CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND,

1833—1834.

[27*th August* 1833.]

WILLIAM MILLER and others, Appellants.—*Dr. Lushington—Anderson.* No. 1.

JOHN MILLER and others, Respondents.—*Lord Advocate (Jeffrey)—Murray.*

Testament—Succession—Trust.—A party conveyed his property to trustees, with directions to pay the rents to J. during his life, and if he married and had children to convey the property to him; but in the event of his marrying and having no children, to convey the property to W., his heirs and assignees whatsoever. W. predeceased J. without issue, and J. died without being married. Held (affirming the judgment of the Court of Session), that no right vested in W. and J.; and that the heir of line, and not the heir of conquest, had right to the property.

2D DIVISION.
Lord Fullerton.

THE late John Davidson, writer to the signet, married Miss Martha Miller, but had no children. He executed a trust disposition of his estate in favour of Sir William Miller (Lord Glenlee) and others, for the purpose inter alia to be immediately mentioned. Sir William's eldest son was Thomas; his second son, William, was a lieutenant colonel in the army; and his third son was John, a writer to the signet. The chief purpose of the deed was expressed in these terms:—"I appoint

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" my said trustees to pay the clear rent of my lands " and estate aforesaid; that is, Stewartfield, Ulston, " and acres aforesaid, Halltree, Kirkotter Chapel, and " Cairntows, to Joseph Davidson my cousin, Fellow " of Cambridge, during his life; and if he marries and " has children, then to dispone to him and the heirs " of his body the lands and estates, and acres and " pertinents thereof*, to be disponed by them at " follows; viz., the lands and estate of Stewartfield " and Ulston, and acres aforesaid, to William Miller, " second son to the said Sir Thomas† Miller, his heirs " and assigns whatsoever; and the said lands of Hall- " tree, Kirkotter Chapel, to the said Robert Dundas, " and the heirs succeeding to him in the estate of " Arniston, in the precise terms of the entail of the " estate, only with this difference, that the said Robert " Dundas, and these heirs in their order, may give the " life-rent thereof to their widows." And in a subsequent part of the deed he provided, " and if the " said Joseph Davidson does not marry, nor has not " children, I appoint my said trustees to dispone the " lands of Cairntows to the Right Honourable Henry " Dundas, one of His Majesty's secretaries of state, " his heirs and assignees whatsoever." He also made certain provisions for Thomas, the eldest son; but he revoked these by a codicil, as Thomas was "sufficiently " provided for" otherwise. Thomas died, leaving a son, William (the appellant); Colonel William Miller was killed at Waterloo in June 1815, being unmarried; and Joseph Davidson survived till the 21st of October 1828, when he died also unmarried.

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* Both parties were agreed that the following words had been omitted, and should be inserted, at this part of the deed; viz., " and if the said " Joseph Davidson does not marry, nor has no children."

† The name in place of Thomas should have been William.

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Under these circumstances John Miller, the third son of Sir William, brought an action against the trustees, setting forth, "that the said deceased Lieutenant Colonel "Miller, who is the person mentioned in the clause of "the aforesaid deed of settlement relating to the lands "of Stewartfield, Ulston, and others, was mortally "wounded at the battle of Quatre Bras, and died "unmarried on the day of June 1815; and "that the said Joseph Davidson having died on the "21st of October last, 1828, without being married "and leaving children, the said John Miller applied "to said trustees, requiring them to denude in his "favour, and to dispone the said lands and estate of "Stewartfield, Ulston, and acres about Jedburgh to "him, as being the person to whom the description "of heir devolved; but they refuse and delay to pro-"ceed in the execution of their trust, and will not "dispone the said lands as required, alleging that "William Miller, son of the late Thomas Miller, the "immediate elder brother of the said deceased Lieu-"tenant Colonel William Miller, may claim said lands "as heir of conquest to the said deceased Lieutenant "Colonel William Miller, and that they cannot with "propriety denude in favour of the pursuer until he "shall ascertain his right as against the said William "Miller:—Therefore it ought and should be found and "declared, by decree of our Lords of Council and "Session, that the said Lieutenant Colonel William "Miller having died unmarried, the pursuer, his "immediate younger brother, has in him the character "of heir whatsoever of the said William Miller: And "it ought and should be farther found and declared, "by decree foresaid, that the said William Miller, son "of the said deceased Thomas Miller, has no right or

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" title whatever to the said lands and estate; but that " the pursuer, the said John Miller, has the only good " and undoubted right and title to all and whole the " said lands and estate of Stewartfield, Ulston, and " acres about Jedburgh, in virtue of the deed of settle- " ment and provision of the said deceased John David- " son; and that the same do pertain and belong in " property to him, the said John Miller, as holding the " character of the heir of line, or heir whatsoever of the " said Lieutenant Colonel William Miller, and not to " the heirs of conquest of the said deceased Lieutenant " Colonel William Miller."

In defence the appellant, William Miller, insisted that the word "heirs" must be taken in reference to the nature of the succession; that the right vested in Colonel Miller as disponee, and therefore the appellant had right to the property as the heir of conquest of Colonel Miller.

The Lord Ordinary appointed the question to be argued in cases, and issued this note of his opinion:—

" On the suggestion of the parties the Lord Ordinary " has ordered cases; but he thinks it right to intimate " to them the opinion which he at present entertains. " He does not think that there was vested in Colonel " William Miller any right, or even any title, which " could afford a proper occasion for a service, or " which could possibly be considered as conquest in " his person. In one sense, no doubt, the settlement " may be viewed as being in favour of William Miller, " as such an expression may be and is frequently used " in regard to every person on whom a deed confers " an interest, whether present or postponed, certain " or contingent; and so also it may, perhaps, be loosely " said that the heirs of Colonel William Miller claim

" through him, as it was presumably through the inter-
" vention of the favour entertained for him by the
" disponer that his heirs were called to the succession.
" But still, considering the terms of the settlement,
" and the circumstances in which it took effect,—keep-
" ing in view that by the clause, even as construed by
" the defenders, the trustees were to dispone the lands
" to William Miller only in the event of Joseph
" Davidson not marrying, nor having children, and
" that William Miller died before Joseph Davidson,—
" it is clear that the settlement never had any legal
" operation in favour of Colonel William Miller himself;
" and that, consequently, as no right in virtue of it
" ever existed in his person, his heirs do not take as
" in his right. The case resembles, as nearly as can
" well be conceived, that of a legacy bequeathed to a
" person and his executors, in which, if the legatee
" predecease the testator, the executors take in their
" own right, and not as in right of the legatee. ' A
" ' legacy, when it is devised to a legatee and his exe-
" ' cutors, is not evacuated by the predecease of the
" ' legatee, but passes after the testator's decease to the
" ' legatee's executors, not by any right which these exe-
" ' cutors derive from the legatee, to whom that legacy
" ' never belonged, he having died before it could have
" ' effect by the testator's death, but in their own right,
" ' as conditional institutes in the legacy.'* According
" to this principle, and there being on the present
" occasion a conditional institution of Colonel William
" Miller and his heirs, it would seem to follow that
" the clause in dispute must be held to involve the
" institution of Colonel William Miller, if he survived
" the event forming the condition, and if he did not

* Ersk. b. iii. tit. 9. sec. 9.

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"survive, the institution of his heirs; in which case, as "in that of a direct disposition to the heirs of a par- "ticular individual, it appears to the Lord Ordinary "that the term must be construed designative, as de- "noting the heirs of line, the persons to whom the "general character of heir, unconnected with any right "in the person of the ancestor, would apply." Thereafter his Lordship, on the 10th of July 1830, in respect of the reasons assigned in his note of the 12th of December 1829, repelled the defences, and declared and decerned in terms of the conclusions of the libel, but found no expenses due. To this interlocutor the Court adhered on the 19th of January 1831.*

William Miller appealed.

Appellant.—1. The disposition of the estate which Mr. Davidson made in favour of his cousin Joseph in life-rent, and Colonel William Miller in fee, vested in each of them respectively a right of life-rent and of fee from the death of the testator; and although the beneficial interest of Colonel Miller was suspended till it should be seen whether Joseph Davidson married or not, yet the radical right was vested in Colonel Miller, and the trustees held the feudal fee for him. A fee cannot be in pendente, whether held by trustees or not. The trustees may hold the fee so as to satisfy the feudal principle, but the beneficial interest in the fee must be vested in some person absolutely. In the present case it was vested in Colonel Miller. It is true that his right might be defeated by Joseph marrying and having a family, so that he was merely a conditional disponee; but till that event took place, the radical right belonged to him;

* 9 S., D., & B., 295.

and as the condition never took place, the quality attached to the fee did not affect the vesting.* The respondent claims as heir of Colonel Miller, and thereby necessarily admits that there was a vested right in him; and indeed, there can be no doubt, that if, for example, either Joseph or the trustees had begun to cut down standard timber, Colonel Miller would have had a title to use legal measures to prevent them from doing so, which shows that there was a right vested in him.†

2. Assuming that the right to the fee, though subject to be defeated by Joseph marrying and having children, vested in Colonel Miller, then it devolved at his death upon his heir of conquest. The disposition is taken to Colonel Miller, "his heirs and assignees "whatsoever;" and as he acquired right to the estate by a singular title, and not in the ordinary course of succession, the party entitled to take as his heir is the heir of conquest, and not the heir of line. It is not necessary, in order that the succession should devolve on the heir of conquest, that the right should have been feudalized; it is sufficient if it be a right which is capable of being feudalized.‡ The intervention of trustees makes no difference on this rule of law.§ Even where a right is liable to be defeated, still the question of succession ought to be decided secundum subjectam materiam, and not by the circumstance of the survivance of the disponee.

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* Wellwood's Trustees v. Wellwood, 24th Feb. 1791, Bell's Cases, p. 191; Wallace v. Wallace, 28th Jan. 1807, Mor. No. 6, Appendix Clause; Nelson v. Bailie, 4th June 1822, 1 S. D. 458, new ed. 427; Christie v. Paterson, 5th July 1822, 1 S. D. 543, new ed. p. 498; M'Dowal and Selkirk v. Russell, 6th Feb. 1824, 2 S. D. 682, new ed. 574; Smith v. Leitch, 2d June 1826, 4 S. D. 659, new ed. 665.

† Tait v. Maitland, 2d Dec. 1825, 4 S. D. 247, new ed. 253.

‡ Robertson v. Halkerston, 7th July 1675, Mor. 5605; Creditors of Menzies, 8th Dec. 1738, Mor. 5519; 3 Stair, 5, 10.

§ Duke of Hamilton v. Earl of Selkirk, 8th Jan. 1740, Mor. 5615.

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It seems strange to maintain, that if Colonel Miller had survived Joseph Davidson, and the latter had died unmarried, that in a question of this nature one heir should be understood as called, and another and a different one in the event of Colonel Miller predeceasing Joseph Davidson. It may be that Colonel Miller's right was defeasible; but as it was never defeated, his heir should be preferred; and that heir is the heir of conquest.* If the respondent claims as a substitute to Colonel Miller, which indeed is his true character, he ought to serve to him in order to establish his propinquity; but he has not done so. He cannot be regarded as a conditional institute because there is another person called to the succession before him; and it is not sufficient to say, that that person did not survive the purification of the condition which suspends his right.†

Respondent.—1. It was impossible that, during the lifetime of Joseph Davidson, Colonel Miller could have any vested right in the lands. He was in the situation of a conditional institute, who, in case he should survive Joseph Davidson, and if that gentleman should not marry nor have children, would be entitled to claim the lands. He was not even a substitute to Joseph and his children, for if Joseph had married and had had children the conditional institution of William Miller would have been instantly evacuated. It may be true that, upon feudal principle, a fee cannot be in pendente,

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* Short v. Short, 13th Feb. 1771, Mor. 5615.

† Menzies v. Menzies, 18th Jan. 1803, (not reported,) affirmed on appeal 20th July 1811; Mackenzie v. Mackenzie, 24th Nov. 1818, F.C.; Creditors of Graitney, July 1727, Mor. 14855; Forbes v. Forbes, 3d Aug. 1756, Mor. 14859; Peacock v. Glen, 22d June 1826, 4 S. D. 742, new ed. 749; Colquhoun v. Colquhoun, 16th Dec. 1828, 7 S. D. 200, Remitted 17th Dec. 1831, 5 W. S. 32.

for there must always be a vassal entitled to take the fee, when it is left vacant by the death of the vassal last infeft; but this rule does not apply to the case where the fee is vested in trustees to hold for contingent and possible heirs. In the present case Colonel Miller had no sort of fee whatever, for it was only upon the contingency of Joseph Davidson dying without children that he could ever have any present or vested right. Joseph Davidson might have maintained, with as much if not more reason, that he himself was the fiar, subject only to a substitution or conditional institution in favour of Colonel Miller, in case Joseph should die without heirs of his body, than Colonel Miller could have maintained that he was fiar during the lifetime of Joseph; for he was a contingent fiar, and the fee would have vested in him or his children on their coming into existence. It seems, therefore, impossible to maintain that there was a contingent fee vested at one and the same time in him and Colonel Miller.*

2. In treating of conquest, all the authorities assume it to be essential that the right shall have vested in the alleged ancestor, and that it be a right capable of being feudalized.† Nay, for a long period infeftment was considered essentially necessary. But although the rule has been relaxed, so that it is sufficient that the right be of a nature capable of being feudalized, yet it has been uniformly held that there must be a present right, either feudal or personal, vested in the ancestor at the period of

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* Burden v. Smith, 27th April 1738, Craigie and Stewart's Reports, p. 214; Glendinning and Gaunt v. Walker, 13th Nov. 1825, 4 S. D. 237, new ed. 241; Buchanan v. Downie, 12th Feb. 1830, 8 S. D. 516.

† Quoniam Attachiamenta, and statutes Robert III. cap. 3; Craig, lib. 1. dig. 10. t. 32; 3 Stair, 5, 10; 3 Ersk. 8, 14; 3 Bankton, 4, 21.

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his death*; but in no case has it ever been held that a contingent or possible claim is to be regarded as conquest.

By the death of Colonel Miller, without any right having vested in him, the conditional institution of his heir came into operation, and took effect on the death of Joseph Davidson. The respondent is that conditional institute; and although he is described as "heir," there is no necessity for a service, because the fact that he is that heir can, if disputed, be ascertained without the necessity of a service. The term "heirs whatsoever" embraces heirs of every character and denomination; but the interpretation of that term must be regulated by the nature and state of the right when the succession opened. According to this, the heir called as the conditional institute cannot be the heir of conquest, because such an heir can take in no case where there has not been a vested right; and therefore the party described as heir must be the heir of line.

LORD CHANCELLOR.—My Lords, in the case of Miller v. Miller, which was argued before your Lordships with very great ability, I was induced, in consequence of what was said of the very narrow division of the learned Judges in the Court below, and in consequence of the importance of the case, to take time to consider it. With respect to what is called the very narrow division of the learned Judges, Lord Glenlee, it appears, took no part, which left only three Judges to dispose of the question. Two Judges gave an opinion the one way, and the other Judge the other way. It is

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* Hope Minor Prac. p. 171; 3 Mackenzie, 87; Robertson v. Halkerston, 7th July 1675, Mor. 5605; Menzies v. Menzies, 8th Dec. 1738, Mor. 5519; Lord Selkirk v. Duke of Hamilton, 8th Jan. 1740, Mor. 5615.

true this was the narrowest division by which three learned Judges could be subdivided; yet it would certainly be as accurate to say, that there were two to one in favour of the decision. The very learned opinion of the Lord Ordinary, of the 12th of December 1829, to whose interlocutor, in the first instance, their Lordships adhered, and those of the learned Judges who pronounced the interlocutor from which this appeal was presented, contain reasons to which I am not able to perceive any answer; and having given the utmost attention to the very elaborate argument addressed to your Lordships from the bar, and to the cases to which your Lordships were referred, I am satisfied,—though the decision may not be free from all doubt, yet, upon the whole, on the grounds stated in those reasons very distinctly and satisfactorily,—that the Court below have come to a right conclusion, and that the interlocutors of the 10th of July 1830 and the 19th of January 1831 ought to be affirmed; but in this case, my Lords, both looking to the nature of the pleadings, and the importance of the case, I am of opinion that no costs should be given.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

RICHARDSON and CONNELL—MACDOUGALL and BAINBRIDGE, Solicitors.