No. 58.

Observed on the Bench: All the descendants of Sir Robert Henderson are heirs of tailzie. The clause of devolution merely anticipates the succession of the second son, who must therefore take the estate under the limitations of the entail. The form of making up titles is of no consequence.

The Lords unanimously refused the petition, without answers.

Lord Ordinary, *Justice-Clerk Braxfield.* For the Petitioner, *Honyman.* Clerk, *Pringle.*

R. D. *Fac. Coll. No.* 1. *p.* 1.

1797. *January* 31.

ROBERT HENDERSON *against* GEORGE WILSON and CATHARINE and CHRISTIAN MELVILLES.

No. 59.

A person, after making a regular entail of his estate, executed a second in England, altering some of the substitutions, and at the same time a relative will, both tested according to the law of England; the first substitute under the first entail having taken benefit under the will, his doing so was found obligatory on the substitutes in the first deed excluded by the second, to the effect of obliging them to make up titles, and denude in favour of the heirs under the second.

Walter Bowman died in 1782, in England, where he had long resided, possessed of his paternal estate of Logie, in Scotland, and personal property worth about £.10,000.

His heirs-at-law were the representatives of his two sisters, Jean and Isabel Bowman. Jean had a son, George Melville, (afterwards represented by his son, James), and three daughters, viz. Isabel, (afterwards represented by her grandson, George Wilson), Catharine, and Christian Melvilles.

Isabel, Walter Bowman's other sister, was represented by her grandson, Robert Henderson.

In 1757, Walter Bowman executed a procuratory of resignation, in the Scots form, of the lands of Logie, in favour of himself, and the heirs of his body; whom failing, in favour of James Bowman, his brother consanguinean, and the heirs-male of his body; whom failing, to the heirs-male of the body of George Melville; whom failing, to certain other substitutes; whom failing, to the heirs-male of the body of Isabel Melville; under which substitution, George Wilson would have succeeded; whom failing, to various other substitutes, among whom Robert Henderson would have come in; whom all failing, to any other person to be afterwards named by him. The deed contained prohibitory, irritant, and resolutive clauses, particularly directed against holding the estate by any other title than itself; but it reserved power to the granter to alter the order of succession, and conditions contained in it, and in general every power which he possessed before it was executed.

The testing clause bore, that " I the said Walter Bowman have to the eleven first sides of this my procuratory of resignation, contained in three sheets of paper, set my hand, and to the last side thereof my hand and seal;" of the date and before the witnesses therein mentioned.

Of the same date, he executed another deed, authenticated in the English form, and referring to the former, conveying his other property to trustees, who were directed to convert it into money; and, after paying his debts and legacies, to purchase lands with the residue, as near as possible to those of Logie, and to entail

them precisely in the same manner with that estate; and, till a proper purchase should occur, they were directed to place the money in the public funds, the heir for the time to be entitled to the dividends. No. 59.

In 1763, Walter Bowman executed a second procuratory of resignation, for entailing the lands of Logie, nearly in the same terms with the former, (to which, however, it did not refer), but with some variations in the substitutions; in particular, after himself, and the heirs of his body, and James Bowman his brother, and the heirs-male of his body, the next persons called were George Melville, and the heirs-male of his body; whom failing, Robert Henderson, grandson of his sister, Isabel Bowman; and George Wilson appeared only as a postponed substitute to Henderson. This deed was authenticated in the English form.

Of the same date, he executed another deed, also in the English form, referring to the one last mentioned, by which he named James Bowman and George Melville his executors, and, precisely as in the will 1757, he directed his personal property to be laid out on land, in the neighbourhood of Logie, and entailed in the same manner with it, and the money, in the mean time, to be placed in the public funds, the dividends to be drawn by the heirs of entail *seriatim*.

This deed contained a revocation of all former *wills*.

Upon Walter Bowman's death, the only deeds at first discovered were the procuratory and will 1763; by both of which, in consequence of the failure of prior substitutes, George Melville was entitled to succeed.

The heirs-at-law brought an action for setting aside the procuratory 1763; and George Melville took no steps under it; but he proved the will, and placed the money in the funds, in name of himself and his son, James Melville. The procuratory and will 1757 having been afterwards discovered, the former entire, the latter having the name of the granter torn from it, the heirs-at-law abandoned their action, and James Melville, who was heir to Logie by the procuratory 1757, made up titles, in terms of it.

George Melville died in 1791. The agents to whom George and James had granted a joint power of attorney, continued to draw the dividends on the stock, vested in their joint names, till James' death, in the end of 1792. The same gentlemen likewise levied the dividends on between £.500 and £.600, to which Walter Bowman had succeeded on the death of his brother James, and which stood vested in stock in name of James Melville singly.

After James Melville's death, Robert Henderson, now the heir under the deeds 1763, brought an action against George Wilson, the heir under the procuratory 1757, concluding, that he should make up titles under that procuratory, and denude in his favour. A declaratory action was likewise raised by Wilson against Henderson. All parties concerned agreed, that the personal property should be vested in trustees, till the right to it should be ascertained. These trustees raised a multiple-poinding, in which appearance was made for Catharine and Christian

No. 59. Melvilles, who likewise brought an action to have it declared, that the estate of Logie should go to Walter Bowman's heirs *ab intestato*.

All these actions were conjoined. Henderson admitted, that the procuratory 1763 could not be sustained as a direct conveyance of the lands of Logie; but he

Pleaded: 1*mo*, A person, not heir-at-law, succeeding under a deed containing a reserved faculty to alter, cannot object to any alteration afterwards made by the granter, even on death-bed; 11th February, 1755, Forbes against Lord Forbes, No. 71. p. 3277.; August, 1758, Buchanan against Buchanan, No. 72. p. 3285. and no technical form is required for the exercise of such faculties; 31st January, 1667, Henderson against Henderson, No. 7. p. 11339.; 13th July, 1722, Kennedy against Arbuthnot, No. 22. p. 1681.; Duke of Hamilton against Douglas, 9th December, 1762, No. 40. p. 4358.; 19th December, 1776*, 19th December, 1778*, and in the House of Lords, 29th March, 1779*. It is sufficient that deeds for that purpose be probative *secundum legem loci*; and a contrary doctrine would be hard on persons residing abroad, where Scots conveyancers cannot be procured. The procuratory 1757 is therefore binding on the heirs under the procuratory 1757, as being in exercise of the faculties reserved by that deed.

2*do*, Although the procuratory 1763 be ineffectual, taken *per se*, yet, being framed *unico contextu*, and, in fact, making part of the will executed of the same date, upon the doctrine of approbate and reprobate, a person taking the benefit under the latter is bound to fulfil the former; 2d December, 1674, Cranstoun against Brown, No. 18. p. 8058.; 20th February, 1729, Countess of Strathmore against Marquis of Clydesdale, No. 40. p. 6377.; 19th July, 1745, Paterson against Spruels, No. 113. p. 3333.; 17th January, 1758, Cunningham against Mary Gainer, No. 10. p. 617. Now, it was for the interest of James Melville, the heir under the procuratory 1757, to take the benefit under the will 1763, even though he should thereby homologate the relative procuratory; because he would thus succeed to both estates, on the death of his father; and it is established that he did take the benefit under it accordingly.

Nor does it make any difference that, by the procuratory 1757, James Melville held the estate under a strict entail, and that George Wilson represents him in no other capacity than as a substitute under that deed. Walter Bowman had no intention of tying up his own hands by the execution of it. As to him, therefore, and his deeds, the case is the same as if he had held the estate in fee-simple; and James Melville, by carrying into effect the will of Walter Bowman, as expressed in the procuratory, was not guilty of an act of contravention.

These were the primary grounds urged for Henderson; but, in the event of their being repelled by the Court, he concurred with Catharine and Christian Melvilles, two of the heirs-at-law of Walter Bowman, in pleading,

3*tio*, The procuratory 1757 is itself null, from not stating the number of pages of which it consists. It indeed states, that the deed was written on three sheets

* Not reported; see APPENDIX.

of paper, and that the eleven first sides of it were signed by the granter, and the last by the granter and witnesses; and although there may be no reason for suspecting any thing wrong in the present case, still, as the number of sides or pages into which a sheet may be folded is arbitrary, (indeed, in the technical language of the law of Scotland, two pages are called a sheet), to hold the clause in question as equivalent to expressing the number of pages, might, in other cases, give room for interpolation, and be dangerous in point of precedent. No. 59.

4to, Although heritage cannot be conveyed gratuitously from the heir-at-law, except by a deed executed in a certain technical form, it does not follow, that a deed already executed can only be revoked in the same manner. Such deeds are completely under the power of the granter. He may cancel or destroy them; and, for the same reason, every declaration of his intention with regard to them must be attended to; and, in evidence of such intention, all that is required is a deed executed *secundum legem loci*; 25th February, 1783, Dundas against Dundas, Sect. 6. *h. t.* (afterwards reversed, on specialties). If, therefore, the sole object of the deeds executed by Walter Bowman in 1763 had been, to revoke those executed in 1757, their wanting the statutable solemnities of the law of Scotland would have been no objection to their validity. The same intention is implied from the deeds now in question. After executing them, Mr. Bowman no longer intended that the heirs under the former should have any interest in his succession; and the second being liable to objection, the heirs-at-law must succeed. There is the more reason for this, that, by supporting the procuratory 1757, it will be impossible to carry into complete effect the will of the granter, as it stood before the execution of the second settlement; which was, that the whole of his property should be held by the same heirs; which, however, cannot now be the case, from his having torn his name from the will 1757. Indeed, as the will and procuratory were executed at the same time, and refer to each other, it is fair to presume, that, by tearing his name from the one, he considered himself as cancelling both.

Wilson

Answered: 1*mo*, It may be true, that where the granter of a regular deed reserves to himself a power of nominating heirs, the deed of nomination needs not be conceived in the same technical form with the original one; at the same time, the second deed must be probative, and it must refer to the first; Stair, B. 1. Tit. 10. § 9.; 1579, C. 80.; 1681, C. 5.; House of Lords, 21st February, 1773, Douglas against The Earl of Morton, (not reported; see APPENDIX); 25th February, 1783, Dundas against Dundas, Sect. 6. *h. t.*; 10th December, 1793, Mercer against Ogilvy, No. 114. p. 3336. But the procuratory 1763 is not probative; and so far from referring to the procuratory 1757, it was meant entirely to supersede it. The doctrine now contended for imposes no unnecessary hardship on persons abroad; and it is even for their interest, as, in such circumstances,

No. 59. they may frequently be very ignorant of the effect of the deeds which might be executed by them.

2do, In point of fact, James Melville took no benefit under the will 1763; and if he had, his conduct could not have affected the respondent, who has no other connection with him than being a postponed substitute under the same entail, and one whose *jus crediti*, acquired by the death of Walter Bowman, no prior substitute could disappoint.

To the plea of the heirs-of-law, Wilson

Answered: *3tio*, Formerly, when the different sheets of which a deed was composed were pasted together, it was customary for the granter to subscribe each of the joinings. And when the act 1696, C. 15, allowed deeds to be written book-wise, provided the pages were numbered, it meant merely to prevent the interpolation of sheets; and, accordingly, when a deed consists only of one sheet, it is not, in practice, held to be necessary that the pages should be numbered; see 7th January, 1742, Robertson against Ker, and the cases which follow it, *voce* WRIT. In the present case, the enactments of the statute are literally complied with. The deed is declared to consist of three sheets; and, upon inspection, it is evident, that they were so folded as to consist each of four pages; and the deed declares, that the eleven first sides (a word equivalent to pages) were signed by the granter, and the last by him and the witnesses.

4to, The procuratory 1757 cannot be considered as revoked by the procuratory 1763. Even where a subsequent deed expressly revokes a former one, the revocation is not understood to have effect, unless the second deed be supported for all the purposes intended by it. And the case is much stronger when, as here, the revocation is only implied from its being inconsistent with the former, as the inconsistency flies off when the second deed is ineffectual.

With regard to the personal estate, Henderson contended, That even although the estate of Logie should be found to belong to Wilson, or to the heirs-at-law, still the will 1763, which was unexceptionable, must be carried into effect, and the money in the funds be employed in the purchase of lands, as near Logie as possible, and be entailed, as directed by Mr. Bowman.

Catharine and Christian Melvilles, on the other hand, maintained, That if the procuratory 1763 be null, the will of the same date could not be supported. It was a relative deed, (it was said), bestowing certain benefits on the persons supposed to be already vested with the character of heirs of entail of Logie; the enjoying of which character is, as it were, the condition on which they were to receive any benefit from the will. To support, therefore, the will 1763, if the succession to Logie be regulated by the procuratory 1757, would, instead of making one family, which was the ruling passion of Mr. Bowman, create two families, rivals of each other; and if the estate of Logie be found to belong to the heirs-at-law, still, as this case was not foreseen by Walter Bowman, it is impossible to say, that, had he foreseen it, he would have executed the will 1763.

No. 59.

The Lord Ordinary, " In respect that Walter Bowman's deed of entail of the estate of Logie 1763, is specially referred to in his will of the same date, and executed *unico contextu* therewith, found, That the two, taken together, fall to be considered as the settlement of his affairs, and that George Melville was not entitled to approbate and reprobate any part of his said will; and Melville having taken up the personal estate, to the amount of £10,000, found that he was thereby bound to ratify the said deed of entail 1763; and as the defender George Wilson cannot now make up titles to the said estate of Logie, as heir of James Melville under the said entail, without being under the like obligation with him; therefore, found the said deed of entail 1763 was rendered, and now is, a valid settlement of the said estate of Logie; and decerned the defender George Wilson to implement the same, by making up titles, and denuding in terms thereof, in favour of Henderson."

Upon advising a petition, with answers, &c. the Court ordered memorials, and it was then appearance was first made for the Melvilles. The Lords (15th June 1795) " found, That the estate of Logie falls to be governed by the deed of entail executed by Walter Bowman in the year 1757, and decerned accordingly; but found it unnecessary, *hoc statu*, to decide as to the residue of the personal estate of the said Walter Bowman."

Henderson and the Melvilles both presented petitions against this interlocutor, which were answered by Wilson. The Court ordered a hearing in presence; after which, all the Judges were agreed, that the personal estate must be regulated by the will 1763, and the Court were, in general, for returning in substance to the interlocutor of the Lord Ordinary as to the estate of Logie.

The Lords " found, That the procuratory of resignation executed by Walter Bowman in 1757, was a valid and formal settlement of his estate, excluding his heirs at law, but qualified with an express reservation of powers to invert or alter the order of succession, and the other clauses and conditions therein contained: Found, that the procuratory 1763, being formally executed according to the *lex loci*, although not according to the solemnities of the law of Scotland, contained a sufficient declaration of the granter's will, with regard to his succession in exercise of his reserved powers, and must be held as part of the total settlement: And farther, that George and James Melville having, upon their succession, taken benefit from all the deeds, were not at liberty to approbate and reprobate, and the subsequent heirs must be equally bound; therefore, altered the last interlocutor, and found, decerned, and declared in favour of Robert Henderson accordingly."

Reclaiming petitions for Wilson and the Melvilles were (21st February) refused without answers.

Lord Ordinary, *Justice Clerk Braxfield.* For Henderson, *Solicitor General Blair, Hope.*
For Wilson, *Lord Advocate Dundas, Ro. Craigie, W. Erskine.*
For Melvilles, *Tait, D. Douglas.* Clerk, *Gordon.*

D. D. *Fac. Coll. No.14. p. 30.*