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CASSILIS, &c. *v.* HAMILTON, &c.

The EARL and COUNTESS of CASSILIS, - - - - } *Appellants;*
LORD ARCHIBALD HAMILTON, *et alii*, - - - - } *Respondents.*

LORD ARCHIBALD HAMILTON, - *Appellant;*
ANNE, COUNTESS OF RUGLEN; WILLIAM, EARL OF MARCH, (her Son); the EARL and COUNTESS OF CASSILIS, *et alii*, - } *Respondents.*

ANNE, COUNTESS OF RUGLEN; and WILLIAM, EARL OF MARCH, } *Appellants;*
LORD ARCHIBALD HAMILTON, *et alii*, - - - - } *Respondents.*

19 *and* 21 *March*, 1745.

TAILZIE.—CONDITION.—PROVISION TO HEIRS AND CHILDREN.—A power being given to the heir of entail in possession to burden the lands with provisions to younger children,—how far these provisions are effectual, upon such heir denuding (in virtue of a clause to that effect) in favour of another heir of entail? Found by the Court of Session that such heir of entail was not bound to relieve the lands of the burden. Not determined in the House of Lords.

Found that it was not a fair and proper exercise of the power, whereby the provision was to be effectual only against the heir of entail on whom the estate devolved, and not on the granter and his heirs.

PRESUMPTION.—Circumstances under which the special terms of a bond of provision, directing it in certain events to devolve to certain substitutes, were found to be limited by a general devolving clause in settlements of other family property subsequently executed.

[Elchies, *voce* Provision to Heirs and Children, No. 6.]

WILLIAM, Duke of Hamilton, and Anne, his Duchess, had six sons; James, Earl of Arran,

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Charles, Earl of Selkirk, and Lords John, George, Basil, and Archibald Hamilton. By an entail, containing the usual prohibitory, irritant, and resolutive clauses, executed by the Duke in 1693, the estate of Riccarton was settled upon his third son, Lord John Hamilton, and the heirs male of his body, with other substitutions; and it was provided, that in case Lord John shall succeed to either of his elder brothers, "that then the foresaid whole "lands, tithes, and others hereby disponed, shall "devolve, fall on, and belong to the next imme-"diate younger son substituted in the foresaid "tailyie, and the heirs male of his body," &c.

It is further provided, that the said Lord John and the heirs of entail "shall do no fact nor deed "to alter, innovate, or infringe the foresaid tailzie, "directly or indirectly, in prejudice of the heirs "above mentioned, their succession to the lands "aforesaid in all time coming, without prejudice "to him or them, to give reasonable jointures to "their wives, and also rational provisions to their "younger children, as they shall think fit."

Lord John had two daughters, Anne and Susan. Upon the marriage of the former to the Earl of Ruglen, her portion was advanced by her father, without being made a charge upon the estate of Riccarton; and he afterwards granted to Susan an heritable bond of provision over that estate, binding himself and the heirs succeeding to the same to pay the sum of L.3000. Shortly thereafter, Susan was married to the Earl of Cassilis.

Charles, Earl of Selkirk, died in 1738, and Lady Susan was infeft upon the bond the day after his death.

By the death of Earl Charles, Lord John succeeded to the estate and earldom of Selkirk, and in consequence, the right to the estate of Riccarton devolved, in terms of the entail, upon his brother Lord Archibald; who thereupon brought an action against Lord John, (then Earl of Selkirk) to have it found that he should not only denude of Riccarton, but that he should also clear the estate from the incumbrance created by the heritable bond in favour of Lady Cassilis.

On the report of the Lord Ordinary, the Court found (22 January, 1742) "that the Earl of Sel-"kirk is bound to disburden the lands of Riccar-"ton of the heritable bond of L.3000, and to re-"lieve Lord Archibald and the lands of Riccarton "thereof."*

Lord Selkirk reclaimed, and founded on the clause in the entail above recited; and the Court (12 November, 1742) altered and found "that "he is not bound to disburden the entail of Ric-"carton of the heritable bond of L.3000, and in-"feftment following thereon in favour of his "daughter, now Countess of Cassilis, so far as the "said heritable bond shall be found to be a rational "provision in favour of the said Countess; and "remitted to the Lord Ordinary to proceed ac-"cordingly." A debate then took place before the Lord Ordinary upon the point, in how far the said sum was a "rational provision."

* The Court "thought that the condition of the devolving clause "having existed by his succession to his brother Selkirk's greater "estate, he must denude of Riccarton as he got it; and that the "faculty to provide wives and children was only an exception from "the prohibition to alter the order of succession." Elchies's Notes, *voce* Provision to Heirs and Children, No. 6.

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It appeared that when the action was first raised, the Earl and Countess of Cassilis had (13 July, 1741) granted a back bond to the Earl of Selkirk, whereby, upon the recital, and in implement of certain conditions and obligations contained in their marriage articles, "they declare that they shall "have no action against the said John, Earl of Sel-"kirk and Ruglen, or his heirs of line, for war-"ranting or making effectual the said L.3000 "Sterling, and interest thereof to them, or for "maintaining them in possession of the said yearly "annual rent and lands themselves; and in case, in "any question with the said heirs of entail, the "said Earl should be found to have exceeded the "powers he had, in burdening the said estate with "the said L.3000, or that the same should be re-"stricted to a lesser sum, and the Earl decerned "to relieve the estate of so much thereof; in that "event they bound themselves to grant a discharge "and renunciation of so much of the said debt as "the Earl may be found to have burdened the "estate with, beyond the powers he had by the "entail," &c.

Founding upon this deed, Lord Archibald maintained that the bond of provision had not been intended to be a charge upon the estate at all events, or a charge upon the Earl of Selkirk and his heirs of line, which alone was the sort of burden allowed by the entail; but was evidently a mere contrivance to charge the estate whenever it should descend to Lord Archibald or the other heirs of entail.

The Earl and Countess of Cassilis now appeared for their interest, and, being made parties, pleaded, that the estate was effectually burdened

by the bond of provision and the infeftments thereon, as well against the Earl of Selkirk and his heirs male, as against the heirs of provision; and that by the agreement entered into by the marriage articles, whereby a benefit was stipulated in favour of Lord Selkirk, in consideration of what he had otherwise given, that burden was not destroyed or intended to be so.

The Court (18 February, 1743) found, "That "the Earl of Selkirk could not, in virtue of the "faculty, charge the estate of Riccarton with pro- "visions in favour of his children, to take place "only in case of devolution, and not to affect the "estate during the time the same remained with "his own heirs; and therefore found, that the "provision in question, made in favour of the "Countess of Cassilis, being qualified by the back "bond dated 13 July, 1741, so as not to affect "the estate of Riccarton, except in case of the de- "volution upon Lord Archibald Hamilton, which "has now happened, and not to affect the same "while the estate remained with the Earl of Sel- "kirk's lady, the said provisions in favour of the "Countess of Cassilis is no effectual charge upon "the estate of Riccarton in prejudice of Lord "Archibald Hamilton, to whom the estate is now "devolved." And they afterwards adhered.

An appeal was brought by the Earl and Countess of Cassilis,* from the interlocutor of 18 February, 1743, and others in the cause. Entered 6 February, 1744.

A cross appeal was brought by Lord Archibald 22 March, 1744.

* The Earl of Selkirk was likewise an appellant, but, by an order of 4th December, 1744, was struck out from the appeal, and allowed to be made a respondent.

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Hamilton from the interlocutor of 12 November, 1742.

Pleaded for the Appellants:—(the Earl and Countess of Cassilis.) Lord Selkirk had, by the entail, a power to charge the estate with such reasonable provisions for his younger children as he should think fit; and this power he exercised in a legal and proper manner, not contingent upon the event of devolution on the other heirs of entail, but absolutely binding upon himself and his own heirs male; so that, unless modified by a subsequent agreement, there can be no doubt that the estate was effectually charged to that extent. This agreement entered into on the marriage of the appellants, cannot have the effect of defeating that charge *in toto*. It was previously a subsisting burden on the estate, perfected by infeftment; and the only alteration made at that time, (and subsequently in 1741,) was a stipulation in favour of Lord Selkirk, releasing him personally from the obligation to pay interest; and taking upon themselves the hazard of the suit, touching his power to charge the lands of Riccarton, and his liability now to disburden the same. It cannot be supposed that the provision was not to become effectual in case of the estate devolving to the subsequent heirs of entail, it being the only provision which Lord Selkirk had made for his daughter, and therefore all that she could have claimed, if he had died before her marriage.

Pleaded for the Respondent:—(Lord Archibald Hamilton.) Although by the entail of Riccarton a power was reserved to grant rational provisions to younger children, that was only in the event of the estate descending to the heirs male of

the body of Lord John, and not in that of its devolving to the other heirs of entail. As that was the only estate he had, out of which he could make such provision, the heirs of his body might in that case be bound; but such provision could not bind the other heirs of entail, for by the entail, in the event of Lord John's succeeding to a much greater estate, the "*hail* lands," &c. are to devolve on the next heir therein mentioned, and Lord John is obliged to denude himself of all right to the same; and therefore, as the right which he got was absolute and unincumbent, he ought to give up and denude himself of a right in like manner free from all burdens whatever, especially as in the devolving clause no power is given to him to charge the lands with provisions to his children, with which, had it been intended, would not have been omitted. On these grounds, the interlocutor, 12 November 1742, ought to be reversed.

But whatever might have been Lord Selkirk's power of granting provisions to his younger children, he did not exercise that power in a fair and legal manner. From all the circumstances of the case,—the time of granting the bond, the date of the infeftment thereon, and especially from the stipulations in the marriage settlement, and the relative back bond,—it is evident that the whole was a fraudulent transaction, to render the provision a charge against the estate, only in case of its devolving to the respondent Lord Archibald, and not while in the person of Lord Selkirk, or his heirs. Bonds of provision to younger children are understood to be intended for an immediate fund of subsistence, payable at such terms and in such events as make it reasonable and necessary that younger children should be

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so provided, and therefore the parent binds himself and his heirs in payment of them. But a bond under such restrictions as the present, could not be a proper provision for any child; which plainly shows the simulate nature of the transaction.

Judgment, 19 March, 1745.

After hearing counsel, &c. "it is ordered and "adjudged that the interlocutor complained of in "the said appeal of the said Earl and Countess of "Cassilis, be, and the same are hereby, affirmed. "And it appearing, that the question touching the "disburdening the estate of Riccarton of the sum "of L.3000 and interest, claimed by the appellant, "is now immaterial, and doth not properly come "in judgment in this cause, it is hereby also order-"ed and adjudged, that the interlocutor of the 12th "November, 1742, pronounced thereupon, be, and "the same is hereby, reversed; but without pre-"judice to that question, when the same shall pro-"perly come in judgment in any other cause," &c.

A separate question arose between the Countess of Ruglen, Earl John's eldest daughter, and her son the Earl of March, on one hand, and Lord Archibald Hamilton and Basil* Hamilton, on the other; and related to his bonds, one for L.20,000 Scots, and another for L.40,000 Scots, which had been granted to Lord John, (afterwards Lord Selkirk,) both under clauses of devolution.

By a deed executed in March, 1685, William, Duke of Hamilton, assigned an heritable bond for L.20,000 Scots, in favour of his third son, (the said

* Basil died during the dependence of the action, which was afterwards carried on by John Hamilton (as executor creditor confirmed) and Lord Dunbar, and Mary Hamilton (Basil's children) were made parties to it; but as this does not affect the question, the report is carried on in the name of Basil.

Lord John,) and his heirs male; whom failing, to his younger brothers successively, with certain other substitutions, and with a provision, "that in "case Lord John should succeed to either of his "elder brothers, then the aforesaid sum should "descend to the said Lord George, and the rest of "the younger brothers successively, &c. and that "the said Lord John should be obliged to denude "himself thereof in their favours."

Again, by the entail in 1693, (above mentioned) the estate of Crawford Douglas is conveyed to Charles Earl of Selkirk, (the Duke's second son,) with a provision, "that in case the said Charles Earl of "Selkirk should die without heirs male of his body, "so that Lord John, the third son, or any of the "younger brothers above mentioned, should hap-"pen to succeed to the said lands and barony of "Crawford Douglas, then any sums of money "which should be due to Lord John, or any of the "said younger brothers so succeeding," &c. should return and fall back to James E. of Arran, (their eldest son,) and his said heirs male, &c. "and the "bonds of provision granted by us to our said sons "so succeeding shall be void and extinct, so far as "the said sums shall be resting unpaid by the re-"presentatives of the family of Hamilton. But in "case the sums contained in their said bonds shall "happen to be uplifted and paid at the time of "their succession to the said lands, in that case "their said provisions, or so much thereof as shall "have been actually paid, shall not return to the "family, but the same, with any other money or "estate left by us to our said younger sons, shall "fall, appertain, and belong to the said hail other "younger brothers of them that shall succeed to

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" the aforesaid lands and barony of Crawford Dou-
" glas, and their heirs male equally among them."

The estate of Crawford John was also conveyed by the Duchess of Hamilton, with consent of her husband, to Earl Charles, with the same substitutions, and under the same conditions. Shortly afterwards (in Sept. 1693) she granted an heritable bond in favour of Lord John, for L.40,000 Scots, payable at the first term after the decease of the longest liver of her and the Duke, with a provision, " that in case " the said Lord John should happen to succeed to " Charles Earl of Selkirk, his immediate elder bro-
" ther, in the lands of Crawford Douglas and Craw-
" ford John, then so much of the said sums, there-
" by provided, as should be uplifted at the time of
" his said succession, should fall and belong to the
" heirs of the family of Hamilton, and this bond to
" be paid in so far as it extends to sums that should
" be resting unuplifted thereof," &c. A power of revocation and alteration is reserved.

Upon the marriage of Lord John in 1694, the Duchess, in the marriage contract, (her husband being dead,) after reciting the terms of the provision to Lord John of the L.40,000 Scots, and the reserved power of alteration, bound and obliged herself, her heirs and executors, to pay to the said Lord John, his heirs and assignees, at the term of Lammas 1695, the said sum of L.40,000 Scots, with interest during the non-payment, and declared that it should belong to him, his heirs and assignees, although it should happen to be unpaid at her decease, notwithstanding of any clause in the said bond to the contrary.

Upon the succession of Lord John to his elder brother, Lord Charles, in 1739, two actions were

raised against him by his younger brother, Lord Archibald, and by Basil Hamilton, (son of Lord Basil) for having it found *(inter alia)* that he was bound by the devolving clause in the settlement of 1693 to pay to them the sum of L.40,000 Scots received by him on the said bond of provision, and also the sum of L.20,000 Scots, received by him on the assignation by his father to the heritable bond.

The Court (22 January, 1742) "found, that "the defender, John Earl of Selkirk, having suc- "ceeded to the estates of Crawford Douglas and "Crawford John, is, by the condition in the settle- "ment of these estates, bound to make payment "to the pursuers, equally between them, of the sum "of L.20,000 Scots, contained in the bond assign- "ed to him by the disposition from his father in "1685; and that, notwithstanding the clause con- "tained in the said disposition, which provides, "that in case the defender should succeed to any "of his elder brothers, the said sum should fall and "descend to his immediate younger brother, and "the heirs of his body; and found, that this clause "was effectually altered by the condition annexed "to the subsequent settlement made by the "said Duke and Duchess of Hámilton, of the "lands of Crawford John and Crawford Douglas. "But found, that the heritable bond of L.40,000 "being granted to Lord John, his heirs and assig- "nees, and reserving to the Duke and Duchess to "alter the same, and the said Duchess after the "death of the said Duke having consented and be- "come a party to the said defender's contract of "marriage, whereby it was agreed that the said "sum should be employed in purchasing lands,

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" &c. to be taken to the defenders and the heirs of " the marriage; that thereby the clause in the set- " tlements of the above estates, which provides, " that in case of the defenders succeeding to the " said lands, any other money or estate left by the " said Duke and Duchess to the defender, should " fall and appertain to his hail younger brothers, " and their heirs male, equally among them, was ef- " fectually altered; and that, therefore, the defen- " der is not bound to pay to the pursuers the said " sum of L.40,000," &c.

(John, Earl of Selkirk, and Mr. Basil Hamilton died after these interlocutors were pronounced; but it is unnecessary to detail the proceedings that took place, in consequence.)

Entered 22 March, 1744.

An appeal was brought by Lord Archibald Hamilton from that part of the interlocutor of the 22d January, 1742, which relates to the L.40,000, and from the interlocutor of the 4th February, 1742.*

Entered 6 Feb. 1744.

A cross appeal was brought by the Countess of Ruglen, and her son the Earl of March, from that part of the interlocutor of the 22d January, 1742, which relates to the L.20,000 bond, and from an interlocutor of the 18th November, 1743. To this appeal the representatives of Basil were made parties.

Pleaded for the Appellant, (Lord Archibald:) —1. (As to the L.40,000 bond.) By the clause of devolution in the settlement of 1693, it was fix-

* He likewise appealed from an interlocutor of the 26th January, touching the superiority of certain lands, the particulars of which claim it is thought unnecessary to detail.

ed that all the provisions made in favour of Lord John were, in the event of his succeeding to the Crawford estates, to appertain to the younger brothers; and he cannot claim under that settlement, unless he complies with this provision.

Although a power of revocation was reserved, it cannot be considered as an implied revocation of this proviso, that the Duchess, in the provision of the L.40,000 bond to Lord John in 1693, declared that any part of this sum, which shall be unuplifted at his succession, shall return to the family, but omits to say, as was done in a clause of the former settlement, that, what shall have been paid to the said Lord, shall fall to his younger brothers, and their heirs male, equally among them.

Neither can it be considered as a revocation of this proviso, that she consented to the marriage contract of Lord John. The only difference thereby made was, that she so far dispensed with the power of revocation; and that the bond was made payable immediately, instead of being so only after her death. The proviso still remained that, if Lord John succeeded to the Crawford estates, he must make that sum good to his younger brothers.

2. (With regard to the bond for L.20,000.) There is no doubt that this sum was part of the provision for Lord John, and that the money was actually received by him; and, therefore, by the express words of the settlement in 1693, all the provisions and estates so received were to devolve to his younger brothers, and their heirs male, equally. It cannot then be a doubt that the money must be paid, and there can be as little

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doubt to whom this payment is now to be made, since, whatever was the destination in the first settlement of 1685, a power of alteration was therein reserved, and this power was effectually exercised by the settlement of 1693.

Pleaded for the Respondents, (the Countess of March and Ruglen, and the Earl of March:)—1. The devolving clause in the settlement 1693, (whereby, if Lord John or any of his younger brothers should succeed to the Crawford estate, such part of their provision as remained unpaid should sink for the benefit of the heir at law, and such other part as should have been actually received should be divided amongst, and payable to, the next younger brothers, and their heirs male,) was, in many respects, altered by the bond granted in September 1693, to Lord John by the Duchess. By the former, such provisions as might have been actually received were, upon his succession to the Crawford estates, to be divided equally among his younger brothers. By the latter, L.40,000 were settled upon Lord John, his heirs and assignees, and the only proviso is, with regard to such part of it as should remain unpaid at the time of his succession to either of his elder brothers, and this part is directed to be sunk, and to return to the heir and representative of the family of Hamilton.

The words "to his heirs and assignees," convey an absolute interest in whatever may have been paid.

But, if there were any doubt, this is entirely removed by the marriage contract of Lord John. A power of revocation and alteration was reserved, in the bond, to the longest liver; and the

Duchess having survived the Duke, had this power, and exercised it effectually by the part she took in the contract. She then renounced all power of revocation, and made the sum payable at the first term thereafter, instead of the first term after her decease; and by this means gave him an unlimited valid right in the whole sum, and freed it of the condition in favour of the heir of the House of Hamilton.

Further, the Duchess, after having thus conferred an absolute interest in this sum, is a party to Lord John's marriage contract, whereby this and other sums are settled upon the heirs of the marriage without any condition as to Lord John's succeeding to the Crawford estates; whereby she who alone had the power of altering the former destination, secured as well the sums actually paid as those unpaid, at the time of the succession opening to Lord John, upon him and the issue of his body.

2. The special destination in 1685 of the L.20,000 bond, with the clause of devolution therein contained, was not altered by the posterior devolving clause in the settlement of 1693. It is a rule of construction, that a prior special conveyance is not to be defeated by a subsequent conveyance in general terms, and relating principally to other subjects. But, admitting that the former destination had been so defeated, and that Lord John could not gratuitously alter this last conveyance, yet he might and did alter it by his marriage contract; for such a contract is not gratuitous, but rational and onerous.

"Ordered and adjudged that the interlocutor of Judgment, March 21, 1745.

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"the 22d January, 1742, complained of, be, and "the same are hereby affirmed."

For the Earl and Countess of Cassilis, *Ro. Craigie, C. Erskine.*
For the Countess of Ruglen and Earl of March, *A. Hume Campbell, Alexander Forrester.*
For Lord Archibald Hamilton, *Wm. Murray, W. Hamilton.*

GEORGE OCHTERLONY, - - *Appellant;*
ARCHIBALD HUNTER, *et alii*, - *Respondents.*

9 *April*, 1745.

BILL OF EXCHANGE.—Found that one who had retired bills in London, *supra* protest, for the honour of the drawer, (who was in Scotland,) was not debarred of his recourse against the drawer, although he did not give notice of the dishonour of the bills for eight days.

Found also that this was a sufficient notification of the dishonour of other bills, retired in the same way, although payable after the date of the letter.

[Kilkerran, p. 73. Elch. *voce* Bill of Exchange, No. 32; Dict. III. 54; Mor. 1567; Brown's Supp. v. 733.]

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SEVERAL bills were drawn in Scotland by Hunter, upon Charles Murray in London, payable to Peter Murdoch, merchant in Glasgow, or order. These bills were paid by Ochterlony *supra* protest, for