pursuer's plea was, that in the entail 1697 the prohibitions and restrictions are imposed only on the heirs of tailzie; and as the pursuer's father was institute under that deed, the estate was in his person a fee simple; and that though the entailer's intention might have been to include his son Robert under the description of heir of tailzie, yet entails being *stricti juris*, intention avails nothing if not habilely executed. If, therefore, Sir Robert was unlimited fiar, it follows, that the contract of marriage executed by him must regulate the succession, and as that deed binds him to vest the lands in the heirs of the marriage without any fetters whatever, the pursuer, as heir of the marriage, is entitled to take these lands as a fee simple. As to Carbettie, as that estate belonged to Sir Robert at the marriage, it is of course included in the provision therein, "of all other lands and estates which then belonged to him." Besides these grounds, it was urged *separatim* for the pursuer, that there was an express reservation in his favour; and moreover, that the tailzies were actually revoked. The defence was founded on the clear intention of the original entailer to subject his son to all the restrictions, and consequently the incapacity of the son, by any marriage-contract, to defeat that intention; and that the deeds of revocation applied only to former settlements of moveables, not to the investitures of the land-estates, of which the entails were never *per expressum* cancelled. The Lords decerned in the reduction and declarator. See APPENDIX. No. 69.

Fol. Dic. v. 4. p. 334.

1791. *February* 23.

ROBERT WELLWOOD *against* ROBERT WELLWOOD and Others.

No. 70.
A destination being to the granter in liferent only, and failing him by decease, to another person in fee; the latter understood to be disponee or institute, and not an heir of entail.

Henry Wellwood executed a bond of tailzie of his lands, containing a procuratory of resignation, in favour "of himself in liferent, for his liferent use only; and failing of him by decease, to Robert Wellwood his nephew, and the heirs male of his body; whom failing, to the heirs female of Robert's body," &c. The usual prohibitory, irritant, and resolutive clauses respecting selling the estate, or contracting debt, which the bond contained, were directed against the heirs whether general or of tailzie before mentioned," without naming Robert Wellwood, or distinguishing him as disponee or institute. But in several places of the deed, the expression runs thus: "the said Robert Wellwood my nephew, and the other heirs of tailzie before mentioned."

On the death of Henry Wellwood, Robert made up his titles to the estate, by executing the procuratory of resignation. He afterwards having an intention of selling the lands, instituted a declaratory action against the heirs of tailzie, for having it found, "That being *nominatim* disponee, institute, and fiar, in the said estate, he was not an heir of entail, and therefore not liable to any of the conditions, provisions, limitations, or restrictions in the said deed of entail." And in support of this action he

No. 70.

Pleaded: By the conception of this bond, the pursuer became fiar; the only right remaining in Henry Wellwood being a liferent by reservation. It is true, that a destination to a father in liferent, and to his children *nascituri* in fee, renders the father a constructive or fiduciary fiar. But this is *ex necessitate*, because a fee cannot be *in pendente*, whereas, in the present case, there was no such necessity, the fee being vested in the pursuer as *nominatim* disponee, to whom the other persons named were heirs of tailzie and provision.

But in consequence of that strictness of interpretation which is ever applicable to entails, the pursuer, as institute or disponee, ought not to be included under those prohibitions and irritancies, which are directed against "heirs of entail."

This limited construction is established by the cases of Leslie, 24th July 1752 *, and of Balfour 14th February 1758, No. 58. p. 4406. But in that of Edmonstone, 24th November 1769, No. 59. p. 4409. the very point now maintained was so determined by the House of Lords; a judgment which has been steadilyfollowed as a precedent, particularly in the case of Menzies, 1785, No. 53. p. 15436. With regard to the phrase, "other heirs of tailzie," that happens to occur in some parts of the deed, and seems to refer to Robert as in that class, it is to be observed, that the law, explained by the case of Edmonstone, requires the technical and appropriated expression in its proper place; and it is not enough that such words, as if casually occurring, may be found in other parts of the deed.

Answered: The entailer's purpose of restraining the institute, not less than the substitutes, is implied in the very idea of an entail, calculated, as this was, for preserving this estate among his kindred. It is true, however, that entails are to be strictly construed; and it is admitted, that the judgment in the last resort in the case of Edmonstone is an established precedent.

But that case was essentially different from the present. There the granter disponed his estate directly "to his eldest son, and his heirs male; whom failing, to his second son," &c.; and of course the fee was immediately vested in the eldest son, who, by infeftment as institute or disponee, could make up a complete feudal right to the lands. Here, though, *ex figura verborum*, the granter resigned in favour of himself in liferent, for his liferent use only, yet, instead of vesting the fee in the pursuer, he is only called to the succession thus: "Failing of me by decease, to Robert Wellwood," &c. Hence he could not be considered as an institute or disponee, but as an heir of entail; and in order to make up a proper title to the estate, he ought to have been served heir of entail and of provision to the granter. And if before the entailer's death Robert had died, his son must have made up a title, not as heir to him under the entail, but as heir of entail to the granter.

The Lord Ordinary reported the cause on informations.

Some of the Judges thought that there was no immediate disposition of the fee, the conveyance being to the granter in liferent only; and though to Robert in fee, yet not till after the granter's decease; so that, as a fee cannot be *in pendente*, the granter was fiduciary fiar, and Robert heir of entail.

* See Appendix.

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. No. 70.

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.

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.

Edward Macculloch of Ardwell executed a deed of entail, by which he disponed 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 infeft, 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 resolutive 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 infeftment 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 *hæreditas 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