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The defenders pleaded:

That neither by the intention nor words of the contract in question, could Mr. Macculloch's younger children be held or construed to be parties. The parties contractors shewed this to be the fact; there was no stipulation made on behalf of the pursuer or the younger children; nor was there any person named in the contract who was intended to contract for them. Mr. Gordon and his wife acted for their own children alone. The pursuer's father neither did nor could mean to become bound to her; and as both were interested to have the deeds of settlement set aside, nothing was promised upon his part, and nothing undertaken upon hers. The case had no resemblance to the obligation in a marriage contract: the pursuer's situation, on the contrary, was like that of heirs called in a marriage settlement other than the children; every obligation in favour of whom could be rendered ineffectual by the gratuitous act of the husband. As this pursuer therefore was no party to this contract, her discharge was unnecessary; and as that deed had been renounced by Mrs. Gordon and her issue, and the renunciations and discharges accepted of, it was as much at an end as if it never had existed, and could be no bar to the revocation of the entail having full effect.

The majority of the Judges, at advising, were of opinion, That the contract was no longer obligatory; but as they adhered to their former opinion upon the first point, *viz.* the incapacity of the liferenter and fiar, by their joint act, to alter or revoke an entail, having no reserved power so to do, the decision may truly be considered as having been given upon that abstract question alone.

The judgment was in these words: "In respect of the discharge and renunciation now produced, find that the decree of reduction formerly pronounced falls by defect of a pursuer; but as to the processes of declarator, sustain the defence pleaded for Jean Macculloch, and refuse to declare in terms thereof."

Lord Ordinary, *Stonefield.*

For Gordon and Macculloch, *A. Lockhart, Crosbie, G. Wallace, Ilay Campbell.*

For Dewar, &c. *Ad. Montgomery, Macqueen, A. Murray, Sol. H. Dundas.*

Clerk, *Campbell.*

Fac. Coll. No. 101. *p.* 300.

1783. *February* 25.

SIR THOMAS DUNDAS *against* THOMAS DUNDAS and Others.

No. 124.
Whether a settlement of a landed estate may be effectually revoked by a testamentary deed.

Sir Laurence Dundas, on occasion of the marriage of his son, became bound, by the marriage-articles, to execute in his favour a disposition of his estates in Scotland, "for his liferent-use of the rents, profits, and issues of them after the death of Sir Laurence; and in trust *quoad* the fee and property of the lands and estate, for the use and behoof of the sons of the said marriage, and their issue-male;" but subject to certain reservations, and in particular one of "a power and faculty to destinate and carry on the line of succession, and thereby to impose such

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Whether it may be so revoked by a deed destitute of the statutory requisites; but executed abroad agreeably to the *solemnia loci*.

conditions and limitations on them, and other persons called to the succession, as he should judge proper, and might be effectual to disable them from altering the course of succession."

That intended disposition, though drawn up, was never executed. But afterwards, when he had acquired other lands in Scotland, Sir Laurence executed a deed of entail of the whole of his Scottish estates, "in favour of his son and children, of his brother, and of various other heirs called in substitution;" to which deed he annexed the following proviso: "That it shall be lawful to me at any time of my life, and even upon death-bed, to revoke, alter, or change this present tailzie at my pleasure, in so far as the same shall be consistent with the marriage-articles above mentioned."

About eleven years after the date of the entail, Sir Laurence, then residing at London, made his latter will, in the English form, as follows: "I do give, devise, and bequeath, unto my dear son, Thomas Dundas, all my real estate in England, Ireland, and Scotland, as also in the island of Dominica in the West Indies, and elsewhere, not included in the settlement made on his marriage, and all my personal property of every nature and kind soever, to hold to him, his heirs, executors, administrators, and assigns, for ever; but charged and chargeable with one annuity or yearly sum of £.2400, which I hereby give and bequeath to my dear wife." (Here follow several other legacies). "And I do hereby revoke all former and other wills by me heretofore made, and do constitute and appoint my dear son my sole executor of this my last will."

After the death of Sir Laurence Dundas, his son Sir Thomas brought against the substitute heirs of entail an action of reduction and declarator, for the purpose of having that settlement reduced and annulled, and the whole entailed estates above mentioned, so far as not contained in the marriage-articles, declared to belong to him in fee-simple. The action was chiefly founded on the above testamentary deed, as containing a revocation of the tailzie, if not a new devise of the subjects of it.

Pleaded for the defenders: Deeds of a testamentary from, being understood in law as executed upon death-bed, are not competent for the transmission of heritage; Burgess *contra* Stanton, No. 42. p. 4488. The devise, therefore, contained in the former part of the will in question, is clearly ineffectual as a conveyance or settlement of the lands situated in this country; of which, indeed, the portion comprehended in the marriage-articles is therein expressly excepted: And surely that non-subsisting devise must be equally unavailing as an implied revocation of the above mentioned entail; Lord Bankton, B. 3. Tit. 4. § 49. On the same principle, the after part of the will, that which recals "former wills," in whatever manner interpreted, is of as little effect as the preceding; the circumstances occasioning the incompetency of the one for creating a new settlement, causing not less evidently that of the other for the revoking or annulling of a valid settlement already established; nor can any authority be produced to countenance a distinction between the two cases. Besides, the sole object of such a revocation

being to make way for a new destination, this being precluded, that must fall of course. But, in truth, the revocation contained in the will is altogether out of the question; that being merely "of all former wills;" an appellation under which a deed of entail is not to be comprehended. To indicate such an intention, the term "settlements," or the like, would have been employed in the place of "wills," which is a word plainly not less applicable even to a bill or a bond than to an entail. In the same manner, it may be observed with regard to the devise itself, which is conceived in favour of the pursuer, and of "his heirs and assigns," that as this phrase is of a signification which admits of being accommodated to antecedent titles, or other peculiar circumstances, so it may here be understood to denote the heirs of entail themselves; and thus the supposed incompatibility of the two deeds will be obviated. Should it, however, be asked, for what end then was the will framed? The answer would be, that it was meant to bestow on the wife of the testator her large annuity, and on the legatees their several bequests; all which provisions, constituting a new charge against the pursuer and the estate, it was natural enough to mention or repeat the destination in his favour. No. 124.

But the testamentary nature of the deed in question is not its only imperfection. It is destitute likewise of those solemnities which, by the statute-law of Scotland, are required to give authenticity to documents respecting considerable property; or, in the statutory language, deeds of importance; among which this must hold a high rank. Though not holograph of Sir Laurence Dundas, it expresses neither the name and designation of the writer, nor those of the witnesses; so that it is to be regarded as null and void. This objection is not obviated by the will's being conformable to the *solemnia loci* of England, where it was framed; since it relates to heritable subjects, situated in Scotland. In personal obligations and contracts, indeed, or those relative to moveable subjects, which have not a permanent *situs*, the *lex loci contractus* is the governing rule; notwithstanding that such deeds may eventually become means of imposing burdens on landed property; the result perhaps rather of necessity than of *comitas*, since at the time of contracting, it may be impossible to foresee in what country, from the debtor's withdrawing himself and his moveables thither, execution of his obligations must be demanded. But of deeds, on the other hand, which directly and originally relate to landed property, the courts of the country where it is situated ought to judge entirely according to their own laws; denying execution to all those which are not authenticated by the forms which these laws prescribe. This is the doctrine, not only of our law, but of that of England, on which last the pursuer grounds his action; Erskine, B. 3. Tit. 2. § 40.; Stewart's Answers to Dirleton's Doubts, *voce* Strangers; February 1729, Earl of Dalkeith, No. 25. p. 4464. Williams' Reports, vol. 2. p. 294; Burrow's reports, p. 1079. Nor on this head, more than in the preceding part of the argument, is there any just distinction to be made between deeds of themselves constituting new settlements, and those which import the revocation of an-

No. 124. tecedent destinations; and therefore none such is recognised either in the statute or the common law of Scotland; where, on the contrary, this rule universally obtains; *Unumquodque eodem modo dissolvitur quo colligatum est.* And certainly no reason for thus distinguishing in this case can arise from the circumstance of the deed's being executed in a foreign country, as England is respecting the present question. It is true, nevertheless, that to express the simple purpose of revocation, no technical terms or phrases are requisite; but from hence it does by no means follow, that no peculiar forms are necessary legally to constitute such a document. The will or intention of making a settlement may be as simply expressed, and with as few technical terms, as that of revoking one previously executed; and yet a *jus ad rem*, will be thereby created, which by certain known processes of law, may be perfected into a complete feudal right. But as in the latter case the will must be authenticated by the proper legal forms, so in the former these are not less indispensably requisite.

Answered for the pursuer: That the deeds directly purporting the transmission or even the burdening of landed-property, must be executed agreeably to the forms or solemnities prescribed by municipal laws, is a point not to be controverted. It hardly, however, belongs to the present question, which, since the pursuer has little occasion to insist on the validity of the devise as such, respects chiefly the revocation of a prior gratuitous settlement still remaining under the power of the granter. As the granter of such a deed may himself at any time cancel or destroy it, he can undoubtedly authorise another person so to do. In particular this authority may be given by any writing expressive of his intention, and surely to ascertain the authenticity of that writing, nothing more is necessary than its being of the form requisite to render it probative by the law of the country where it is executed. Nor should it appear at all singular, that a writing so framed were sufficient for carrying into effect the design of revoking a prior settlement; seeing such a writing would be not less effectual for the purpose of creating a new and valid destination or conveyance of a landed estate. For might not sufficient authority for that effect be given by a power of attorney, drawn up in conformity to the law of the country where at the time the granter resided? For example, would not infeftment taken in virtue of an English power of attorney be valid and effectual? If so, it ought not to seem strange that a similar writing should confer the authority for annulling a gratuitous settlement still under the granter's power. The will in question, considered as a deed of revocation, is precisely of such a nature. Being executed according to the forms of England, where it was framed, it contains a declaration revoking a gratuitous settlement, the power of doing which at any time the granter had therein reserved to himself. The expressions of will in the two cases are not to be distinguished from each other. Hence it is evident how totally misapplied by the defenders is the maxim, that unumquoque eodem modo dissolvitur quo colligatum est; a rule indeed which in our law admits several exceptions respecting heritage.

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An objection has been likewise made to the testamentary form of the deed in question. Such a deed being evidently inept for the conveyance, it was said, must by consequence be equally ineffectual as a revocation of a prior settlement of heritage. In this argument, however, the peculiar nature of a revocable deed, still in the custody and at the absolute disposal of the granter, is totally overlooked; and therefore the conclusion at least is erroneous, although the premises be true. But even these may be justly questioned. For it is only heirs who are secured against, or entitled to challenge alienations *in lecto*; and in this case the pursuer, who is heir, approves of the testamentary deed. He means not, however, to dispute, that heirs of tailzie and provision, as well as of line, may in general plead that exception; but the defenders are precluded from it by the faculty of revocation expressly reserved in the tailzie, which is their sole title. If they are to claim under that qualified deed, they surely cannot reject its qualities; Dirleton, 7th June 1676, No. 11. p. 8055. December 11, 1751, Simpson against Barclay, (see APPENDIX.) In the last quoted case, a testamentary writing was not only held sufficient for the revocation of a prior revocably settlement of heritage, but likewise for the conveyance of at least the half of it, in favour of another person than the heir at law. See APPROBATE and REPROBATE.—DEATHBED.

With regard to the criticism of the defenders on the words "former wills," the expression used in the deed in question, that phrase is undoubtedly to be interpreted agreeably to the language of the deed itself; and as "will" there denotes a writing conveying heritage, so the same meaning is throughout to be adopted. Nor is any thing else than a like reference to the latter will itself necessary, in order to furnish an answer to the observation, that because that term "heirs and assigns" is of pliable signification, it should be there construed as denoting the heirs of entail; the defenders thus attempting to wrest in their own favour the conception of a deed, evidently designed and executed in direct opposition to them.

Replied: In the case of Simpson against Barclay, as it does not appear but that the will was holograph of Barclay, that decision can be of no authority in support of the effect of a deed destitute of the legal solemnities.

The Court seemed to consider the devise contained in the first part of the will to be quite ineffectual; but were generally of opinion, that the subsequent part of it imported a valid revocation of the entail, in virtue of the faculty therein reserved; any simple expression of will in a writing probative by the *lex loci*, being held sufficient for that purpose.

The interlocutor of the Court, pronounced on the report of the Lord Ordinary, was as follows: The Lords find, That the deed of entail libelled on is effectually revoked by the deed executed by Sir Laurence Dundas upon the 14th February 1779; and therefore find, that the pursuer, and the sons of his (said) marriage, are entitled to hold, possess, and enjoy the lands settled upon them in the marriage articles libelled on, and that in terms of the obligation therein contained;

No. 124. and also that the said pursuer is entitled to hold, possess, and enjoy the whole lands and heritable subjects specified in the said deed of tailzie, and not contained in the said marriage-articles, and that, in fee simple, as heir of line in general served and retoured to his father, as libelled, and to make up and expede his titles in that character accordingly."

The defenders reclaimed against this judgment; but, on advising their petition, with the answers, the Court adhered to it,

Lord Reporter, *Gardenston.* Act. *Lord Advocate (H. Dundas) Wight, Ilay Campbell.*
Alt. *Maclaurin, Blair, A. Abercromby, R. Dundas.* Clerk, *Orme.*

S. *Fac. Coll. No.* 97. *p.* 151.

*** This case was appealed. The House of Lords, 21st May, 1783, "ORDERED AND ADJUDGED, That the interlocutor complained of be reversed, in so far as it finds, that the deed of entail libelled on is effectually revoked by the deed executed by Sir Laurence Dundas on the 14th February 1779; and that the cause be remitted back to the Court of Session in Scotland, to carry this judgment into execution."

SECT. VII.

Act 1685. Cap. 22.

1710. *February* 24. DR. PITCAIRN, Supplicant.

No. 125. Dr. Pitcairn presented a tailzie to be registered, made by Sir Archibald Stevenson, his father-in-law. The Lords observed, it was only of a tenement in Niddry's Wynd, and did not think the act of Parliament 1685 intended such mean subjects of property, but was to secure land-estates in the country from going out of the family, and not houses, which may, in a night, be consumed with fire, and nothing but the superfices and area left, which did not deserve irritant clauses to fetter them from alienation, However, the Lords allowed it to be registered in common form, *et periculo petentis.*

Fol. Dic. v. 2. *p.* 436. *Fountainhall, v.* 2. *p.* 572.