APPENDIX.

PART I.

PRESUMPTION.

1776. *Nov.* 22.

ELIZABETH LECKIE *against* AGNES AND JANET LECKIES.

NO. 1.

Registration of a deed found to be equivalent to delivery, with regard to heritage, but not as to moveables. See No. 245. p. 11581.

JOHN LECKIE, in the year 1767, executed a deed of settlement of a small heritable subject of which he was possessed, in favour of Elizabeth Leckie his youngest daughter, and George Stannars her husband, in liferent, and to John Stannars their son, and his heirs and assignees, in fee; reserving at the same time his own liferent.

By the same disposition, John Leckie made over, in the same manner, to the same parties, the moveable effects of which he should be possessed at the time of his death. And of the same date, he also executed a bond in their favour for L. 400 Sterling, which bond was delivered to them. The disposition contained a clause dispensing with the delivery.

In the 1771, John Leckie executed another deed of settlement, by which he disponed the heritable subject above mentioned to his three daughters, Agnes, Janet, and Elizabeth Leckies, equally among them, their heirs and assignees; and by the same settlement, he disponed equally among his three daughters, his moveable effects. He also granted a bond for L. 400 Sterling to his two eldest daughters. The disposition here, too, contained a clause dispensing with the delivery.

Upon John Leckie's death, it became a subject of competition before the Commissaries of Edinburgh, among the three sisters, which of them ought to be preferred to the office of executor; Elizabeth, the youngest daughter, and her husband, claiming upon the deed 1767, and the two elder sisters claiming upon the deed of 1771, by which the former deed, they contended, was revoked.

NO. 1. The Commissaries having found, that the deed 1771 was the rule for determining the defunct's succession, preferred the whole three daughters, and their husbands for their interest, to the office of executors as general disponees to him. Their judgment was brought before this Court by advocation, and Elizabeth and her husband, in order to determine the whole questions in dispute, both with respect to the heritable and moveable subjects, brought an action of reduction and declarator against the elder daughters, of the last settlement executed by their father in 1771.

In this action, which was conjoined with the former one respecting the judgment of the Commissaries, it was

Pleaded for the elder daughters:

The deed 1767, disinheriting the defenders, was a most unjust and irrational settlement. But whatever might have been its effect, had it been delivered to Elizabeth and her husband, or completed by infeftment in the father's lifetime, yet it is clear, that while it remained in his custody, or in that of any other person for his behoof, it could not stand in the way of any after settlement. The clause dispensing with the delivery, clearly denotes, that it was meant to remain with the father, and under his power till his death; when, and no sooner, it was to take effect.

And accordingly, though the deed disponing the heritable subject, is in the form of a disposition *inter vivos*, importing an immediate transfer of the property, no more was or could be intended by it, but a disposition *mortis causa*, to take effect after death, and consequently liable to revocation or alteration. In the nature of things, the disposition of the moveables in an after clause of the deed, could operate no transfer of the property till the father's death; and yet it is conceived in the same identical words with the disposition to the heritable subject; from which, joined with the other circumstances, the disposition to the heritage can be considered in no other light than as a deed *mortis causa*.

It can have no effect upon this case, that this deed was put into the register shortly after its date. If it was, in its own nature, liable to revocation, its being registrated for preservation merely, could not alter its nature. This is not changed, even by the formal delivery of a settlement in itself revocable. Registration is a slender as well as an equivocal act; and in all cases in which a deed appears in itself to be truly testamentary, is interpreted in favour of the testator; Bankt. B. 1. Tit. 9. § 48. In many cases, an absolute right, which seemed to all intents to be vested in children, has been found not to be established in them; and although effectual deeds have been delivered and recorded, parents have been found still to retain a power of revocation; Kerr against Kerr, January 25. 1677, No. 64. p. 3249.

The only difference in the two conveyances of the heritage and the moveables in the deed 1767, arises from the known principles of the law of Scotland, that heritage can only be devised *per modum actus inter vivos*; for

in every other respect, these conveyances are the same. But the form in which the settlement is required to be conceived, cannot alter its substance. With regard to the moveables, a disposition to these is given effect to by the law only, as the *suprema* or *ultima voluntas;* settlements or last wills being ambulatory, and revocable at pleasure, *usque ad extremum vitæ halitum*, in so much, that a clause declaring them irrevocable, is itself subject to revocation, as well as the other clauses, like a statute, which, although declared to be perpetual, remains alterable by the same authority which enacted it. Now the deed 1767, even with respect to the heritable subjects, being, from its circumstances and nature, as much a settlement *mortis causa* as the assignation of the moveables, the father was not disabled by it from executing the posterior settlement 1771, which, besides, was a settlement as rationable and equitable, as the former was unnatural and unjust. NO. 1.

Answered for the pursuers:

The deed 1767, is clearly in the form of a disposition *inter vivos*, conveying the fee of the whole subjects directly to them and their eldest son, in which John Leckie's liferent only is reserved, and which requires nothing to make it effectual, but delivery.

Now, it is a general rule, that delivery is presumed when the deed is out of the hands of the granter; Stair, B. 1. Tit. 7. § 14.; Sir George Mackenzie, B. 3. Tit. 2. § 6. See likewise the case of Major Agnew's succession, No. 36. p. 8210., where a deed preferring one child to all the rest, was found delivered, because in the hands of the wife of the son in whose favour it was executed.

No presumption of the granter's having had an intention to keep the deed in his own custody, can arise from its containing a clause dispensing with the delivery. This is the usual clause of style, which the writer never fails to put in, whether the deed is meant to be delivered or not. Besides, such a clause denotes a deed *inter vivos*, more than a proper testamentary deed; because, in the last, such dispensation is in no shape necessary, a testamentary deed requiring no delivery to make it effectual. The only use of a dispensing clause is, to put it in the granter's power, either to deliver the deed or not as he shall think proper; and by his not delivering it, he retains the power of alteration, not because this is inherent in the nature of the deed, but because having the custody of the instrument, he may destroy it. A clause dispensing with delivery, cannot thus make a deed revocable, if not otherwise liable to revocation; Erskine, B. 3. Tit. 3. § 91. This deed 1767, therefore, being in its nature irrevocable, and being besides out of the granter's hands, and even put into a public register, there can be no doubt that the posterior disposition revoking it, was *ultra vires* of the granter. And as to the idea of its being a settlement *mortis causa*, this is totally out of the case. The form of the deed is not denied to be of another sort; and

NO. 1. a deed granted to have effect at death, if it be so granted as to be irrevocable, and if delivered to the person in whose favour it is conceived, has the effect to denude or bind the party *inter vivos*. Bonds or other rights undelivered or delivered, but containing a power to revoke, may no doubt be held as donations *mortis causa*; Bankt. B. 1. Tit. 9. § 48. But neither of these is the case in the present question; and this author's authority is accordingly with the pursuers, as well as the rest.

As to the moveables, the deed 1767 is not a testament, but a disposition of the effects, and was not therefore alterable by the granter, even as to them.

The Lord Ordinary had pronounced an interlocutor, "sustaining the "reasons of reduction, and finding, that the deed 1767 was the rule for de- "termining the defunct's succession, and preferring the pursuers to the of- "fice of executors or general disponees to the defunct." The Court, by interlocutor (13th January 1774) found, "That the deed 1767, so far as re- "lates to the executry or moveables, was revocable, and actually revoked by "the deed 1771; and that Elizabeth, Agnes and Janet Leckies, and their "husbands for their interests, have an equal interest in said executry and "moveables, and ought to be conjoined in the confirmation; and as to this "point, remitted to the Commissaries to proceed accordingly." With regard to the heritage, a condescendence before answer was ordered, for proving that the said deed was a delivered evident. A proof followed upon the condescendence, from which it appeared, that though the deed was registered, yet it was not certain whether this was done at John Leckie's desire or not; and some of the witnesses likewise mentioned, that Leckie seemed to think that he had a power to alter. The Court were of opinion, that when the granter gives a deed out of his hands, a legal presumption of delivery takes place: That registration is to be considered as a public delivery; and that it would require, in order to set it a side, a proof of fraudulent registration. And an interlocutor was accordingly pronounced, (22d November 1776) finding the deed a delivered evident.

Lord Ordinary, *Monboddo.* Act. *Ilay Campbell.* Alt. *Dean of Fac. Lockhart, Geo. Wallace.*

J. W.

1776. *Dec.* 11.

Miss REBECCA MONTEATH and OTHERS, *against* ARCHIBALD DOUGLAS of Douglas and OTHERS.

NO. 2.

Whether by a deed in cer-

MARGARET, Dutchess of Douglas, executed at different times, several settlements in favour of the family of Mr Monteath of Kep, who was married