years should not hold in fee-simple, but should still be fettered for the benefit of the next heir; and it follows that he can take no advantage from the presumption that heirs of the special substitution are not intended to be fettered for the benefit of heirs whatsoever.

"It is admitted that the entail is effectual, and it is on that footing that the petition is presented. The only question, therefore, is, whether upon a sound construction of the deed the entailer intended the fetters to apply to an heir in the position of the petitioner? If he did, the next substitute is undoubtedly an heir of entail, although when he has taken up the estate in that character he will be entitled to hold it in fee-simple."

The petitioner reclaimed, and argued—The petitioner was the last heir of entail, as he was the last heir who comes under the fetters of the entail; the next heir would become, on his succession, fee-simple proprietor of the estate, and could not be called an heir of entail in the sense of the Act of 1685. The petitioner here was in the same position as the last substitute heir of entail called immediately before the heirs whomsoever, or heirs and assignees, of the entailer. On the analogy of the cases which have decided that the last substitute in an entail closing with such a destination may deal with the estate as a fee-simple proprietor, the petitioner had a right to possess this entailed estate in fee-simple—*Stewart v. Home*, M. 15,535; *Colville v. Colville*, March 8, 1843, 5 D. 861 (Lord Jeffrey at p. 863), *aff.* 4 Bell's App. 248; *Gordon v. Mosse*, December 13, 1851, 14 D. 269 (Lord Ivory at p. 274); *Steele v. Cowpar*, February 15, 1853, 15 D. 385; *Gordon v. Gordon's Trustees*, October 28, 1881, 9 R. 50 (Lord J.-C. Moncreiff at p. 72).

The respondents were not called on.

At advising—

LORD PRESIDENT—The entail in this case is dated in 1814, and by it the entailer settled his estates upon himself and the heirs whatsoever of his body, whom failing Mrs Ann Gardyne, his eldest sister, relict of Captain James Bruce, in liferent, and on Captain William Bruce, their only son, and the heirs male of his body in fee. Then follow various other substitutes, whom it is not material further to allude to, except to notice the fact that there are additional substitutes. The heir of entail at present in possession, who is the petitioner here, is one of the heirs called under the destination to heirs-male of the body of Captain William Bruce, and the respondents who are called as heirs of entail belong to the

same class, so that both these substitutes and the heir of entail in possession come under the first branch of the destination in the entail.

The clause upon which this question arises is in these terms:—"Declaring always, as it is hereby expressly provided and declared, that notwithstanding of the above destination and order of succession, and clauses irritant and resolutive before prescribed, the foresaid lands and estates hereby disposed shall, upon the expiry of the term and period of sixty-eight years from and after the date hereof, and the lifetime of the person then in possession, become a fee-simple in the person of the next heir or substitute who shall succeed in virtue hereof."

The heir of entail in possession maintains that the period of sixty-eight years having expired, and as on his death the estates would devolve in fee-simple on the next heir, he is therefore now entitled to hold them in fee-simple.

I am very clearly of opinion, and on the grounds stated by the Lord Ordinary, that the heir of entail in possession does not hold, and that he is not entitled to hold, the estate in fee-simple, because upon a true construction of this deed, and of this clause, he is fettered for the benefit of the heir of entail next entitled to succeed, and who for the first time will be entitled to hold the estates in fee-simple. The ground of judgment is thus stated by the Lord Ordinary in his note:—"But the respondents are not in the position of heirs whatsoever, but are all of them in the class of proper substitutes called by special destination. If either of them succeeds, he will take as heir of tailzie and provision, and in no other character. The petitioner is the last fettered heir; but that is not because of his being the last person whom the entailer specially desired to favour, but because that will be the position of the heir coming after him, and for whose benefit the entailer intended that he should still be subjected to the fetters." That is the ground of judgment, and I think it is too clear to require further illustration.

LORD DEAS and LORD MURE concurred.

LORD SHAND—I am of the same opinion. The petitioner's case is of such a nature that he can only succeed if he is able to satisfy the Court that he is the only heir of entail in existence for the time. If that is so, he is entitled to succeed; if not, the petition must be refused.

Now here the next heir called will succeed, not under a general destination to heirs whatsoever, or to the entailer's own heirs and assignees, but under a special destination, and that being so it is quite apparent that the next heir is to all intents and purposes an heir of entail, although the entailer has not thought fit to apply the fetters to him. The petitioner is fettered, not for the benefit of heirs whatsoever, but for the benefit of an heir specified in the destination. I think that the explanation of the principle laid down in several cases, that when the destination in an entail opens under a clause to heirs whatsoever the estate is held in fee-simple, is that the object of inserting such a clause is to exclude the claim of the Crown. The true ground of the decisions in cases of that class is given by Lord Fullerton in the judgment referred to by the Lord Ordinary, and that principle has no appli-

cation to a case like the present, where the heir is entitled to take under a special destination. In my opinion, therefore, the heir of entail in possession is not the only heir of entail in existence, and therefore is not entitled to succeed.

The Court adhered.

Counsel for Petitioner—Solicitor-General (Asher, Q.C.)—Mackay. Agents—Lindsay, Howe, & Co., W.S.

Counsel for Respondents—Pearson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, November 6.

SECOND DIVISION.

[Sheriff of Lanarkshire.

M'INTYRE V. GALLACHER.

Reparation—Defective Work by Tradesman.

A landlord who had been found liable in the amount of damage done to his tenant's premises by an overflow of water, brought an action for the amount he had to pay, and for his expenses in resisting the claim, against a plumber, on the ground that he had occasioned the damage by defective and insufficient work executed on the premises four years previous to the overflow. The Court awarded the damages sued for, being satisfied that the landlord had in point of fact established his averment.

Mrs Roche, who was tenant of a shop at No. 475 Gallowgate Street, Glasgow, sued her landlord, Patrick M'Intyre, in the Sheriff Court of Lanarkshire at Glasgow, for the sum of £30 as damages occasioned by an overflow of water which occurred on 29th May 1882, and by which her shop was flooded and the goods therein injured. She obtained decree in her favour, and M'Intyre was found liable in £20 of damages and £16, 5s. 1d. of expenses. Thereupon M'Intyre, having paid these sums, raised this action in the same Court against John Gallacher, a plumber whom he had employed in April and May 1878 to put in new supply pipes throughout the said property, and to do all necessary repairs for making the plumber work of the tenement secure. The ground of action was that the defender had at that time cut a pipe leading from the main pipe supplying the water-closet cistern to the kitchen jawbox, and that he had culpably failed to solder it securely, and that in consequence it burst and caused the overflow for which the pursuer had been found liable to his tenant.

The pursuer pleaded—"The pursuer having sustained loss and damage to the extent sued through the fault and negligence of the defender, is entitled to decree as craved, with expenses."

The defender pleaded—" (1) In respect the alleged claim against defender has not been made *tempestive*, but after a period of nearly five years from the date when said work was said to be executed, the pursuer is chargeable with *mora*, and the action is inept and falls to be dismissed with costs. (2) In respect the alleged work