

in it is virtually revoked or altered by the foresaid marriage contract: Therefore, and on the whole circumstances of the case, assoilzied the defenders from the conclusion of the pursuer's declarator."

On advising a reclaiming petition, the Court, influenced by the decision in the case, in Duke of Hamilton against Douglas, No 40. p. 4358., by a considerable majority, "Altered the interlocutor reclaimed against; found, that under the destination, 'nearest heirs and assignees whatsoever,' contained in the deceased John Lockhart Nasmyth's contract of marriage with his last wife, the petitioners are entitled to take the L. 4000 Sterling therein provided."

A second reclaiming petition was presented for the Miss Cullens, and appointed to be answered.

When the cause was again advised, one Judge remained of opinion, that the terms 'heirs whatsoever,' occurring in a contract of marriage, could bear no other interpretation than that of heirs at law; and that whatever might, in fact, be Captain Nasmyth's intention, it would be dangerous, in point of precedent, to give effect to it, in opposition to the legal import of his settlement.

The rest of the Court, however, were now of opinion, that the decision in the case of Douglas did not affect the present question, and that the interlocutor of the Lord Ordinary was right, the provision in the contract of marriage not being of the nature of a total settlement, nor inconsistent with the former deed.

THE LORDS accordingly "altered the interlocutor reclaimed against, and, agreeably to the interlocutor of the Lord Ordinary, assoilzied the defenders." See No 38.

Lord Ordinary, *Polkemmet.*

Alt. *J. W. Murray, W. M. Morison.*

R. D.

Act. *Rolland, R. Craigie.*

Clerk, *Sinclair.*

Fac. Col. No 23. p. 25.

1797. December 13.

WALTER LOGAN *against* MRS MARGARET MITCHELL, and Others.

ON the 14th February 1793, John Maxwell executed a strict entail of the barony of Fingalton, in favour of Mrs Margaret Mitchell, and others.

On the 25th of the same month he executed a deed, disposing to trustees, 'the whole heritable and moveable subjects, heirship-moveables included, of 'whatever denomination,' which should belong to him at his death; 'and particularly, without prejudice of the foresaid generality,' the subjects therein mentioned, which consisted chiefly of houses, and feu-duties. The trustees were directed, after paying his debts and annuities, to dispoise the residue to the same persons who, by the entail, were to succeed to Fingalton. The trust-deed, however, neither mentioned these lands nor the entail, and the free residue was not to be entailed.

No 37:

An entail found not to be revoked by a trust-deed, executed a few days after it, by which the granter dispoised the whole heritable and moveable subjects, heir-

No 37.
 ship-move-
 ables includ-
 ed, of what-
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 nation, which
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 death; and
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 ' generality,'
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 lands to which
 it related, be-
 ing mentioned
 in the trust-
 deed.

The trust-deed contained procuratory and precept as to the subjects enumerated in it. After the testing clause, it was added, ' before subscription,' that Mr Maxwell's share in the Tontine Society and buildings in Glasgow, was meant to be conveyed by it; and this was his only heritable property, except Fingalton, which was not specially mentioned.

Upon Mr Maxwell's death, it turned out that his property, exclusive of Fingalton, was insufficient to pay the debts and annuities; and Walter Logan, the only accepting trustee, brought an action against the heir by the entail of Fingalton, to have it declared, that that estate was comprehended under the trust-deed; contending, that the entail being superseded by the second deed, there was no room for argument as to the intention of the granter; and that besides, it might reasonably be presumed, that by the time the second deed was executed, he had perceived the necessity of a total sale of his property.

Answered; The general clause in the trust-deed is restricted by the subsequent enumeration of particulars of less value than Fingalton; Erskine, b. 3. t. 4. § 9. If Mr Maxwell had considered the trust-deed to include his whole estate, he would not have thought it necessary to mention his share in the Tontine at the close of it. And if he had not meant the entail, so lately executed by him, to subsist, he would have expressly revoked it. House of Lords, 21st May 1783, Sir Thomas Dundas, *voce* TAILZIE.

The Lord Ordinary reported the cause on informations.

THE COURT were unanimously of opinion, that the entail was not meant to be revoked by the trust-deed, nor included under it; and on that ground gave judgment in favour of the defenders.

Lord Ordinary, *Metbven*. Act. *Ar. Campbell*. Alt. *Ar. Campbell, jun*. Clerk, *Sinclair*.
D. D. *Fac. Col. No 51. p. 116.*

1798. February 27.

MRS MAGDALEN MONCRIEFF, and ELIZABETH, ANN, and MARGARET CULLEN, *against* JOHN NAYSMYTH.

No 38.
 A person by
 a settlement,
mortis causa,
 left certain
 annuities pay-
 able from the
 first term after
 his then wife's
 death, ' when
 ' the annuity
 ' to her will
 ' cease.' This
 wife died be-
 fore him;
 and he having

A FORMER branch of this case is reported, 16th May 1797, Patons against Hamilton, No 36. p. 11376., where will be found a statement of the greater part of the facts on which the present point turned.

By the contract of marriage between Captain Naysmyth and Mrs Moncrieff, his third wife, he settled upon her a jointure of L. 80, and some other provisions, which she accepted of in full satisfaction to her ' of all terce of heritage, ' half or third of moveables, or others whatsoever which she can claim or demand from the said John Lockhart Naysmyth, or his representatives, or out of his effects, in case she shall survive him.'