1794. *February* 18. GEORGE ROBSON *against* JAMES ROBSON.

No. 52.
A general disponee, not the heir at law, has right to the after acquisitions of the disponer, though the rights to them have been taken in favour of heirs and assignees.

George Robson disponed to George his second son, under burden of provisions to his wife, his eldest son, and other children, the whole property, heritable and moveable, " that should belong to him at his death ;" reserving a power to alter, &c. He afterwards bought an acre of land, and took the right to himself, his heirs and assignees. James, the eldest son, having, upon his father's death, taken infeftment upon it, George, the disponee, brought an action against him to denude ; and

Pleaded : The term " heir" has different meanings, according to the intention of the person by whom it is employed ; Ersk. B. 3. Tit. 8. § 47. If he has already made a general settlement, naming the person who is to succeed to him, and the word " heir" occurs in any after deed, not executed, *eo intuitu* of affecting his succession, it will be presumed to apply to the disponee ; Ersk. Ibid. ; Skene, No. 20. p. 11354. *voce* PRESUMPTION.

Answered : It is true, that when a particular subject is destined to a certain series of heirs, the general expression, " heirs," occurring in any after deed relating to it, or any subject immediately connected with it, will be presumed to apply to the persons formerly called to the succession. But this presumption will not hold, where the after deed relates to a subject totally distinct from those already disponed. In that case the testator, by using the word "heir," will be held in so far to have exercised his power of altering in favour of the heir at law ; 9th December, 1762, Duke of Hamilton against Douglas., No. 40. p. 4358. *voce* FIAR ABSOLUTE, LIMITED.

The Lord Ordinary assoilzied the defender.

Upon advising a reclaiming petition and answers, some Judges thought, that as the subject in question was quite unconnected with those formerly disponed, the heir of line must succeed to it : But a great majority of the Court were of opinion, that it fell to the disponee under the general settlement, as it could not be presumed that his father had any view to his succession, when he took the rights of this small subject to himself, and his heirs and assignees.

The Lords found, that the pursuer " has a right, by his father's settlement, to the acre in question."

Lord Ordinary, *Ankerville.* Act. *Oswald.* Alt. *Montgomery.* Clerk, *Home.*

Fol. Dic. v. 4. *p.* 309. *Fac. Coll. No.* 106. *p.* 236.

1795. *November* 17.

MRS. ELIZABETH CRAWFURD, *against* THOMAS COUTTS.

No. 53.
Whether a disposition on death-bed ex-

The late Colonel Crawfurd, in 1771, executed an entail of his estate of Crawfurdland, in favour of " himself in life-rent, and to the heirs-male lawfully to be

begotten of his body; whom failing, to Sir Hugh Crawfurd of Jordanhill, Baronet, and the heirs-male lawfully begotten, or to be begotten, of his body; whom failing, to the heirs-male lawfully begotten of the now deceased William Crawfurd, merchant in Glasgow, his cousin; whom failing, to the heirs-male lawfully begotten of the also deceased John Crawfurd, late surgeon in Glasgow, his brother; whom all failing, to his own nearest heirs and assignees whatsoever."

No. 53. cludes the heir at law where the granter, while *in liege poustie*, had executed a former settlement in favour of a stranger, containing reserved powers to alter on death-bed.

This deed contained a clause, reserving power to the granter, "at any time of his life, *et etiam in articulo mortis*, to alter, innovate, annul, and make void these presents, either in whole or in part, and to infringe upon, or totall ychange the foresaid series of heirs, or course and order of succession above devised."

On the 13th February 1793, Colonel Crawfurd, while on death-bed, executed a gratuitous disposition of the same lands in favour of Thomas Coutts. This deed likewise reserved the granter's life-rent, and power to revoke even on death-bed. It also contained the following clause: "And I hereby revoke and recal all former dispositions, assignations, or other deeds of a testamentary nature, formerly made and granted by me, to whatever person or persons, preceding the date hereof, and particularly a deed granted by me in the year 1771, settling my estate upon Sir Hugh Crawfurd of Jordanhill, Baronet, and his heirs; and I declare the same to be void and null, so far as these deeds are conceived in favour of the persons to whom they are granted, but to be valid and sufficient to the extent of the powers therein reserved to me, to revoke, alter, or innovate, the same, to the effect only of making these presents effectual in favour of the said Thomas Coutts and his foresaids."

Colonel Crawfurd died 19th February, 1793.

Mrs. Elizabeth Crawfurd, the Colonel's heir of line, brought a reduction of both settlements, contending, that the deed 1771, in so far as it was conceived in favour of Sir Hugh Crawfurd, and the other strangers thereby called to the succession, was revoked by the deed 1793, and that this last fell under the law of death-bed.

Sir Hugh Crawfurd was dead, and no appearance was made for his heir.

In defence, Mr. Coutts.

Pleaded: The pursuer's right, as heir at law, was effectually cut off by the entail made by Colonel Crawfurd, while *in liege poustie*. The disposition 1793, therefore, in the defender's favour, executed in virtue of the reserved powers of altering or revoking *etiam in articulo*, contained in the former deed, is not reducible on the head of death-bed; because, although to the prejudice of the disponees under that settlement, it does not hurt the heir at law, at whose instance alone a challenge *ex capite lecti* is competent; Stat. Wilh. C. 13.; Dirlton, *vocibus* Faculty to alter; Reduction *ex cap. lect.*; and Stewart's Answers; Stair, B. 3. Tit. 4. § 2.; Erskine, B. 3. Tit. 8. § 98.; Bankton, B. 3. Tit. 2. § 20. B. 3. Tit. 4. § 48.; Ker, No. 64. p. 3248. *voce* DEATH-BED; Mackean, No. 70. p. 3277. IBIDEM; Duke of Hamilton, No. 40. p. 4358. *voce* FIAR ABSOLUTE, LIMITED; No. 32. p. 11371. *voce* PRESUMPTION; 20th July 1776, Donaldson, (not reported; see Appendix.)

No. 53. Answered: 1*st*, Although Colonel Crawfurd might, on deathbed, revoke the deed 1771, in so far as it was granted in favour of persons not *alioqui successuri*, he could not do so to the prejudice of his heirs of line, whom it calls to the succession in the last place; Stair, B. 3. Tit. 4. § 29.; Bankton, B. 3. Tit. 4. § 48. Gray, No. 6. p. 4200. *voce* FIAR; Kennedy, No. 22. p. 1681. BLANK WRIT. But if the Colonel could not *in lecto* revoke this settlement to the pursuer's prejudice, still less could he make another, by which she was wholly excluded.

2*dly*, Supposing the deed 1771 effectually revoked, even as to the pursuer's interest under it, she is entitled to set aside the deed 1793, in so far as it imports a new conveyance to the defender. Colonel Crawfurd, in that settlement, declares the deed 1771 to be "void and null, in so far as it is conceived in favour of the persons to whom it is granted;" so that the right, at least of the persons not *alioqui successuri*, who were called under it, was thus just as effectually annihilated as if the deed had been cancelled or destroyed; in so much that, were Mr. Coutts voluntarily to repudiate the succession, it would *eo ipso* devolve on the pursuer, as the Colonel's heir at law. The moment, therefore, he signed the deed 1793, her right in that character revived; and, as it is the new *institutio hæredis* contained in this deed which alone excludes her, she is to this extent entitled to reduce it as a deed on death-bed to her prejudice; Falc. 10th June, 1748, Cuningham, *voce* TITLE TO PURSUE; Livingtoun, No. 69. p. 3262. *voce* DEATH-BED; Willocks against Auchterlony, No. 100. p. 5539. *voce* HERITABLE AND MOVEABLE; Finlay, No. 10. p. 3188. *voce* DEATH-BED; D. Lib. 28. Tit. 3. L. 2. De injust rupt. &c.

Replied: 1*st*, The destination of the entail 1771, to heirs and assignees, was defeasible by the last *nominatim* substitute, who if the estate had devolved on him, would have held it in fee-simple; February 27, 1760, Earl of March, *voce* TAILZIE. The pursuer's right under that destination is, therefore, too remote and contingent to entitle her to object to its total revocation. Besides, if she claim in virtue of the entail 1771, she gives up her character of heir at law, and puts herself in the situation of a disponee under that deed, and must consequently be bound by its whole conditions, one of which is, that the granter should be at liberty to revoke or alter *etiam in articulo mortis*. The pursuer, therefore, cannot found upon any right under that settlement, and at the same time challenge the deed 1793. executed in virtue of the powers expressly reserved by it; Bertram, No. 68. p. 3258. *voce* DEATH-BED; Dirleton and Stewart, *voce* DEATH-BED.

3*dly*, The revocation contained in the deed 1793, and the new institution in favour of the defender, are *partes ejusdem negotii*, and must stand or fall together. The pursuer will not be allowed to split the deed, so as to make it good as a revocation of the entail 1771, and bad as a new settlement, for this would be to approbate and reprobate the same deed.

Besides, the entail 1771 is not revoked absolutely and unconditionally, but "to the effect only of making the disposition 1793 effectual in favour of the de-

fender;" so that if this last settlement were set aside, the former would still remain in force. No. 58.

Duplied: The doctrine of approbate and reprobate, applies only where every part of the deed is consistent with law. But an ancestor on death-bed, although he may benefit his heir, cannot injure him. Colonel Crawfurd, consequently, was entitled to revoke his former settlement *in lecto;* but, in naming a new heir, he acted contrary to the public law. The pursuer, therefore, approbates every part of the deed which the Colonel had a right to execute. The remainder must be held *pro non scripto*, agreeably to the rule *utile per inutile non vitiatur*. Were a minor, by a deed *mortis causa*, to give his moveable property to his heir, while, by the same deed, he conveyed his heritage to a stranger, it is thought the heir might take the personal estate under the settlement, and at the same time set it aside as to the heritage.

The Lord Ordinary took the cause to report.

The Court were unanimously of opinion, that the plea set up by the pursuer, on her being called to the succession by the destination in the entail 1771, to heirs and assignees, was ill founded.

Some of the Judges, however, were of opinion, that both deeds should be set aside on the other grounds pleaded by the pursuer. From the terms, it was observed, in which the clause revoking the entail 1771 is conceived, there is no reason to suppose it to have been Colonel Crawfurd's intention to give his estate to the disponees under that deed, in preference to his heir at law, in the event of its being found that he wanted power to execute the deed in favour of Mr. Coutts. Further, the disponees under the former settlement might have been prevented by some legal disability from taking the succession, or might have renounced it in favour of the heir at law; so that, in any view, the disposition 1793 is a deed to the pursuer's prejudice. Besides, Mr. Coutts not being called to the succession under the deed 1771, it is *jus tertii* to him to found on it; and without doing so, the deed 1793 is clearly inept, considered as a new conveyance, although effectual to the heir at law as a revocation of the former settlement.

A considerable majority were of a different opinion. The law of death-bed, it was observed, does not create any disability in the disponer; it merely gives a privilege personal to the heir at law to challenge the conveyance. But the pursuer being previously excluded by the entail 1771, executed *in liege poustie*, she has no interest to reduce the death-bed settlement. The revocation of the deed 1771 is a qualified one, executed for the sole purpose of making room for the disponee under the deed 1793; and therefore, were that deed to be effectual, the disponees under the former settlement would be preferable to the heir at law. And even although the revocation had been simple and absolute, it would not have availed the pursuer, as the presumption of law would still have been, that it was executed from the testator's favour to the new disponee alone, and not to put the heir, in any respect, in a better situation than that in which he stood while the former deed remained unrevoked.

No. 53. It was also said, that the judgment in the case of Cunningham, *voce* TITLE TO PURSUE, would probably have been altered in the House of Lords, had not a compromise taken place between the parties, in consequence of which, both consented that it should be affirmed.

The Lords (12th June, 1795,) assoilzied the defenders; and, on advising a reclaiming petition, with answers, they "adhered."

Lord Ordinary, *Stonefield.* Act. *Lord Advocate Dundas, Hope, Rolland, R. Craigie.*
Alt. *Solicitor-General Blair, Erskine, W. Robertson, Tait.* Clerk, *Sinclair.*

R. D. *Fac. Coll. No.* 145. *p.* 443.

*** This case having been appealed, the House of Lords, 11th June, 1790, made an order, "That the cause be remitted back to the Court of Session in Scotland, and that the said Court do re-hear the parties upon the interlocutors complained of in the said appeal."

In consequence of this, a re-hearing took place in the Court of Session, and the parties gave in memorials; on consideration of which, the Court pronounced the following interlocutor: "*3d February*, 1801.—The Lords having resumed consideration of this cause, and, in obedience to a remit from the most Honourable the House of Lords, again heard Counsel for the parties upon the interlocutor complained of in the appeal to the most Honourable House, and having advised the mutual memorial for the parties, they adhere to their interlocutor, assoilzie the defenders from the reduction in so far as concerns the land of Crawfurdland, and decern."

Elizabeth Crawfurd again appealed. She having died, her appeal was afterwards supported in name of her representative, William Moodie, an infant. The following are the terms of the final judgment of the House of Lords.

Veneris, 14*th March*, 1806.

"The Lords find, That in this case, the question, Whether the heir hath a title and interest to challenge the deed of 1793, as made upon death-bed? depends upon the particular nature and effect of the several deeds executed by the late Colonel Crawfurd, and especially on the nature and effect of the deed 1793, regard being had to the particular terms of the deed, as expressing the same to be a revocation and recalling of all former dispositions; and find, That the deed 1771, though executed *in liege poustie*, ought not to be considered as being, at the death of Colonel Crawfurd, such a subsisting valid instrument or disposition, executed *in liege poustie*, as that thereby the interest of the heir to challenge the deed of 1793, as to the lands, by the same deed disponed to the defender, Thomas Coutts, should be deemed to be barred, in as much as the latter deed contains in terms of the most express revocation of all former dispositions, assignations, or other deeds of a testamentary nature, formerly made and granted, to whatever person or persons, preceding the date thereof, and particularly of the deed granted

in the year 1771, and contains the most express declaration, in terms, that such deeds are to be void and null, so far as they are conceived in favour of the persons to whom they are granted; and also find, That although the deed of 1793 contains a declaration, that the former deeds should be valid and sufficient, to the extent of the powers therein reserved, to revoke, alter, or innovate the same, to the effect only of making the deed of 1793 effectual, in favour of the said Thomas Coutts, such declaration ought not to be taken as the ground of an implication rendering such former deeds valid or effectual beyond the extent in which they are, in express terms, declared to be the ground of a construction, whereby such former deeds should be held to be valid or sufficient, in any respect in which they are, by the same deed, in express terms, declared to be null and void; and find, That although such declaration was made in the deed of 1793, asserting the validity of the former deeds, to the extent of such powers, all the dispositions in the former deeds having been revoked, in express terms, there did not, according to the true effect of all the deeds taken together, at the death of Colonel Crawfurd, under any parts of the former dispositions so expressly declared to be null and void, exist in any persons named in such former deeds, any personal or other right in the lands, by the deed of 1793, disponed to the defender, secure against the challenge of the heir *ex capite lecti*, on which the disponee *in lecto*, under the deed of 1793, could be entitled to found as his defence against the reduction of the deed made *in lecto*; and find, That as the deeds in this case are conceived, as to the terms thereof, the disponee under the deed of 1793 cannot be considered as having title or right under the former dispositions, as if they had been named therein, or otherwise under the effect thereof; and find likewise, That the heir is not excluded, in this case, from challenging the deed of 1793 *ex capite lecti*, and at the same time founding thereon, as revoking the former dispositions: And it is therefore Ordered and Adjudged, That the interlocutors complained of, so far as they are inconsistent with these findings, be reversed: And it is further Ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be meet, regard being had hereunto."

No. 53.

See SERVICE AND CONFIRMATION.

Conditional Substitutions in Bonds of Provision to Children; see FIAR ABSOLUTE, LIMITED.

See APPENDIX.