

Friday, May 30.

## FIRST DIVISION.

[Sheriff of Chancery.]

MRS AGNES STUART ROSS OR MACKINTOSH  
AND OTHERS.*Entail—Heir of Line—Heir of Conquest—Titles to  
Land Consolidation Act, 1868, § 41.*

A party bought an estate and entailed it on himself and his heirs-male, and finally, after various substitutions, on his own heirs and assignees whatsoever.—*Held*, in a competition between the heirs of line and the heir of conquest, that the former must be preferred.

This was an appeal from a judgment of the Sheriff of Chancery (M'LAREN) in the competing petitions of Mrs Mackintosh and others for service as heir of provision in special to the late Miss Christina Cockburn Ross of Shandwick, who died May 16, 1872. This lady held the estate under a deed of entail, granted by William Ross of Shandwick in 1790. The destination was first to himself and his heirs male, then to his heirs female, then to several nieces and their heirs, lastly to his cousin David Ross and his heirs male, whom failing, to his own heirs and assignees whatsoever. It was under this destination that the petitioners claimed, three of them as heirs of line, and the fourth, Mr Munro Ross, as heir of conquest. The present case was confined to a consideration of his claims as against those of the other three petitioners. This appeal was presented under the 41st section of the Titles to Land Consolidation Act, 1868, 31 and 32 Vict., cap. 101.

Authorities—*Boyd v. Boyd*, June 28, 1774, M. 3070; *Robison v. Robison*, June 3, 1859, 21 D. 905; *Miller v. Miller*, Jan. 19, 1831, 7 W. and S. 1; *Aitchison v. Aitchison*, March 7, 1829, 7 S. 558., 4 F.C. 684; *Duke of Roxburghe*, June 23, 1807, M. App. v. "Tailzie"; *Grant v. Shepherd*, July 5, 1836, 14 S. 1096.

At advising—

LORD PRESIDENT—Christina Cockburn Ross died on May 16, 1872, being at the time of her death vested in the fee of the estate of Shandwick, and we have now before us four claimants to that estate, all claiming to be served as heirs of provision in special to Miss Ross. Three of them ask to be served as heirs of provision, as being the nearest heirs of line of the entailer William Ross, and the fourth claimant, Mr William Munro Ross, claims as his heir of conquest. The question turns on the construction of the deed of entail of William Ross of Shandwick, dated May 1790. There is no doubt that the estate of Shandwick was bought by him, and he made a destination in favour of himself and the heirs male of his body, whom failing, to the heirs female of his body, and then he inserted several substitutions to nieces and their heirs. Lastly, he called his cousin Captain David Ross and the heirs male of his body, whom failing, "such other heirs and members of tailzie as he should thereafter nominate and appoint by a writing under his hand at any time during his life, whom failing, his heirs and assignees whatsoever." The late Miss Ross was the last substitute, the whole other branches had been exhausted, and the estate devolved on the heirs whatsoever. The party to be served must be served

as heir whatsoever of the entailer; Does this mean the heir of line or the heir of conquest? If it means the heir of conquest, then he is entitled to be served as heir of provision, but if it means the heir of line, then Mr Munro Ross has no case, and is at once excluded. I suppose, on the other hand, if he were to be successful all the other petitions would have to be dismissed. It appears to me that the question is clearly settled by authority; I think the cases of *Boyd*, *Miller*, and *Robison* are applicable. No doubt in all these cases there are points of difference. In the case of *Boyd* there were two subjects in dispute, one of which was destined to his own heirs and assignees, and the other to his father's. As regards the second, the judgment of the Court was as follows:—"In respect that the substitution in said disposition is not in favour of his own heirs whatsoever, but in favour of the heirs whatsoever of Mr Robert Boyd, his father, which might have been different from the heirs whatsoever of the son, finds that the pursuer, as heir of line to the father, is entitled to take John Scot's part of said lands as heir of provision called by said substitution." When a destination of this kind is to heirs whatsoever of a third party, and the party takes no right himself, the destination is to heirs of line. In the case of *Miller*, a property was held by trustees for the purpose of conveying it, in a certain event, to William Miller, his heirs and assignees whatsoever. He predeceased that event, so that no right was held to vest in him, and in a competition between his heirs the heir of line was preferred to the heir of conquest as being the party thus designated, though there could be no doubt that if the property had once vested in William Miller it would have been conquest in him, and would have descended to his heir of conquest. Now, neither of these cases is quite the same as the present one, for here the disponent calls his own heirs, but *Robison's* case comes a good deal nearer, for in it the lands were settled by a post-nuptial marriage contract in favour of certain grand-children, and the last of these having survived the granter and died in pupillarity, it was held that the husband's heir of line must be preferred. Now it appears to me that this comes very near the present case. No doubt, as Mr Keir pointed out, a distinction does exist, because in the case of *Robison* the conveyance was to the spouses in liferent and the grand-children in fee, whom failing, to the heirs whomsoever of the granter. In the present case the entailer conveyed to himself and his heirs male, whom failing, to his heirs female, but I cannot see the importance of the distinction. I therefore hold that case as a direct authority, and am for dismissing the petition of Mr Munro Ross.

The other Judges concurred.

Counsel for Mrs Mackintosh—Solicitor-General (Clark) and Mackintosh. Agents—H. &amp; A. Inglis.

Counsel for Mrs Robertson—Pattison and Thoms. Agent—George Wilson, S.S.C.

Counsel for Captain Reid—Millar, Q.C., and Blair. Agents—Hunter, Blair, &amp; Cowan, W.S.

Counsel for Mr Ross—Watson and Keir. Agents—Stuart &amp; Cheyne, W.S.