the fee of the lands was in Mrs Sword, and not in her husband; and, therefore, that the price of said lands is not affectable by his creditors.' No 15.

Lord Ordinary, *Stonefield.* For the Creditors, *Ilay Campbell et Alexander Abercrombie.* Alt. *G. Wallace.*

L. *Fol. Dic. v. 3. p. 208. Fac. Col. No 4. p. 6.*

1790. *January 20.*

ROBERT BRUCE-HENDERSON *against* SIR JOHN HENDERSON.

No 16.
A husband understood to be a fiar of a subject provided to him *nomine dotis*, though the wife's heirs be called next after those of the marriage, the wife herself being named as a substitute.

ROBERT BRUCE of Earlshall settled his estate 'on the heirs-male of his body; 'failing these, on his four daughters successively; and they and their heirs fail-'ing, on his sisters.'

The succession, under this destination, opened to Helen Bruce, the eldest daughter.

She was afterwards married to James Henderson. To him, by the marriage-contract, she became bound to pay a sum of money equal to the value of the estate; and probably from some doubt of the feudal right in her father, or of his powers to make the settlement, she prevailed on her sisters to concur with her in granting a trust-bond for a sum exceeding the value of the estate, for the sole purpose 'of establishing a title by adjudication to the lands of Earlshall, 'and then denuding thereof in favour of James Henderson and Helen Bruce in 'conjunct-fee and liferent, and the heirs of his body to be procreated betwixt 'him and the said Helen Bruce; which failing, to and in favour of the said 'Helen Bruce, and the heirs of her body by any subsequent marriage; and '(after substituting her sisters and their heirs) of James Henderson, his heirs 'and assignees whomsoever.'

An adjudication was accordingly led by the trustee, he having charged Helen Bruce and her sisters to enter heirs in special to their predecessors.

In order to denude himself, the trustee executed a conveyance, stating, that the bond had been granted to him for behoof of James Henderson, and that it was just he should convey to him the right created by the adjudication, the dispositive clause being as follows: 'Therefore wit ye me to have disponed, &c. 'to the said James Henderson, and Helen Bruce his spouse, and longest liver 'of them two, in conjunct-fee and liferent, and failing either of them by de-'cease, to the heirs and assignees of the survivor, all and whole the lands,' &c.

A charter of adjudication and resignation of the estate was afterwards expede in these terms: *Dilecto nostro Jacobo Henderson de Earlshall, ejusque hæredibus et assignatis quibuscunque.*

After taking infeftment, Mr Henderson executed an entail 'in favour of him-'self and Helen Bruce in conjunct-fee and liferent, and (after various substitu-

No 16. ' tions) in favour of Sir Robert Henderson of Fordel, and the heirs of his body;' to which destination the following clause was subjoined: ' In case any of the ' heirs of tailzie shall happen to succeed to, and be in possession of, the estate ' of Fordel, then the said heir shall be obliged to make up titles to the lands ' of Earlshall, and to convey the same to his second son, &c. whereby the two ' estates may be enjoyed by two separate and distinct persons, and the said ' lands of Earlshall not be absorbed in the estate of Fordel.'

Helen Bruce survived her husband, and continued to possess the lands till her death; when Sir Robert Henderson served himself heir of tailzie and provision under this deed.

Upon his death, his eldest son, Sir John Henderson, entered into possession of the estates, both of Fordel and of Earlshall. He afterwards obtained a conveyance to the latter estate from the heirs of line of Helen Bruce, which was intended to form a right independent of that of James Henderson.

In virtue of the above-recited clause of devolution, Robert Bruce-Henderson, the second son of Sir Robert, instituted an action against his brother, in order that he might be decerned to make up titles, and then to denude himself of them, according to the injunction of that clause. It was

Pleaded for the defender, in the 1*st* place; The entail in question proceeded *a non domino*, and the defender's right is independent of the entailer.

By the conception of the trust-bond, the fee was not placed in James Henderson, but in Helen Bruce. In ordinary cases, the maxim of law no doubt is, that where a right is taken to husband and wife in conjunct-fee and liferent, and the heirs of their bodies, or their heirs indefinitely, the husband is deemed, from the prerogative of his sex, the sole fiar, as the *persona dignior*, and the right of the wife resolves into a liferent; for which reason, the words ' their heirs' are interpreted to be the heirs of the husband. But to this rule there are exceptions; and, in particular, as (in conformity to Lord Stair, p. 502.) it is expressed by Lord Bankton, ' the person to the heirs of whose body the destination ' is made, failing heirs of the marriage, is presumed fiar, though failing those, ' the last termination should be upon the heirs of the other; for the rule is, that ' the person is fiar *cujus hæredibus maxime providetur*, v. 2. p. 337.' The same doctrine is laid down by Mr Erskine. Now this was the predicament in which by the trust-bond, Helen Bruce stood.

On the other hand, the destination in the reconveyance was, ' to the longest ' liver, and to the heirs and assignees of such survivor;' and Helen Bruce was the survivor. In her, therefore, the right of the adjudication was ultimately vested, agreeably to the decision 22d November 1749, Lord Boyd *contra* King's Advocate, Kames's Rem. Dec. No 11. p. 4205.

Besides, as the estate of Earlshall stood devised to heirs-male, and Helen Bruce could only take the estate as heiress of provision under her father's settlement, it was inept to charge her and her sisters to enter heirs in special to their

predecessors, as if all of them had been heirs-portioners to the estate, and the investitures of it had stood in favour of heirs whatsoever. No 16.

Answered; With regard to the terms of the trust-bond, there are two grounds, independently of the last termination being upon the heirs and assignees of the husband, on which the fee became vested in James Henderson. One is, that the first substitution is to the heirs of his body, so that had there been children of the marriage, they must have taken up the fee by a service as heirs of provision, not to Helen Bruce, but to James Henderson. The other ground is, that Helen Bruce herself, and not her heirs, is called in the substitution next after the heirs of the marriage; and consequently she is to be considered merely as a substitute, and as having only an eventual right of fee, in case her husband should die without children existing of the marriage; and such eventual fee could have been taken up by her, in the character only of heir to her husband or children respectively. The character of institute then being solely applicable to the husband, a decisive answer arises from this circumstance to the arguments founded on the authorities quoted on the other side.

The terms of the reconveyance, so different from those of the trust-bond, would have required some other authority than the will of the trustee; but even these are not inconsistent with the fee being understood to have been in James Henderson. In conjunct fees, to make the wife fiar two requisites must concur; first, that the last termination be upon her heirs, which here it was not; and, secondly, that the subjects flowed from her or her friends *gratuitously*; whereas here the grant of the estate was not gratuitous, but in implement of the obligation in the marriage-contract, which *nomine dotis* provided the wife's interest in the estate, or what was equivalent to it, in Mr Henderson's favour.

At the same time it is to be observed, that this question is superseded by the consideration, that the fee was certainly in Mr Henderson during his lifetime. The estate could then have been adjudged by his creditors, and consequently was equally disposable by his deed, as in this case.

With respect to the objection made to the charge on which the adjudication proceeded; as a special service implies a general one *ejusdem generis*, so a special charge which is the substitute of a service, is held to include that kind of charge called a general special charge, and consequently the special charge in question was competent to carry the personal right, which Helen Bruce might have taken up by general service. Nor, however superfluous, could it invalidate this proceeding, to include unnecessarily her sisters.

Pleaded for the defender, in the *second* place; The entail being supposed not *ultra vires* of the granter, the clause of devolution, when strictly interpreted as it ought, will not aid the pursuer, as having no application to the actual circumstances of the case. The condition of this devolution is, 'That the heir 'of entail shall happen to succeed to, and be in possession of the estate of For-'del;' but the case which happened, was that of a proprietor of Fordel suc-

No 16. ceeding as heir of tailzie to Earlshall. This latter situation cannot be included under the entail, except by implication, which would be an extension of its terms beyond their natural and proper import.

But this would be inconsistent with that strict interpretation of entails which is established by the concurring voice of all the writers on our law, whether ancient or modern. Stair, p. 614.; Erskine, p. 556.; also Craig, p. 340.; Hope, p. 400.; Bankton, v. 1. p. 588.

Besides, this devolving clause is unconnected with the prohibitory, irritant, and resolutive clauses applied to the rest of the deed, and contains nothing but a bare injunction to convey.

Answered; Those authorities all refer to restraints upon such uses of property, as are not only adverse to the nature of the right, but to general expediency. The public interest requires, that their operation should be as much limited as justice will permit; and if the terms in which they are conceived be not express and significant, the law will not interpose to supply what is wanting, or to infer what is withheld.

But if, on the other hand, the question is merely which of two heirs shall succeed, a matter which concerns not the general interest; the testator's will is to be judged of according to the same rules that are employed in the interpretation of any other deed or contract, upon a complex view of the whole, and consideration of the object in view. Thus it was James Henderson's object to prevent 'the estate of Earlshall from being absorbed in that of Fordel;' an event not more connected with the case in express terms described, than with that which in fact has occurred. A similar judgment was given in the case of Lockhart against Gilmour, 25th November 1755, *voce* Tailzie.

The Lord Ordinary reported the cause, when

The Court seemed to adopt most of the arguments of the pursuer, and

'Repelled the defences, and decerned and declared in terms of the libel, with respect to the pursuer's right to the lands and estate libelled, and the defender's making up legal titles thereto, and denuding thereof in favour of the pursuer, in terms of the entail libelled.'

And the Court adhered to that judgment, on advising a reclaiming petition for the defender, with answers for the pursuer.

Reporter, *Lord Rockville.* Act. *Rolland.* Alt. *Party.* Clerk, *Mitchelson.*

*** This cause was appealed. May 11th 1791. The House of Lords 'Ordered, That the appeal be dismissed, and the interlocutor complained of, affirmed.'

S. *Fol. Dic. v. 3. p. 208. Fac. Col. No 101. p. 185.*