

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 allenary, 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.*