No. 68. being fiar or disponee, and not heir of tailzie, ought not by implication from other parts of the deed of entail to be construed within the prohibitory, irritant, and resolutive clauses laid only upon heirs of tailzie.

Fol. Dic. v. 4. p. 332.

*** This case is No. 59. p. 4409, *voce* FIAR, ABSOLUTE, LIMITED.

1777. *July* 8.

SIR WILLIAM GORDON of GORDONSTONE *against* MRS. LINDSAY HAY and Others.

No. 69.
Another case in which the institute was found not to be bound by the restrictions of the entail.

In 1697, Sir Robert Gordon entailed the barony of Gordonstone in favour of himself in life-rent, and his eldest son Robert, and the heirs-male of his body in fee; whom failing, a series of heirs of tailzie, with the usual prohibitory, irritant, and resolutive clauses; but these were only laid on the heirs of tailzie. Charter and infeftment followed in favour of the entailer and his son, and the entail was recorded. On the entailer's death, his son Sir Robert possessed the estate as fiar under the above deed, and in his marriage-contract with Agnes Maxwell in 1734, he declares, "that as by the present investiture of the estate, it is settled on himself and the heirs-male of his body, which secures it, if not altered, to the heirs of this marriage; so in case it shall be in his power, or he shall hereafter think fit to alter the same, he binds and obliges himself to provide the whole lands therein in favour of himself, and his heirs-male of this or any subsequent marriage; whom failing, to any he shall nominate by a writing under his hand, or in case of no such nomination, then to the heirs-male and of tailzie above mentioned." In 1767, Sir Robert executed a deed of entail of certain other lands called Carbettie, on himself and the same series of heirs as in the entail of Gordonstone executed by his father: But of the same date he executed another deed, which proceeding on the narrative of his powers to alter, declares, that being "resolved to alter the same, in so far as to liberate his second son William Gordon from the whole clauses of said entail; therefore, in case he shall succeed to the entailed estate, he shall be wholly liberated" from all its fetters. In 1771, Sir Robert having altered his intentions, executed a revocation of the entail of Carbettie, and in the same year he granted a disposition of his moveables in favour of Robert his eldest son, in which he expressly declares all former testaments and deeds of settlement made by him to be revoked. He died in 1772, and his eldest son Sir Robert, judging that neither the entail 1697 nor that of Carbettie in 1767 were binding on him, who, as heir-male of the marriage, was entitled to take both estates in fee simple, in virtue of his father's and mother's marriage-contract, expede a general service as heir of provision under that contract, and brought a reduction and declarator for setting aside both the said deeds, against the whole heirs therein named. Sir Robert having died unmarried, his brother Sir William serving heir in general under the contract of marriage, prosecuted the same action. The

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