JEAN ALLAN, and DONALD SMITH, her Husband, *Appellants;*
ARTHUR SINCLAIR, Esq., and ISAAC GRANT, W.S., his Attorney, - - } *Respondents.*

House of Lords, 13*th Nov.* 1776.

DEED—IMPLIED REVOCATION—ERROR IN PROCEDURE.—A party executed a deed, conveying his whole heritable and moveable estate to his four sisters and their heirs-male, according to certain proportions, in 1764, reserving power to revoke, but declaring it to be good in so far as not revoked. He afterwards married, and in 1766 executed a new deed, conveying his whole heritable and moveable estate to the heirs of his own body, of that marriage. There was no revocation of the first deed. He thereafter died, leaving a son, who only survived his father three months: Held, on failure of his issue, that the first deed remained good; and as there was no implied revocation of it by what was done, and no express revocation, the same was to be read as if it had within it the deed of 1776, and so excluded the heirs-at-law as such. Question, Whether proceedings were correct in Court below? *Vide* Note at end of case.

Captain James Allan, then unmarried, executed in 1764 a settlement, (which appears to have superseded a previous deed executed in 1748,) conveying his real and personal estate, then belonging, or which might belong to him at the time of his death, to and in favour of himself, and the heirs whatsoever of his body, whom failing, to his four sisters (he having no brother) according to the following division:— 1st, To his eldest sister, Margaret, in liferent, and his nephew and nieces, children of his younger sisters, in fee, all and whole an heritable bond for £800 on the lands of Malsetter; 2d, To the appellant, his second sister, Jean, in liferent, and to her eldest son, and the heirs-male of his body, whom failing, to her next son, Frazer Smith, and the heirs-male of his body, all and whole the lands of Walls and Hoy; 3d, To the youngest sister, Anne Allan *alias* Sinclair, in liferent, and to her three sons, Arthur, the respondent, James and Benjamin Sinclairs, according to their seniority, and to the heirs-male of their bodies, in the same order, his lands and estate of Campston in Orkney, and as also adjudication and infeftment upon the estate of Sabay, with whatever he might acquire to the said estate; 4th, To his youngest sister he gave the whole personal estate in liferent, and to her three sons in fee.

In the deed there was a power to revoke; but declaring,

1776.

ALLAN, &c. v. SINCLAIR. 1766.

"*so far as not revoked* or altered, by a writ under my hand, the same was to be held as a valid and delivered deed."

Thereafter Captain Allan married, and, of this date, executed a new settlement of his whole heritable and moveable estate, whereby, after binding himself to provide his wife a liferent annuity out of the lands, he also binds and obliges himself to dispone the same in favour of the eldest son of the marriage, and to burden him with suitable provisions to the other children of the marriage.

The deed contains no revocation of the one executed in favour of the sisters in 1764; and Captain Allan dying in autumn 1767, leaving one child, a son, of the second marriage, who died a few months thereafter.

Upon this event, the appellant, Jean, was advised that the succession to the heritable estate of her brother and nephews did of right belong to their heirs-at-law, in respect that the instrument executed by Captain Allan, in the form of a will in 1748, was countermanded, and put an end to by the disposition and settlement made by him in 1764; and *that* of 1764 was superseded and put an end to by his last disposition and settlement made in 1766; and as by this last deed he had not made any substitution of heirs who should take on failure of his own issue, so, upon failure thereof, by the death of his son, the succession devolved of course on his heirs-at-law. Subsequent to the execution of the deed 1764, he sold the lands of Walls and Hoy conveyed by it. The question, therefore, came to be, Whether the first deed of 1764 was virtually revoked by Captain Allan's subsequent marriage, and his subsequent disposition of 1766? Upon the latter supposition, the sisters would come in equally as heirs-portioners of their brother, without regard to the division in the first deed 1764. Acting on this supposition, they proceeded to serve themselves in that character, when the respondent, the eldest son of his third sister, to whom by that deed the fee of the estate of Campston was disponed, raised the present action of reduction and declarator, contending, that the first and second deeds were not inconsistent, and that revocation was not to be implied.

The Lord Ordinary (Auchinleck) pronounced this interlo-

July 16, 1773. cutor:—"Finds, that as Captain Allan's settlement of his "affairs in 1764 appears, from the conception of it, to have "been intended to fix the succession to him in all different "events; his subjects being provided, first, to the heirs of

" his own body; and failing these, to the other heirs and " persons therein mentioned, with a proviso, that notwith- " standing power of alteration is reserved, yet so far as not " revoked and altered by a writ under his hand, it is de- " clared to continue valid, and though the Captain, in the " year after his marriage, made a new deed for regulating " his succession among the descendants of his own body, but " which goes no further, and contains no revocation of the " former settlement in favour of the heirs called thereby " after the heirs of his own body; finds that the case is the " same as if the settlement 1764 had contained in it the " settlement 1766, which is in no way incompatible with it; " and that therefore the pursuer is entitled to take the suc- " cession provided to him by the deed 1764, in the same way " as if the deed 1766 had not been executed."

On two representations the Lord Ordinary adhered; and on reclaiming petition to the Court, the Lords adhered. The action then went back to the Lord Ordinary, whereupon the respondent moved, by minute, to apply the judgment pronounced, by giving decree in terms of the other conclusions of the action These conclusions were, to have it found and declared, that the property of the lands of Campston, together with the heritable rights which Captain Allan had upon the lands of Saba, did now belong to the respondent, who, by the death of his two brothers without lawful issue, had right to their shares of the heritable bond of £800 due by Benjamin Moodie, and to the property or other right which the said Captain Allan had to the lands of Hamiger, and whole progress of writings relative thereto, and rents of the lands since the death of Captain Allan. And that the said Anne Allan, the respondent's mother, and his two brothers, being all now dead, the respondent was the sole remaining executor of the Captain, and had the right to his executry, or personal estate, wherever situated; and, as one of the four heirs-portioners of the said Captain Allan, had also right to a fourth part of the lands of Oversanda, and any other lands or heritable subjects acquired by the Captain posterior to the settlement. And these things being so found and declared, the foresaid special service of the appellant and others ought to be reduced, as heirs-portioners to Captain Allan.

Nov. 15 & 27, 1773. Jan. 18, 1774.

Counsel for the appellants not objecting, the Lord Ordinary pronounced the following interlocutor:—" Having con- " sidered the above minute and libel referred to, decerns

Feb. 22, 1774.

1776.

ALLAN, &c. v. SINCLAIR.

" and declares in terms thereof, so far as not determined by " the interlocutor of 16th July last; and, in respect the writ- " ings called for to be reduced, are not produced, reduces, " decerns, and declares, as to them, *contra non producta.*"

The appellants gave in a representation against this interlocutor, setting forth, that they had not intromitted with the rents, and praying further time to be heard as to the other conclusions; but the Lord Ordinary pronounced this

July 4, 1774. interlocutor:—" Having heard parties, makes avizandum to " himself with respect to the executry funds in England; " but finds the pursuer entitled to the executry funds and " whole moveables in Scotland; and ordains the defenders " to give in an account of these funds on or before the 12th " Nov. next: Finds, also, that the pursuer (respondent) has the " sole and absolute right to Captain Allan's claims upon " the estate of Sabay, and likewise to the heritable bond of " £800 sterling due by Benjamin Moodie of Milsetter to " the Captain; and whatever right was in the Captain to " the lands of Hamiger; and also to the fourth part of the " lands of Oversanda; and finds, that he has also right to " the whole progress of writs and title-deeds conceived in " the Captain's favour; and ordains the defender to lodge " these title-deeds in the hands of the clerk, at the expense " of the pursuer, and that on or before the 12th November " next, with certification that if they are not then lodged, " the Lord Ordinary will not allow them to be afterwards " received, without inflicting a proper demand upon the de- " fenders."

The appellants again presented a representation, contending that the respondent had no right to the whole bond of £800, but only to a part of it. The Lord Ordinary pro-

July 26, 1774. nounced this intelorcutor:—" Finds that Arthur Sinclair has " the sole and absolute right to the lands and estate of " Campston, lying in the parish of St. Andrews, upon the " main land of Orkney; and restricts the sum due to the " pursuer in the £800 to the share which belonged to his " deceased brothers, James and Benjamin Sinclairs, with " these variations refuse the desire of the representation."

The respondent moved, that the appellants produce the title-deeds; and, on failure to do so, the Lord Ordinary, "in " respect the defenders have not obtempered the above in- " terlocutors, decerned against them in terms of the libel.

July 26, 1775. Aug. 2, 1775. " On representation, the Lord Ordinary adhered."

The present appeal was brought against the interlocutors

of 16th July, 13th and 27th November, 1773; interlocutor of the Lords, 18th January 1774; interlocutor of Lord Ordinary, 22d February, 5th and 26th July, 1774; 26th July and 2d August, 1775.

Pleaded for the Appellants.—1. Every settlement of a man's succession is, by the law of Scotland, revokable at pleasure. The deed 1764 was, in its own nature, revokable, and might have been so revoked or altered, although no reserved power to do so had been expressly declared in the deed itself. The deed 1764 was intended to take effect only in an event which has not happened, namely, the death of Captain Allan without leaving any child. But, as he afterwards married, and made a new settlement of his whole succession upon his wife and children, and as he had a son of this marriage, who survived him, the effect of the deed must be limited to the non-existence of children, and not by their failure through death. Supposing no second deed had been executed, yet the existence of issue of his body would have virtually put an end to the deed 1774, upon the principle *si sine liberis decesserit* alone, without the necessity of any express revocation; and if this be law, then, on the birth of issue, the first deed was thereby destroyed. Hence, therefore, the reason and the cause why the second deed did not expressly revoke the first, because, in the understanding of the maker, the existence of issuse, *per se*, put an end to it. Accordingly, on this understanding, he proceeds, in this second deed 1766, to dispone his whole heritable and moveable estate, leaving nothing that could be carried by the settlement of 1764, and from this fact itself, all former settlements, not expressly saved, must be presumed, revoked or superseded, the last implying a revocation of the first. The rule, therefore, that the deed 1764 must be held as contained in the deed of 1766 is ill founded in law; for this would be to do what the maker himself has not done, and what no Court has a power of doing, make a settlement for the deceased. And this was obviously contrary to his intention, because, after providing for the children of that marriage, he does not say, that failing them, his sisters, or nephews, or nieces, are to succeed; but, on the contrary, ends the destination by giving it to the children of his marriage with any future wife.

2. If what, in the law of Scotland, be technically called a title by service and infeftment as heir of provision under the deed 1766, had been taken out to, or in the name of Captain Allan's son, which was undoubtedly competent, the succes-

1776.

ALLAN, &c. v. SINCLAIR.

sion could not possibly have been taken by any of the persons named in, or appointed by the former settlements, but must be regulated by the investiture upon the deed 1766; and the respondent could never make up a title by service to the son under the deed 1764; and as the right, title, and interest in law did really belong to the son under the deed 1766, the succession of consequence ought to be regulated by that deed, it being plain that the taking or not taking out a title in legal form to the infant son, by his guardians recently after his father's death, cannot vary or affect his father's will or intention, as declared in his last settlement, which must therefore regulate the succession to his estate.

3. The appellants do humbly maintain, that the alterations which happened in Captain Allan's circumstances, posterior to the deed 1764, by his marriage and birth of a child, independent of the other alteration above-mentioned, by the sale of his lands in the islands of Walls and Hoy, which, by deed 1764, were conveyed to the appellant Jane, and her family, do afford clear presumptive evidence, that he did not continue of the same mind he was in at executing the deed 1764; and that such alterations in his circumstances, if no other will or disposition had been made, would be sufficient to operate an implied revocation of the disposition 1764, as well in regard to lands as to personal estate. But when, besides the said alterations in his personal circumstances, he actually executed the disposition 1766, adapted to his circumstances as then altered, it is humbly submitted that the disposition of 1764 was thereby revoked and totally set aside: and though the appellant made it appear that the doctrine maintained by her in this cause was agreeable to the Roman law, as well as to the law of England, and no way repugnant to the law of Scotland, yet the Court thought proper to adhere to the Lord Ordinary's interlocutor.

4. The personal estate, of whatever it consisted, was clearly vested in the son of Captain Allan, upon his father's death, even supposing the deed of 1764 not revoked, for that estate is only given over upon failure of issue of his own body: he had issue, and that issue of necessity takes an absolute interest in the personal estate, to which his next of kin are entitled. Besides, the personal estate in Scotland, having been reserved, and intromitted with by the appellant Jane, and her sister Margaret, under their legal title as executrixes *qua* next of kin to him, decerned and confirmed by the commissary of Orkney, and the greatest part of such

personal estate, having been *bona fide* spent and consumed by them, before the challenge of their right by the respondent was brought into Court, or even before they had notice of such challenge, under such circumstances, the interlocutors, finding the respondent entitled not only to the real estate of Captain Allan, but also to the whole of his personal estate, and decreeing the appellant Jane, and her sister Margaret, to account for the same, without discount or allowance of what was *bona fide* received and spent by them, under a legal title before the commencement of the respondent's action, are plainly unjust, and, as the appellants humbly maintain, contrary to law and equity.

Pleaded for the Respondents.—As the deed 1764 contains a destination and substitution of heirs, and as the deed 1766 contains no substitution of heirs or assignees to take on failure of his own issue, those destined to take by the deed 1764, on such failure, are entitled to succeed. The two deeds were therefore executed with different views, and the one is not a revocation of the other. The first only conveys to his sisters *on failure* of heirs of *his own body*. And the latter is a mere provision to his wife and children, leaving the succession to be regulated by the deed 1764, on their failure. They are therefore not inconsistent with each other, but stand and cohere together. The fact, that there is nothing in his latter settlement expressive of any alteration or revocation of the first, is proof of his intention and understanding, that the first was to take effect on failure of his issue; and he could have no other understanding than this, because, by that very deed which gave them a right to succeed, his sisters' right was only made to emerge on failure of the issue of his body; and also because he thereby expressly declares that the same is to remain valid and effectual, though undelivered at the time of his death, unless altered or revoked by a writing under his hand.

As to the interlocutors of the Lord Ordinary, after the judgment of the Court was given, the same were in terms of the judgment, and for the purpose of applying it to the several conclusions of the action, and no reason was, or can be assigned, by the appellants for setting them aside: the whole parties to the suit before the Inferior Court, other than the appellant and her husband, satisfied by the justice of the judgment, have acquiesced therein.

After hearing counsel,

1776.

ALLAN. &c. *v.* SINCLAIR.

The SOLICITOR GENERAL, for the appellants, was proceeding in reply, to show that the proceedings had been wrong and irregular *ab initio*; that the counsel had been improperly instructed; that they had proceeded irregularly; and that the judgment of the Court of Session, having thus been led to decide upon a matter which, in all its stages, wanted that degree of formality necessary to legalize the proceedings; he contended that he saw no other remedy by which these difficulties could be removed, than by sending the case back again to the Court of Session, to have those mistakes rectified. Upon which

LORD MANSFIELD interrupted him; and said, that this was rather an extraordinary proposition, nor did he know well how to get rid of Mr. Solicitor's objection, but by either deciding the cause as it now presented itself, or the House agreeing to determine on its original jurisdiction.

SOLICITOR GENERAL insisted that the error in the proceeding was a bar to giving any decree.

LORD MANSFIELD asked, if he would choose to abide by the present judgment, or consent, in the name of his client, to pay £100 of costs on remitting the case; but the Solicitor dissenting to this proposal, his Lordship moved to affirm the interlocutors.

It was therefore

Ordered and adjudged that the said interlocutors be affirmed.

For Appellants, *Henry Dundas, Al. Wedderburn.*

For Respondents, *E. Thurlow, Ilay Campbell, Ar. Macdonald.*

Note.—Unreported in the Court of Session.—The nature of the objection to the proceedings in the Court below does not any where expressly appear, but it seems to have been, either that this action of reduction had been discussed on the merits, without first taking a term to satisfy the production—that term appearing not to have been assigned until after the case had gone to the Inner-House on the merits, and had come back to the Lord Ordinary; or the procedure of the Lord Ordinary, after that judgment was pronounced, had been irregular, in so far as new points on the merits were determined, and decree *contra non producta* was pronounced, without taking the usual remedy of going to the Inner-House before coming to the House of Lords.