and purposes, a good presentation, and must, moreover, be held in law to be the act of the patron; and, consequently, being prior in date to that in favour of the appellant, the respondent is entitled to be preferred.

After hearing counsel, it was

Ordered and adjudged that the interlocutor be affirmed.

For Appellant, *E. Thurlow, Henry Dundas.*

For Respondents, *Al. Wedderburn, Ar. Macdonald, Dav. Rae.*

[M. 4358, 10962, 12350.]

EARL of SELKIRK, - *Appellant in first Appeal;*

DUKE of HAMILTON, MARQUIS of DOUGLAS, EARL of ANGUS, &c. } *Appellant in second Appeal;*

ARCHIBALD DOUGLAS, Esq. *Respondent in 1st and 2d Appeals;*

EARL of SELKIRK, - *Respondent in second Appeal.*

House of Lords, *8th March* 1777, *14th April* 1778, *27th March* 1779.*

ENTAIL—CLAUSE OF RETURN—PROHIBITORY CLAUSE—FIAR—NEGATIVE AND POSITIVE PRESCRIPTION—SASINE—REVOCATION—CONVEYANCE—"HEIRS WHATSOEVER"—COMPETENCY OF PAROLE TO EXPLAIN THIS CLAUSE—HEIR ENTITLED TO CHALLENGE ON DEATHBED.—The ancient investiture 1630 restricted the destination of the family estates of Douglas to the heirs-male of Archibald Lord Douglas' body; "whom failing, to return to the Earl of Angus "his father, and his heirs-male and of tailzie," with prohibition to alienate or to contract debt; but no prohibition against altering the order of succession. Several deeds were executed by Marquis James Douglas, one of 9th March 1699, which confined the succession to heirs-male, and favoured the succession of the Earl of Selkirk as such. A subsequent deed, 11th March 1699, introduced heirs-female, together with one executed on 28th October 1699, and others of 1716, 1718, and 1726. He afterwards revoked these by deed 16th October 1744, and declared that his estates and honours should descend to the heirs of ancient investitures. The Duke of Douglas (the Marquis' son) afterwards executed a deed or contract of marriage, 1759, which called, after heirs-male of his own body, "*his own nearest heirs* and *assignees* "whatsoever." On deathbed he executed a deed (1761) calling the heirs whatsoever of his father, which included Lady Jane

* There are two separate appeals here:—the first, between Mr. Douglas and the Earl of Selkirk, in which the latter was appellant, and disposed of 8th March 1777; the second, between the Duke of Hamilton and Mr. Douglas and Earl of Selkirk. They are placed together, as they involve the same narrative of fact and law.

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Douglas and her son, the claimant. Held, in the Court of Session (1.) That the clause of return, and the prohibitory clause in the entail, did not prevent Marquis James, who was fiar, from gratuitously altering the order of succession. (2.) That the clause of return, and prohibitory clause, were cut off both by the negative and positive prescription, on the title and possession had thereon under the charter 1698. (3.) That the deed of nomination of 11th March 1699, and subsequent deed of 28th October 1699, is the nomination of heirs referred to in the charter 1707, and consequently the Earl of Selkirk's claim, under the deed 9th March 1699, was ineffectual, and lost by the negative prescription. (4.) That the objection to the sasine 1707, on account of the witnesses not signing each page of the deed, was not good in this case. (5.) That the possession had, on this charter and sasine, entitled Archibald Douglas, the present claimant, to the benefit of the positive prescription, against the restrictions in the contract of marriage 1630, and the deed of nomination, dated 9th May 1699. (6.) That the deed 1744 was no proper or legal settlement of the land estate, but a revocation or deed merely of a testamentary nature, incapable of conveying land estate; and that the appellant the Duke of Hamilton has no claim under it; and further, that the marginal note, consisting of the words "*and* "*female*," as it appears upon the face of the said original deed of October 1744; and the words "*after my death*" made no difference in the question. (7.) That by the legal import of the terms "*heirs and* "*assignees whatsoever*," in the Duke of Douglas' contract of marriage 1759, heirs of line were meant, and Archibald Douglas, as heir of line, was called to succeed in preference to the nearest heir-male. (8.) That parole evidence was incompetent to give a different meaning to this clause of destination. (9.) And that it was incompetent for the Duke of Hamilton or Earl of Selkirk to object deathbed to the deed 1761, executed by the Duke a few days before his death, this deed being executed in virtue of a reserved faculty, and they not being in the position of heirs entitled to challenge on that ground. Affirmed in the House of Lords.

The decision in the Douglas cause, as reported, *ante*, p. 143, established the right of Archibald Douglas, Esq. to the status of Lady Jane Douglas' son, by her marriage with Colonel Sir John Stewart; and, of consequence, his right to succeed as heir of line, or heir-female, under the destination of "heirs whatsoever," of Marquis James, his grandfather.

The Ducal title became extinct by the death of the Duke of Douglas. The other titles and honours, viz. The Marquisate of Douglas and Earldom of Angus, devolved on the Duke of Hamilton, as nearest heir-male of the family;*

* Mr. Douglas was afterwards elevated to the Peerage, as Baron Douglas of Douglas, in 1790.

and the present various questions were raised in regard to the succession to *certain* parts of the Duke of Douglas' estates.

The Duke of Hamilton claimed the estates of Angus, Dudhope, Bothwell and Wandell, in the character of heir-male general and of provision.

Archibald Douglas claimed the WHOLE in the character of heir of line, and likewise of entail and provision to the Duke of Douglas, and to James, Marquis of Douglas, the Duke's father.

The Earl of Selkirk claimed the Earldom of Angus and Dudhope, as heir of entail and provision.

The state of the titles to the honours and estates stood thus:—

William, Earl of Angus, in 1601, enjoyed the estates of Douglas and Angus, under a simple destination to heirs-male. The estates were known afterwards under the general name of Earldom of Angus.

He married twice. By his first marriage he had two sons, *Archibald* and *James*, and three daughters. By his second wife he had three sons,—William, Earl of Selkirk, afterwards Duke of Hamilton, (from whom the Duke of Hamilton and Earl of Selkirk, two of the claimants, are descended),—George, Earl of Dumbarton, and James, and several daughters.

In 1630, Archibald Lord Douglas married Lady Anne Stewart, on which occasion, *his father*, Earl William, became a party to his marriage contract, and bound himself, in consideration of the tocher given by the Lady, "to infeft and "seize by charter and sasine, *titulo oneroso*, in due and com-"petent form, the said Archibald Douglas, and the heirs-male "lawfully gotten, or to be gotten of his own body; which "failing, *to return* to the said noble Earl of Angus, his "father, and his heirs male and of tailzie contained in the "infeftment of the Earldom of Angus, and their assigns "whatsoever, under the reservations and other provisions "and restrictions aftermentioned." In this deed the Earl reserves his own liferent, and it contains a clause prohibiting the said Lord Archibald Douglas and his foresaids, "to "*sell*, *annalzie*, *wadset*, dilapidate nor put away any of the "lands and others above written, nor to contract debt, nor "do any other deed whereby the same may be evicted, by ap-"prizing or any manner of way, from his foresaids, without "the special advice and consent of the said noble William, "Earl of Angus, during his life, first had and obtained."

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But this deed contains no prohibition against altering the order of succession.

Nor did the charter and infeftment which followed thereon, contain the prohibitory clause, although the charter repeated the clause of return. It was upon this deed that the Duke of Hamilton founded his claim.

Mar. 22, 1631. In 1633, Earl William, the father, was created Marquis of

April 29, —— Douglas, upon which event, his son, Archibald Lord Douglas, took the title of the Earl of Angus. Of the latter's marriage with Lady Anne Stewart there was issue one son, *James*, afterwards Marquis James Douglas. But before he succeeded, several deeds were executed. In the first place, upon the death of Lady Anne Stewart, the Earl of Angus married a second time, and on this occasion, and *without* the consent of his father, he settled the estates of Bothwell and Wandell, part of the family estates, on the *heirs-male* of the marriage, under condition of *return* as aforesaid,—failing heirs male. Of this marriage, there was one son, *Archibald*, afterwards created Earl of Forfar.

Archibald, Earl of Angus, died before his father Marquis *William*, who observing that under the above deed of his son, the conditions of the entail, clause of *return*, and prohibitions, were violated and disregarded by him, executed a new deed, conceiving the estate as still in him in fee, whereby "he disponed the estate to the said James (his grandson) "now Earl of Angus, and only son of the first marriage of the "said Archibald, Earl of Angus, deceased, and the heirs-"male of his body; whom failing, to the heirs-male of his "father's body; whom failing, to the heirs male of the "Marquis' own body; whom failing, to return to the Mar-"quis, his heirs male and of tailzie, contained in their infeft-"ments of the Earldom of Angus, and their assigns what-"soever." There was a general reference to the conditions and provisions in the contract of marriage 1630, and the object of the deed was to place the settlement of the succession on *that deed*. On this deed the Earl James was infeft, but the prohibitory clause in the deed was not inserted.

1660. Of this date, Marquis William died, and was succeeded by the said James, who became Marquis James Douglas, and who made up his titles by special service, not under the last deed of his grandfather, but to his own father, as his heir male, on the assumption, that he was infeft in the fee of the estates by the marriage contract in 1630. His retour between the prohibitory clauses in the latter deed, in order to protect against the debts which his father had contracted.

Marquis James, out of respect to his father Lord Archibald's intentions towards the issue of his second marriage with Lady Wemyss, and agreeably with, and in implement of the obligation undertaken by his father in that contract of marriage, disponed to the Earl of Forfar, his brother consanguinean, and the heirs male of his body, whom failing, to return to the said Marquis' heirs male and successors whatsoever, the two baronies of Bothwell and Wandell, upon which he was infeft.

It was upon this, Marquis James' right, that Archibald Douglas, Esq. founded his claim, contending that he had in him the absolute fee of the whole estates, which not only entitled Marquis James to make the deeds after mentioned, but also to make the estates descend to him as heir of line, in preference to *heirs male*, there being no prohibition in the previous investitures against altering the order of succession.

Marquis James was twice married. Had issue by the first, who died unmarried. By the second he had issue, a son, Archibald, the late Duke of Douglas, and Lady Jane Douglas, who was the respondent Archibald Douglas' mother.

By his two marriage setlements with these ladies respectively, the first 1670, the second in 1692, Marquis James conveyed "to his *heirs male* of the marriage, whom failing, "to his other heirs male to be procreated of any other mar- "riage; which failing, to Archibald Earl of Forfar (his "brother) and to the heirs male of his body; which failing, "to William Duke of Hamilton, his uncle, and to any son "procreated, or to be procreated of his body, not succeeding "to the estate and Dukedom of Hamilton, whom he shall "design and nominate by a writ under his hand; and failing "of any such designation, to the second son of the said Duke "of Hamilton, and the *heirs male* of his body not succeed- "ing to the estate of Hamilton; which failing, to the third "son of the Duke, &c., whom all failing, to his own nearest "lawful heirs and assignees whatsoever." He reserves power to alter, and to tailzie. 1670 and 1692.

From the whole of these deeds, as well as the one quoted below, and every act and deed up to its date, it was contended by the Duke of Hamilton that a manifest preference was given by the investitures to the heirs male, to the exclusion of heirs female, or heirs of line; and as Archibald Douglas was only an heir female, being the son of Lady Jane Douglas, of her marriage with Sir John Stewart, he was not entitled to succeed.

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But Marquis James executed in 1699 another deed, resigning the Earldom of Angus and the other family estates (Dudhope excepted) "to his son Archibald, and the heirs "male of his body; which failing, to Archibald Earl of For- "far his brother, and the heirs male of his body; which also "failing, to Lord Basil Hamilton, second son to the deceased "Duke of Hamilton, and the heirs male of his body; which "also failing to second son, to James now Duke of Hamil- "ton, and the heirs male of his body; which failing, to the "next lawful son of James Duke of Hamilton, and the heirs "male of his body; which all failing, to his next heirs what- "soever, heritably and irredeemably." He bound himself *never* to *revoke* or *alter* the tailzie above mentioned. And it was under this title that the appellant, the Earl of Selkirk, claimed as the younger branch of the Duke of Hamilton's family here designated. The only power reserved being to grant provisions.

Mar. 9, 1699.

But after this date, a new line of succession was introduced, by admiting heirs female.

Mar. 11, 1699.

This was done by a deed, whereby he nominated and appointed, that "failing the heirs male of his own body, the "eldest heir female of the body of his son, the said Lord "Angus, and the heirs whatsoever of the body of the eldest "of the said heirs female, which failing, the eldest heir "female of his own body; which failing, the said Archibald "Earl of Forfar his brother, and the heirs male of his body; "which failing, the nearest heir male whatsoever; which "failing, his heirs or assignees whatsoever should succeed, "failing heirs male of his body, as said is, in the Earldom "of Angus and others, in the deed 1697." This deed also dispones Dudhope to the same series of heirs, and likewise the titles and honours of the family.

Under his deed the issue of Lady Jane Douglas, on failure of her brother the late Duke of Douglas without heirs male, was entitled to succeed. Whereas, the Earl of Selkirk contended, that as this deed was in fraud of the marriage contracts, executed by Marquis James in 1670 and 1692; and also of the tailie of 9th March 1699, he had power to execute the same, and are therefore invalid, and that the deed he made on 11th March 1699, in favour of heirs female was impetrated from him while in sickness.

But this deed itself was revoked by a revocation or declaration executed on 15th June 1699, which was again superseded and altered in its turn by Marquis James execut-

Oct. 28, 1699.

ing an entail, of this date. It recites the disposition to his

son Lord Angus 1697, and deed of nomination of 11th March 1699 confirms the same, and thereby "*irrevocably* nominates "and appoints, that failing heirs male of our body, the eld- "est heir female of the body of the said Lord Angus, and "the heirs whatsoever of the body of the said heir female; "which failing, *the eldest heir female of our body, and the* "*heirs whatsoever of the said eldest heir female;* which fail- "ing, Archibald Earl of Forfar, our brother, and the heirs "male of his body, which failing, to our heirs male whatso- "ever; which failing, our heirs and assignees whatsoever "shall succeed, failing heirs male of our body as said is, to "the Earl of Angus, and haill other lands contained in the "said disposition." This deed advanced the female line, or Marquis' own daughter, Lady Jane Douglas, and the heirs of her body, in the order of succession, before the Marquis' own *brother*, the Earl of Forfar; and the destination goes no further, and does not, as by the former settlements, confine the succession to heirs male, nor extend the substitution of that line beyond his own brother, to the Duke of Hamilton's family of the younger branch.

The Marquis James died of this date, leaving his son Ar- Feb. 23, 1700.
chibald, the late Duke of Douglas, and Lady Jane Douglas, his only daughter, the son being created a Duke of this date, although then a minor. He completed this title by 1703.
charter and sasine in 1707, which refer to the deed of nomi- 1707.
nation of heirs on 11th March 1699.

The Duke had no issue of his marriage. By deeds exe-
cuted in 1716, 1718, and 1726, he confirmed the settlements of his estates as above, namely, failing heirs of his body, he settled them upon his sister, Lady Jane and her heirs, and certain other substitutes. He afterwards revoked these set-
tlements by a simple deed of revocation, 16th October 1744, 1744.
declaring, in the same deed, that on failure of heirs male and female of his body, his lands and estate, and heritable offices, were to descend to, and continue with the heirs of the ancient rights and investitures of the same; and therefore he revoked and recalled all and whatsoever deeds and settlements preceding this date. The Duke of Hamilton alleged that this deed was a settlement in favour of heirs-male, and gave him a title to reduce the deed aftermen-
tioned, on the head of deathbed. Again, in October
1754, after Lady Jane's death, he executed a deed, sett- 1754.
ling his estates, failing heirs male of his own body, up-
on his next heir male, the Duke of Hamilton, whom failing, the heirs female of his body. This deed was confirmed by

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another in 1757, which expressly excluded Lady Jane Douglas' issue. On his marriage the Duke of Douglas settled the lands and estate on the "heirs male of "his marriage, whom failing, upon the heirs male of the said "Duke in any subsequent marriage; whom failing, upon "the heirs female of this present marriage, the eldest Aug. 6, 1759. "daughter or heir female always succeeding without divi- "sion, and secluding her younger sisters as heirs portioners; "whom failing, to such heirs as he hath or shall name and "appoint in the settlement of his estate, made, or to be made "by him, and failing thereof, *to his own nearest heirs and as-* July 11, 1761. "*signees whatsoever.*" On deathbed he also executed an entail "to and in favour of himself and the *heirs whatsoever* of "his body; whom failing, to the *heirs whatsoever* of the body "of the deceased James Marquis of Douglas his father; whom "failing, to Lord Douglas Hamilton, second son of the Duke "of Hamilton," &c. This, and the deed immediately before it, superseded the deeds 1754 and 1757; and on the Duke's July 21, —— death, which happened of this date, they were accordingly found in his repositories with the signatures cut away, and marked cancelled: but the deed of revocation of 6th October 1744 was found uncancelled in his repositories.

Archibald Douglas, Esq. maintained that the investitures since Marquis James' death in 1700, with one single exception, down to the Duke of Douglas' death in 1761, expressly bore the estates as conveyed, on failure of heirs male of his body, to the heirs female, or heirs whatsoever of their body; and that he, as heir of line of Marquis James, and heir female, on failure of heirs male of his body, and as heir whatsoever of Lady Jane Douglas, was entitled to the whole estates. That the only exception to this unbroken title, upon which the Duke possessed for sixty-one years, was the deed of revocation of 1744: but as this deed was a mere declaration, it could not have the effect of a deed conveying heritable estates, nor even of a settlement inferring an obligation to implement.

But the Duke of Hamilton entered more fully into the discussion. He contended, 1st, on the investitures, that by the clause of return, and prohibitory clause in the contract of marriage 1630, the heirs male of Archibald Earl of Angus' body were disabled from gratuitously preventing the return stipulated in that contract to Marquis William and his heirs male, and from altering the order of succession thereby established. Succession to land estates may, by the law of Scotland, be settled in three different ways, 1. By simple

destination; 2. Under prohibition to alter; 3. Under irritant and resolutive clauses. The last kind had not received the sanction of the law, and was hardly known in 1630. Prohibitions were the strongest guards to such settlements. Prohibitions may be either expressed or implied. Instances of the latter were tailzies for onerous causes, tailzies mutual, and tailzies containing clauses of return to the maker and his heirs. In none of these can the settlements be disappointed by gratuitous deeds. In the case of a clause of return, the granter gives his estate under that condition; the condition therefore is onerous, and may be said to be purchased at the price of the whole estate. The clause of return in the deed of 1630 could not be defeated in this case by any subsequent gratuitous deed. And its binding effect has been decisively established by the authority of lawyers and several decisions. Neither does it make any difference that William Marquis of Douglas was only settling his estate on the heir *alioqui successurus*. Lord Douglas had no right to the estate during his father's life. The Marquis could have burdened the estate to any extent, and when he disponed it to his son free during his own life, the son could not take it up but *sub forma doni*. The prohibitory clause, though it respects only the power of selling, gives additional force to the clause of return: for the Marquis would not have prohibited the heirs to sell, if he had not understood that he had restrained them from altering the order of succession, which was of much more importance to his family, and more agreeable to his views. The whole circumstances shew the purpose and intent to secure the estate to the heirs of investiture, or heirs male, in preference to heirs of line.

Sir George Mackenzie, p. 458; Dirleton, *voce* Return; M'Dowal, vol. 1, p. 592, and 595; Erskine, p. 370. Waddell *v.* Waddel, Jan. 16, 1739, *voce* Minor.

2. Prescription. Nor can the clause of return in the contract 1630 be lost by the negative prescription. No doubt, in the charters 1698 and 1707 this clause of return is not repeated. But the heirs of the contract 1630 had no occasion to challenge this, so long as no positive act or deed was done to intercept their right of succession in those events in which the return was to operate in their favour. And though it should be admitted that one or other of the nominations of 1699 was referred to in the charter 1707, and made a part of it, yet the positive prescription could never begin to run in favour of such deeds, nor the negative prescription against the titles of the heirs male to challenge them, till by some overt act, it was published and known that such deeds had been granted. Further, the Duke, by these nomina-

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tions in 1699, was laid under harder fetters than the reasonable clause of return to the heirs of his honour and dignity; so that all the right he acquired by his prescription was being tied down to one set of heirs in place of another, consequently there could be here no *adjectis dominii*, which is the definition of prescription.

3. Objection to sasine. The sasine on the deed 1707 was written bookways, and the witnesses not having signed each page, as directed by the act 1686, the Duke of Hamilton further contended that it was null, and consequently that no prescription could be founded on said charter and sasine.

4. Point of revocation. He further insisted, that the revocation 1744, which remained uncancelled and subsisting at the Duke of Douglas' death, and which proceeds on this narrative: "To the end that failing of the heirs of his own "body, his lands and estate, heritable offices and jurisdic-"tions, may descend and continue with the heirs of the ancient "rights and investitures of the same," ought to be construed as a deed of settlement; or at least, as an indication of the Duke's will with respect to the person entitled to take his succession under the penult branch of the contract of marriage 1759, viz. the heirs whom the Duke had named or should name, &c., because, when a faculty is reserved to appoint heirs, no *verba solemnia* are necessary for exercising that faculty. It is enough if the person's will be signified by any authentic deed. *Vide* Henderson, 31 January 1667, *voce* Testament; Sir John Kennedy of Culzean *v.* Arbuthnot, No. 22, p. 1681; Simpson *v.* Barclay, see Append. 11th Dec. 1751.

5th Point. Construction of "*heirs whatsoever*," and competency of proof to explain this term. Laying aside the deed 1761, as executed on deathbed, and if the succession was to be regulated by the immediate preceding deed, viz., the contract of marraige 1759, the person entitled to take the succession, under the last substitution of heirs and assignees whatsoever in said contract, was the heir of the former settlements and investitures, which his Grace intended to be the heir male, and, in aid of this construction, a condescendence of facts was given in for him, tending to shew that the Duke of Douglas had no intention, under this termination of the settlement in the contract of marriage to call his heir of line; that the person in view must have been the heir of the ancient investitures, and of the honours and dignities of the family. And of this condescendence a proof was craved. In support of this proof the Duke of Hamilton

argued, "that the term heirs whatsoever," has no fixed invariable signification in the law, but is a general and flexible term, which must be explained according to circumstances. For the most part, this term is understood to denote the heir of line, or heir general, but, from the circumstances, it may also be descriptive of particular heirs. Its signification depends upon the intention of the user, and points out those heirs, who, from the circumstances of the case, appear to have been designed to be called to the succession. The reason why the heirs of line are generally meant by the expression "heirs whatsoever," is, that heirs of line are always presumed, unless a contrary intention appears; so that still intention is the rule. Sometimes these words denote all kinds of heirs. Thus, where one obliges himself and his heirs whatsoever, he obliges all his representatives in their order, and under this general description, the creditor will be well founded in his action, not only against the heir of line, but against the heir of provision, and against his executor. In like manner, where a right is taken to one, and his heirs whatsoever, the interpretation varies according to circumstances. *In feudo novo*, it signifies heirs of conquest; *in feudo antiquo*, heirs of line; and *in mobilibus*, an executor. In an heritable bond, with a clause of infeftment, these words carry the subject to the heir of line; but if the creditor has charged his debtor with charge of horning, heirs whatsoever become executors. In bonds of corroboration, wherein principal sums and annual rents are accumulated, and both principal sums and annual rents are taken payable to heirs and assignees whatsoever, it has been found, that these words signify both the heir of line and the heir of conquest, and as to the annual rents, the executors; and thereby the same words in the same deed, carry different parts of the estate to different heirs: Marquis of Clydesdale *v.* Dundonald, Jan. 1727, No. 3. 1262; Duke of Hamilton *v.* Earl of Selkirk, 8th Jan. 1740, *voce* Heritable and Moveable; Scott *v.* Scott, Jan. 1665, *voce* Presumption; Skene, 31st July 1725, *voce* Presumption; Hay *v.* Crawford, 16th Nov. 1698, *voce* Succession; Farquharson *v.* Farquharson, No. 43. p. 2290; M'Dowal *v.* M'Dowal, Feb. 1727, *voce* Provision to Heirs and Children; Stair, *voce* Heirs, § 12; M'Dowal, v. ii. p. 330, § 27; Erskine, p. 368, § 20.

The Duke of Douglas had no intention to call his heir of line, but all along meant to favour the heir of his honours and ancient investitures, appears from the whole tenor of his settlements, and from the circumstances of his family; and

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the same can be put beyond doubt, if a proof is allowed of the condescendence. This will not be taking away written evidence by witnesses. The purpose of the proof is to discover from circumstances, the sense and intention of a phrase of doubtful signification. It is not to destroy or take away the deed, or to explain it. Parole evidence was allowed by the Roman law in such cases, L. 69. ff. de legat. 3; and by our law, nothing is more common than to allow a proof by witnesses, of facts and circumstances inferring payment, or any other matter which could not have been the subject of direct proof by witnesses, 3d Feb. 1697, Drummond observed by Fountainhall, *voce* Proof.

To this it was answered by Mr. Douglas the respondent.

1. That as the respondent was the heir of line of the Douglas family, he has favour on his side; and the presumption of law is for him, agreeable to the opinion of Lord Stair, Title Heirs, § 35, and Sir Thomas Craig, lib. 2, dieg. 16, § 12. The clause of return, in this case, is merely a substitution. The words "which failing to return" have no charm in them. The effect would have been the same, had the words been "which failing, to the granter and his heirs." And, accordingly, in the charter following on the contract, the words are "Quibus deficien. prætato prædelecto," &c. The person in whose favour a return is stipulated, takes the estate by a service, as heir to the person last infeft, is subject to his debts and deeds, and is, in every respect, a substitute. Such returns, therefore, receive their effect not from any particular form of words used in the deed, but from the nature of the deed in which they occur. When a man freely and gratuitously alienates his estate, or any part of it, to a stranger, from himself and proper heirs, as all donations are strictly to be interpreted, he is not understood to grant more than he has thought proper to give in express words, and when, in such a deed, he stipulates a return of the estate to himself, in any particular event, though conceived in the form of a simple substitution, he thereby gives away his estate *sub modo*; and it becomes an implied condition in the grant, the granter or his heirs shall not disappoint the return to the granter or his heirs, when the same opens to them in the course of succession; in the same way as in the case of mutual tailzies, or tailzies for onerous causes, though they contain no express prohibitory clause, it is implied in the transaction itself, that the succession cannot be disappointed by any gratuitous deed. But, for the same reason, and upon the same principles, where a man, under a

previous obligation, for an onerous cause, to dispone his estate, does, in implement of that obligation, grant a disposition, containing a clause of return to himself in a certain event, such clause can have no stronger effect, than a substitution in a simple destination of succession, and which will be defeasible by the disponee, or by any of the substitutes at pleasure. In the former case, the return is the *modus* or condition of the grant; and the will of the granter must be the rule. But, in the latter case, the conditions inserted in the disposition are the act of the disponee. He could have regulated the destination as he thought proper. It was a matter of favour in him to give the disponer any place in the settlement; and, therefore, he cannot be understood to have laid either himself or his heirs under any fetter. As, therefore, it is evident that the clauses of return do not receive their force or efficacy from any form of words, but must receive their construction from the nature of the deed, and the intention with which they were put in, the question is, whether in a settlement of a man's successsion upon his heirs, who are to represent him, such clause can imply any thing more than a naked substitution. When a person gives away his estate from himself and proper heir, though to a younger son, it is an alienation. The younger son is, in the eye of law, a stranger; and a substitution in favour of the granter himself and his heir, is understood to be a condition of the grant, implying a prohibition on the donee and his heirs to do no deed to defeat it. But when he settles his estate upon his own proper heirs, this is no alienation. A man's heir is, in the sense of the law, *eadem persona* with himself; he possesses the estate not upon singular titles, but as the representative of the deceased, and even though the settlement takes place in the granter's life, this is only *præceptio hereditatis.* In the case of lands holding ward, such a disposition, though without consent of the superior, did not infer recognition. As such deed, therefore, is not understood an alienation, but a settlement of the estate upon the proper heir, who, independent of the deed, would be entitled to take and hold it, the meaning of the grant will fall to be most benignly interpreted; nor will any fetters be brought upon him but such as are clearly expressed. The distinction here pointed out is clearly established by the decisions, Duke of Douglas *contra* Lockhart of Lee, No. 31, p. 4343, M. &c. Some of the authorities appealed to, on the other side, do not prove the point for which they are adduced; others respect bonds of

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provision to daughters, which are plainly of the nature of donations, and where the return must be understood as a condition of the gift. The prohibitory clause does not enter at all into the question, as it limits only the power of selling and contracting debt, and was likewise at an end by Marquis William's death.

2. Prescription. The next question was, Whether, supposing the clauses in the contract 1630 amounted to an express prohibition to alter the order of succession, the same were not cut off and at an end, both by the negative and positive prescription?

The prescription in this case is founded in the express words, both of the acts introducing the negative prescription, and in the act 1717 concerning the positive prescription. The Duke of Douglas was infeft in the estate of Angus, as far back as 1698, upon a charter under the Great Seal, proceeding upon the disposition 1697, containing no prohibition or clause of return or other limitation whatever. In like manner, the charter of infeftment 1707, referring to a nomination of Marquis James, in favour of a different series of heirs, contains no limitation or clause of return in favour of collateral heirs male. Upon these titles the Duke possessed his estate, without molestation or challange from the family of Hamilton, or any other heirs male, who would have been entitled to the succession, upon the marriage contract 1630. Such titles and possession, undisturbed for a half century, were sufficient to secure the Duke's rights under those infeftments, as an unlimited fee by prescription, and to work off the fetters of any former tailzies or limitations. This is now an established point by decisions: case of Auchlinkart, 31st Dec. 1695, *voce* Prescription, M. ; Mackerston, 10th July 1739, Ibid; Douglas of Kirkness, 3d Feb. 1753, M. 4350; Ayton *v.* Monypenny, *voce* Prescription.

3. Objection to sasine. The statute 1686, on which the objection to the sasine 1707 is founded, seems to have been altered by the act 1696; and accordingly the objection has been repelled by the Court of Session as often as it has occurred. And upon a search, it has been found that, in practice, since the year 1696, the bulk of the sasines in Scotland are only signed by the witnesses on the last page, agreeably to the provision of the statute 1696.

4th Point. Revocation 1744. Supposing this writing could be construed as a deed of settlement, it does not appear upon what ground it could be a settlement in favour of the Duke of Hamilton. From the tenor of the deed it-

self, it appears that the ancient rights and investitures are put in opposition to the deeds of settlement which the Duke had executed himself. He only revokes all deeds and settlements made by himself, declaring the same to be null and void, as if he had never granted the same; which is saying in plain words, that his succession was to go in the same way as if he himself had never executed any deed. In which view, it is plain that if this revocation is to be construed a deed of settlement, the persons entitled to claim under it are the heirs of the charter and sasine 1698, and subsequent nomination 1699 and charter 1757, consequently the respondent would be, in the event that has happened, the heir called in this deed. What further shews this, is that the reservation bears the Duke's intention to make way for his succession devolving first upon the heirs-male and female of his own body; which could only be on the deeds executed by his father, after revoking those made by himself. Yet revocation cannot be turned into a deed of settlement. The tenor of it shews that it was only calculated to pave the way for a new settlement by a revocation of the old ones. And he accordingly, in the 1754, executed a formal and solemn settlement upon the Duke of Hamilton and his heirs-male, which was superseded by the subsequent deeds. But even if it were a settlement, it could not avail the appellants, as it expressly reserves to the Duke power to make new settlements, which power was duly exercised in virtue of this reserved faculty.

5. The words "nearest heirs whatsoever," are technical words well known in law, and which have received a fixed and determined signification, denoting the heir of line, or heir general; and, though in some cases *ex præsumpta voluntate*, arising from the face of the deeds themselves, "heirs "whatsoever" may receive a different construction; yet it is clear that in a settlement of heritable succession, they can only be construed to mean the heir of line. And no parole proof can be received to impress a different construction on the deed than that which it legally bears. The deed itself is not ambiguous. It is clear and intelligible. Nor are the words heirs whatsoever ambiguous terms. They have a known legal signification; and it is totally incompetent, and would be of dangerous consequences, to allow such to be affected by the testimony of witnesses.

Several of the above points also occurred in the question between the Earl of Selkirk and Mr. Douglas, and the same arguments used. A separate plea was further insisted in by the

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Earl, upon the deed of nomination 9th March 1699, by which he claimed to succeed in right of his father, Lord Basil Hamilton, the substitute to Lord Forfar; contending that this deed was a proper and habile exercise of the Marquis' reserved faculty in his deed 1697, and his faculty so reserved being thus exercised, was so completely exhausted as to deprive him of the power of executing any subsequent deeds to his prejudice, such as were the deeds 11th March and 28th October 1699. It was answered, that the deed 9th March 1699 was a mere nomination of heirs, granted without any onerous cause, and was in its nature testamentary, and so revokable and alterable at pleasure. The judgment pronounced by the Court of Session

Dec. 9, 1762.

was: "Find, that neither the clause of return or substitution, "nor the prohibitory clause in the contract of marriage 1630, "disabled Marquis *James* from gratuitously altering the "order of succession appointed by the said contract: And "find that the Duke of Hamilton's claim, founded on the "said clause of return and prohibitory clause, is cut off by "the negative prescription, and also by the positive prescrip-"tion, upon the title of the charter and infeftment, anno "1698, and possession following thereon: Find the deed of "nomination of 11th March 1699, ratified by the subsequent "deed, dated 28th October 1699, is the nomination referred "to in the charter anno 1707; and that the Earl of Selkirk's "claim, founded on the deed executed by the Marquis on 9th "March 1699, and the deed 16th June following relative "thereto, is lost by the negative prescription; Repel the "objection to the sasine anno 1707; and find that the char-"ter and sasine 1707, and possession of the late Duke fol-"lowing thereon, entitle Archibald Douglas to the benefit "of the positive prescription against the conditions and re-"strictions contained in the contract of marriage 1630, and "the deed dated the 9th May 1699. Find that the deed of "revocation 1744 was no proper or legal settlement of the "lands and estate belonging to the late Duke of Douglas. "Find that from the legal import of the clause '*heirs and* "'*assigns whatsoever*,' in the late Duke of Douglas, his con-"tract of marriage dated in the year 1759, Archibald Dou-"glas, as heir of line, is called to succeed to the Duke in "his whole estate, including the baronies of Bothwell and "Wandell: And find, that the parole evidence offered by "the Duke of Hamilton and Earl of Selkirk, to the effect "of giving a different meaning to the said clause, is not "competent: And also find that it is not competent to the "Duke of Hamilton or Earl of Selkirk to object deathbed

" to the late Duke's disposition of 11th March 1761, as they " are not called to the succession by the last feudal investi- " ture 1707, nor by the contract of marriage 1759; there- " fore repel the reasons of reduction."

The Duke of Hamilton put in a reclaiming petition, but his Grace having died before the cause was advised, the guardians of the Duke allowed the matter in the meantime to drop.

The Earl of Selkirk also reclaimed; but, upon advising his petition and answers, the Court adhered, in so far as respected him, as follows:—" Find that the deed of nomina- July 19, 1769. " tion of the 11th March 1699, ratified by subsequent deed, " dated the 28th September 1699, is the nomination refer- " red in the charter 1707; and that the Earl of Selkirk's " claim, founded on the deed executed by the Marquis on " the 9th March 1699, and the deed of the 15th June fol- " lowing relative thereto, is lost by the negative prescrip- " tion: Found that the charter and sasine anno 1707, and " possession of the late Duke following thereon, entitles " Archibald Douglas to the benefit of the positive prescrip- " tion against the conditions and restrictions contained in " the deed dated the 9th of March 1699: Found that, from " the legal import of the clause, 'heirs and assignees what- " 'somever,' in the late Duke of Douglas, his contract of " marriage dated in the year 1759, Archibald Douglas, as " heir of line, is called to succeed to the said Duke in that part " of his estate claimed by the Earl of Selkirk; and that the " parole evidence offered by the Earl of Selkirk, to the effect " of giving a different meaning to the said clause, is not com- " petent: And also found that it is not competent to the " Earl of Selkirk to object deathbed to the late Duke his " disposition of the 11th of July 1761, as he is not called to " the succession by the last feudal investiture anno 1707, " nor by the contract of marriage anno 1759; therefore the " Lords adhered to their former interlocutor, in so far as " concerned the Earl of Selkirk, and refused the desire of " his petition."

The Earl of Selkirk, after acquiescing in these judgments for five years, entered his appeal before the House of Lords, in November 1774; and the cause having come on for hearing of this date, upon its being represented that a petition was pre- Mar. 27, 1776. sented by two of the guardians of the Duke of Hamilton, then a minor; setting forth: " That they had discovered " from the printed cases in a cause appointed to be heard " before your Lordships, wherein the Earl of Selkirk is ap- " pellant, and Archibald Douglas, Esq. and others, are re-

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" spondents, that the interest of the Duke of Hamilton, their " pupil, may, without having an opportunity of being heard, " be materially affected by the judgment in such cause; " and that they were resolved to prosecute and follow forth " the Duke's claim to the Duke of Douglas' succession, " which had been only delayed, on account of the nonage " and absence of their ward, and therefore praying for such " order as may prevent the Duke's claim from being injured." Whereupon the House of Lords ordered the petitioner's counsel to be heard at the bar, along with counsel of the Earl of Selkirk, if they thought fit. The petitioner's counsel were accordingly heard. Whereupon, as the petitioners contended that they were ready to take out brieves and to proceed with all diligence to assert their claim, the Lords ordered the consideration of this appeal to be adjourned *sine die.*

That the decision of the question in Scotland might not be delayed, an action of reduction was raised at the suit of the respondent, against the appellant, the Duke of Hamilton and his guardians, of all right or claim his Grace might have to the estates in question, and containing a conclusion declaratory of the respondent's right thereto, which was served against him upon the 18th April 1776. To this the Earl of Selkirk was cited as a party.

The Duke of Hamilton, on his part, took out brieves to be served heir of provision to the Duke of Douglas, and upon 15th May 1776, executed three different summons of reduction and declarator, one as to the estate of Angus, another as to Dudhope, and the third as to Bothwell and Wandell; in which the Earl of Selkirk and the respondent were called as defenders.

The Court of Session having conjoined all these processes,

Dec. 19, 1776. and again considered the whole cause, " Find that Archibald, " late Duke of Douglas, was unlimited fiar of his whole es- " tate in question, including the baronies of Bothwell and " Wandell. That under the clause of substitution, to his " '*heirs and assignees whatsoever,*' in his contract of marriage, " executed in the year 1759, the said Archibald Douglas, " now of Douglas, as heir of line, was called to succeed to " the said Duke in his whole estate, including the baronies " of Bothwell and Wandell as aforesaid. That the whole " parole evidence offered by the Duke of Hamilton, to the " effect of giving a different meaning to the said clause in " the contract of marriage, is neither competent, nor the con- " descendence of facts relevant, and therefore refuse to al- " low any such proof; repel the whole other defences plead-

" ed by the Duke of Hamilton against the said Archibald " Douglas' declarator; and in respect the said Archibald " Douglas is already found to have a preferable right to the " Earl of Selkirk to those estates, by final judgment in the " Court in the former process which depended betwixt these " parties, find it unnecesary to give any judgment here."*

The appellant again applied to the Court of Session, by reclaiming petition, in which he confined himself entirely to the argument upon the deed of revocation, and praying the Court, " to find that by the deed 1744, and contract of mar- " riage 1759, heirs-male whatsoever were called to the suc- " cession, before ' heirs and assignees whatsoever,' and that " therefore the petitioner had a good title to reduce the " deed 1761, in favour of Mr. Douglas, executed by the " Duke on deathbed." But, on advising, the Court adhered. Mar. 5, 1777.

The Duke of Hamilton then took an appeal to the House of Lords.

In the meantime counsel were again heard in Lord Selkirk's appeal against the interlocutors of 9th December 1762, and 19th July 1769.

In this appeal, it was *pleaded for the Earl of Selkirk*, 1st, As against the Duke of Hamilton's claim, that he was entitled to be preferred, because by the deed, 9th March 1699, James, Marquis of Douglas, had full power to substitute heirs-male to the heirs-male of his own body, under such conditions as he thought proper, which is proved by the marriage contracts 1670 and 1692, and by the power and faculty reserved in the disposition 1697, and charter 1698. Nor was he restrained from so doing by the clause of return in the contract of 1630, nor the prohibitory clause therein, and possession having followed on charter and sasine for more than 40 years, in consequence of the deed of nomination 1699; all challenge was cut off. Nor is the Duke of Hamilton entitled to plead the deed of revocation 1744, as a settlement by the late Duke of Douglas, in favour of the heirs of the " ancient rights and investitures," because it was not a settlement conveying the lands, nor even one in-

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* Note.—" At advising this cause, the Lords were unanimous; and rested their opinion chiefly upon the positive prescription creating the late Duke unlimited fiar of his whole paternal estates, (for as to his own purchases there was no question,) and on the substitution of the contract of marriage 1759, calling his heirs and assignees whatsoever to the succession. As to the first, the decision in the case of Mackerston, and other like decisions, were highly commended and approved of. And as to the second, the decision in the case of Waygateshaw, allowing parole evidence to explain the words of a settlement, in themselves sufficiently clear, was greatly condemned." Brown's Supp. " Tait," p. 467.

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ferring an obligation to convey, so as to entitle to enforce implement thereof. 2d, In regard to Archibald Douglas' claim, he maintained that the only question between him and the appellant was, which of the deeds of appointment made by Marquis James, pursuant to the powers reserved by him in his settlement of 14th September 1697, was the standing and effectual nomination of heirs of the Marquis. He insisted that the proper deed of nomination of heirs which regulated the succession, was the deed of 9th March 1699, by virtue of which, Lord Basil Hamilton, the appellant's father, (in whose right the appellant was) was called, failing heirs-male of his own body, and he was therefore entitled to succeed upon that deed, together with the deed of 15th June following (1699). It was, besides, a delivered and completed deed before the subsequent deed of nomination, 28th October 1699 was executed. That any reserved faculty which the Marquis had, was completely exhausted by this deed, so as to debar him from executing the subsequent deeds of nomination. That the deed of 11th March 1699, therefore, which introduced, for the first time, heirs-female, together with the deed of nomination of 28th October following, were not the deeds which regulated the succession; and as the deed of 9th March is referred to in the charter of 1707, and as the latter investiture refers to the tailzie of 9th March 1699, no subsequent deed could sweep it away. Besides, the whole scope and tenor of the subsequent deeds, 1699, which introduced heirs-female, go to shew that the estates were limited to heirs-male; and as these latter deeds, which introduced the female branch, were only impetrated from the Duke by fraud and imposition, the same were null and void.

Pleaded for Mr. Douglas.—That the deed of March 1699, which preferred Lord Forfar, and certain younger sons of the family of Hamilton, to his own two daughters and lineal descendants, was obtained by undue means and by fraud. That, besides, even if a fair deed, it was effectually revoked by the deeds of 11th March and 23d October 1699, and as the Marquis was an unlimited fiar, he had full power to execute such deeds, and consequently power to revoke it. But even if this deed of 9th March was such as could not be revoked by the Marquis, yet his son, the late Duke of Douglas, was not thereby debarred from altering the order of succession, as the Marquis had reserved no power to lay his son, the fiar, under any limitation. The deed of 11th March is now confirmed by the negative prescription. Besides, by the terms used in that deed, "heirs whatsoever," Lord Basil Hamilton, in whose right the Earl of Selkirk claims, was not meant. By the term "his own nearest

heirs and assignees," it was evident that his heirs general were called, and were entitled to take the succession, failing the two preceding branches, because the Duke had power so to order his succession. Further, as the deed 9th March was a mere renunciation of heirs, executed in virtue of a reserved faculty, yet as this is a mere will of a testamentary nature, it was revoked at any time, and this whether the deed was delivered or not.

That as the deed of entail 1761 was executed in virtue of a reserved faculty to nominate heirs, the plea of deathbed could not apply to that deed, as having been executed on deathbed. The Duke had reserved power in his contract of marriage to nominate and appoint heirs at any time, which power could be legitimately exercised on deathbed. Besides, such a plea was only competent to an heir *alioqui successurus*, which the appellant the Earl of Selkirk is not.

After hearing counsel, the House of Lords pronounced this judgment in the Earl of Selkirk's appeal,

Ordered and adjudged that the interlocutors complained of be affirmed.

Affirmance of Earl of Selkirk's Appeal, Mar. 8, 1777.

The Duke of Hamilton's appeal having been then heard: against the above two interlocutors of 19th Dec. 1776 and 5th March 1777 it was

Pleaded for the Appellant, the Duke of Hamilton.—As to his right under the feudal investitures of the estates; 1. It is proved, that the estate, as well as the honours of the Douglas family, have from the times of the remotest antiquity, down to the death of the late Duke of Douglas in the year 1761, been settled upon, and uniformly enjoyed by the heirs male of the family, in preference to females or heirs of line. And for the purpose of more effectually securing the succession to the heirs male, the deeds executed by William, the first Marquis of Douglas, in the years 1630 and 1655 contained a clause of return in favour of these heirs, and a *prohibitory clause*, which were framed with an anxious attention for preventing the separation of the estate from the honours. The first attempt towards a deviation from the line of male succession, was that which appears from the deeds which James, Marquis of Douglas, was prevailed upon to execute in the year 1699; but the attempt made by these deeds to call to the succession either the heirs female of this Marquis of Douglas, or his distant male relations, in preference to the heirs male of the family, was null and ineffectual.

2. The four contradictory and inconsistent deeds of nomi-

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nation of heirs executed by James Marquis of Douglas upon the 9th and 11th of March, 15th of June, and 28th of October 1699, the first and third of which are in favour of the ancestors of the respondent, the Earl of Selkirk, while the second and fourth, under which the respondent Mr. Douglas claims, are in favour of the heirs female or heirs general of the Marquis, were all and each of them, from the contents of these deeds themselves, and from the circumstances attending them, so highly objectionable, and contain such intrinsic marks of deception or material error, that the only effect due to them is that of their reciprocally counteracting, destroying, and annulling each other. When these contradictory and exceptionable deeds of the year 1699 are set aside, and when matters are thus brought to the same situation as if the Marquis had omitted altogether to make use of the power reserved to him, of substituting heirs to the heirs male of his son's body, then the destination of succession, even according to the deeds executed by this Marquis of Douglas, and particularly according to the terms of the investiture in the year 1698, stood thus: "1st. To the "Duke of Douglas, and the heirs male of his body;—next, "to the other heirs male of the Marquis' body; next, to "the Marquis' heirs male whatsoever, (which in the present case is the appellant the Duke of Hamilton); and lastly, to "the Marquis' heirs and assignees whatsoever."

3. Although the tutors who acted for the Duke of Douglas during his infancy in the year 1707, obtained a new charter from the crown, for the declared purpose of changing the feudal tenure of his estate, in which, however, they introduced a destination of succession in a very obscure and indirect manner, alluding to an undescribed nomination following upon the reserved power in the charter 1698; yet it is impossible that it could be of any avail to the respondents, because the contradictory deeds and nominations of the Marquis of Douglas in the year 1699 having been from the beginning null and inefficient, it was not in the power of these tutors, by an act of theirs, to give validity and effect to deeds which, independent of their acts, were in themselves invalid and unavailable.

4. The mode in which this was attempted to be done by those tutors, by avoiding, in the charter 1707, any mention of the date or the contents of the nomination to which they intended it should relate, or any mention of the heirs meant to be introduced into the line of succession, was such as must have deprived it of the proposed effect, supposing them to have meant, as is maintained on the part of the respondent

Mr. Douglas, to give effect to the Marquis of Douglas' nomination of 28th October 1699, and thereby to establish Lady Jane Douglas' right to the succession in preference to that of the heirs male of the family.

5. Because the procuratory of resignation executed in the year 1707, by the Duke's tutors, for and in name of their pupil, and the charter which of course followed upon it, if interpreted to contain a destination of succession, by which Lady Jane Douglas, and her issue, were called to the succession, in preference to the collateral heirs male, was in so far as relates to that declaration, and in so far as the Duke of Douglas might have been supposed to acquiesce under it, totally revoked and destroyed by the deed executed by the Duke of Douglas in October 1744, and by the revocations executed by him in the month of June 1752. The object of which deeds of the years 1744 and 1752 being to defeat Lady Jane's expectations of succession to the Douglas estate, and at the same time to send it to the heirs of the ancient investitures thereof.

6. For all these reasons, the charter 1707, under which the Duke of Douglas continued to possess his estate, must necessarily be understood and interpeted to be a continuation of the destination of succession that was contained in the charter 1698; which, as has been already explained, settled and secured the estate to the heirs male of the family immediately after the heirs male of the body of James Marquis of Douglas; and it being thus established that the charter and infeftment 1707, which was the latest modern investiture, as well as all the ancient investitures of the Douglas estate, provided and secured the right of succession to the heirs male; and it being admitted on all hands, that the latest feudal investitures of the estate of Bothwell and Wandell, to which the Duke of Douglas succeeded in the year 1716, were indisputably in favour of the *heirs male, it* necessarily follows that the appellant the Duke of Hamilton, as heir male of the family, must be entitled to all those estates; either in case the Duke of Douglas died without making any settlement at all in relation to these estates; or in case the settlements executed by him, and left in force after his death, were in favour of the heirs of the ancient investiture of the Douglas estate.

7. But further, in regard to the appellant's right under the deeds of the late Duke of Douglas, it is maintained, that the deed executed by the Duke of Douglas in 1744, which contains a revocation of all deeds and settlements made by him preceding that date, in relation to his estate, contains an express declaration of his will and pleasure with regard to the heirs he chose to succeed him in his estate;

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as the Duke in that deed has expressly declared that he executed it "to the end that on failure of himself and the "heirs male and heirs female of his own body, his lands and "estate, and heritable offices and jurisdictions, might de-"scend to and continue with the heirs of the ancient rights "and investitures of the same."

8. And even supposing the deed 1744 were informal, incomplete, or ineffectual by itself, all objections are removed by the contract of marriage 1579, whereby the Duke became obliged to provide and secure his estates on default of his own issue, to such heirs as he had named or should name and appoint in the settlements of his estate made or to be made by him. The deed 1744 was found in the Duke's repositories, along with the contract of marriage, uncancelled; it is the only legal subsisting settlement executed by him; it is a nomination and appointment of heirs to succeed to his estate; it is perfectly consonant to the contract of marriage; the conclusion is evident and necessary; it is the nomination, appointment, and settlement referred to in the contract; it is part of the contract; and of course the Duke of Hamilton, the heir of the ancient investitures, is entitled to take under the remainder or substitution in the contract, preferably to the right which the respondent Mr. Douglas claims under the last institution to heirs and assignees whatsoever. This deed, even if held as a mere revocation, could not deprive him of the estates of Bothwell and Wandell, which always stood destined to heirs male, long before the Duke succeeded, and as the revocation only referred to all the settlements the Duke of Douglas had made in favour of heirs female, it left these estates to go to the heirs-male.

9. If the right is with the appellant, the Duke of Hamilton, on the supposition that the Duke of Douglas had executed no deed of settlement of his estate posterior to the contract of marriage 1759, the deed of 11th July 1761, (the only one he did execute, and whereby he conveyed his estate, in default of his own issue, to the heirs general of his father's body), can make no difference, but must be held *pro non scripto*, because it was executed on deathbed, in circumstances where, by the established law of Scotland, a person can do nothing to injure the right of the legal successor to his estate. And it is no answer to this to say, that though the deed was executed on deathbed, yet as it was only the heir who had the immediate right to succeed, who could void the deed on that ground, that the objection did not apply, because the Duke of Hamilton had the best right to succeed as heir male under the investitures 1695 and 1707.

One general objection has been made by the respondent Mr. Douglas, to the appellant's claim under the deed 1744, that as the Duke of Douglas had declared his predilection for the respondent, his heir of line, not only by the settlement which he executed within a few days of his death, in the month of July 1761; but also by his cancelling and destroying in the year 1760 the regular settlements which he had executed in favour of the Duke of Hamilton's family in the years 1754 and 1757; therefore the claim now made by the appellant is not entitled to any degree of favourable interpretation, and that it is merely owing to accident that he the appellant has any claim at all in consequence of the deed 1744, for it is evident from the circumstances of the case, that the Duke of Douglas, at the same time that he cancelled the settlements 1754 and 1757, would have cancelled and revoked this deed 1744, if he had considered it in the light of a settlement upon the Duke of Hamilton's family. But the answer to this is, supposing it were true that the deed 1744 had escaped the fate of the settlements 1754 and 1757, merely from accident, or from ignorance or misapprehension of its nature and effect on the part of those who were principally instrumental in the cancellation of those settlements, still these extraneous circumstances could not in any respect vary the case, or alter the interpretation of the deed under which the appellant claims: for every court of justice will reckon itself bound to judge of a man's intentions by the deeds executed by him, and left subsisting uncancelled and unrevoked at the time of his death.—such deeds must be considered as containing the intentions of the deceased, not only at the time when the deed in question was executed, but also those in which he persisted to the moment of his death. But if the argument founded on accidental circumstances were entitled to any weight in the decision of the present question, the appellant might be entitled to claim the benefit of that argument fully as much as the respondent; for it must appear to be a remarkable circumstance in this cause, that the only ground upon which Mr. Douglas can have any pretence for disputing with the heir male of the family the right to all the ancient estate of Douglas, is the accidental circumstance of the words "heirs and assignees" having been thrown into a marriage contract as words of style at the close of all the substitutions in that contract; which words were not only so inserted without any directions from the Duke of Douglas himself, but it

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is clear to demonstration, that the Duke could not, at the time, have intended to insert any words that could directly or indirectly call to the succession the respondent Mr. Douglas; for it is acknowledged that in the year 1759, when this marriage contract was executed, the settlements which the Duke had made in the years 1754 and 1757 were subsisting settlements; and in the latest of these there is a clause in these words: "I Archibald Duke of "Douglas, do by these presents debar and exclude the "children, one or more, and issue of my deceased sister, "Lady Jane Douglas, from all right of succession to my "estates, means and effects whatsoever." It was not till within ten days of the Duke of Douglas' death, when worn out with disease and infirmity, and unable to resist the never ceasing importunity of those who had then got the ascendancy over his mind, that he executed, for the first time, a deed favourable to the interests of the respondent Mr. Douglas. In these respects, therefore, the appellant, the Duke of Hamilton, is entitled to say that Mr. Douglas' claim for any part of the Douglas estate derived from the words "heirs and assignees," in the contract of marriage, is owing to fortuitous circumstances, in which he has had at least as much good fortune as can be ascribed by him to the appellant on account of the existence of his claim under the deed 1744. The present contest for the ancient estate of Douglas, is the only instance that has occurred in the course of many centuries, of an heir of line disputing the right to that estate with the heir male, excepting one instance only, when King James the Sixth, as heir of line of the *Douglas* family, contested that point with Sir William Douglas, afterwards Earl of Angus, the heir male, upon which occasion judgment was given for the heir male against his Majesty, then present in Court. It has also been shown that, in the course of 700 years, from the year 1061 to the death of the late Duke of Douglas in the year 1761, there has been no instance of either the estates or honours of the Douglas family being enjoyed by a female or heir of line, though repeated instances have occurred of their being excluded from both the estates and honours by collateral heirs male. It cannot therefore be deemed an unreasonable or unfavourable pretension on the part of the appellant, that while the respondent Mr. Douglas is allowed to enjoy, without dispute, all the estates acquired by the late Duke of Douglas, to the amount of about £6000 of year-

ly rent, the appellant, now Marquis of Douglas and Earl of Angus, inheritor of all the honours of the *Douglas family*, should for himself, and the succeeding Marquises of Douglas and Earls of Angus, assert their rights and pretensions to the estate of *Douglas*, the ancient inheritance of their ancestors.

Pleaded for the respondent Mr. Douglas.—

1. The deed 1744 was never intended for, nor considered by the Duke of Douglas as a settlement of his estate, nor was it in the form of a settlement. The evident purpose and effect of it was, to recal the deeds which he had executed, in order to pave the way for new settlements; in the meantime leaving the estate, in the event of his death, to continue descendible according to the ancient rights and investitures. This is just the reverse of a settlement; for the plain sense and meaning of the transaction is, that the settlements were taken out of the way, in order that they might not bar the succession by the investitures, reserving to the Duke to make new ones if he felt inclined. No settlement was ever made in the form of a preamble to another deed, and it would lead to great injustice and arbitrary decision, were judges to go into the loose doctrine of raising up every supposed *indication of wills* which can be found in any deed of whatever nature, as a settlement fit for carrying succession. The law of Scotland is most abhorrent to every such principle; for, in the case of personal estate, it does not acknowledge nuncupative wills, but requires a formal writing; and with regard to real or heritable estate, it is a fixed rule, that the will is not sufficient, though expressed in writing, but that the transmission can only be *per verba de præsenti*, by actual conveyance, or in such obligatory form as will operate a conveyance by legal process. 2. If the appellant had a *will* in his favour, it would not be sufficient; but in fact he has none; for he begins by converting that into a *will* which is a deed of another kind. His argument is neither founded in law nor in sound criticism; for it disjoins the recital from the body of the deed, and, taking the recital as standing by itself, it transmutes into a will. This is dealing unfairly with the deed; for the recital is necessarily connected with what follows: "To the end, &c. he revokes." This is a mere declaration of what would be the consequence of his settlements being revoked; *i. e.* that the heirs of his ancient investitures might be let in. He revokes, in order to let them in. Taking it in this sense, the means are well

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suited to the end; but taking it as a settlement, and especially as a settlement upon a stranger, the conclusion does not follow from the premises. If I revoke my own private settlements, to the end that my succession may continue with the heirs of my family investitures, I speak good sense; but if I revoke them, to the end that my succession may continue with a stranger, not yet called to the succession, this is unintelligible. I must make a new settlement in his favour, before he can succeed, and then the succession will not *continue* to *descend*, *as by the investitures*, but will be entirely new-modelled. The Duke of Douglas reserved to himself a power of doing so, but he did not make a new settlement in that very deed; for the deed 1744 was nothing more nor less than a revocation. 3. But even if the revocation 1744 could be turned into a settlement, it would not be in favour of the appellant, but, failing heirs of the Duke's body, would be in favour of the respondent, as to all the estates except Bothwell and Wandell; for it is in favour of the heir called by the former rights and investitures; and it is now fixed by your Lordships' decree, that the respondent is the heir of destination in the charter and infeftment 1707 as well as by the preceding deeds of the Marquis of Douglas. The last investitures cannot be got over—ancient rights and investitures stand in opposition to the recent settlements executed by the Duke, and there can be no propriety in going back to the contract of marriage 1630, over the heads of all the intermediate rights and investitures, in order to get at the male succession; for if one century is to be overleapt, so may another, and then we get into the female succession again. 4. The settlement 1754, when the Duke thought proper to prefer collateral heirs male to his succession, introduces itself with a studied preamble in favour of the plan then formed: and although it exceeds the truth in other particulars, in framing excuses for disinheriting his heirs female, and preferring the Duke of Hamilton, founding chiefly upon the clause of return in the contract 1630, and upon the pretended rights of heirs male by the "charters, investitures, and infeftments of the estate of Angus," it is extremely remarkable that not a word is said of any previous settlement having been made upon them by the Duke himself. Mr. Archibald Stewart was the writer of the deed 1754, and it could not be unknown, either to him or the Duke, that there was a deed 1744, which Mr. Stewart himself had written, and of which the Duke had carefully

preserved duplicates. Neither could they be mistaken as to its import; they knew whether it was a revocation, or a settlement, and from their conduct it is perfectly clear, that they knew it to be no settlement. Mr. Chalmer, the successor of Mr. Stewart, knew the same thing when he corresponded with the Duke upon the subject of his settlements, and the Duke must have continued in the same belief, when he afterwards revoked and cancelled the deeds 1754 and 1757, in order to restore the succession to its former channel, leaving entire the deed 1744, because it was only a revocation 5. The reason why the appellant is so anxious to convert this revocation into a deed of settlement, is, that he may found upon it, as adopted in the penult substitution of the contract 1759, under the description of a settlement already made, naming heirs to succeed, failing those of his own body; but it would be shutting one's eyes to the light of the sun, not to see that the settlements which the Duke had then in view, as already made, were those actually subsisting upon the family of Hamilton, viz., the deeds 1754 and 1757, which being afterwards taken out of the way by the revocation 1761, there was an end to this part of the destination in the contract of marriage, as no more settlements subsisted, by which the Duke had already named heirs. But it was still in his power to execute new deeds, and unless he did so, the succession, of course, devolved upon the last substitution of "heirs and assignees whatsoever." 6. Without making the deed 1744 a part of the substitution 1759, it is obvious that the appellant has not a foot to stand upon; for if these two deeds are independent of each other, suppose them both to be settlements, the last must be the rule, as a posterior settlement always supersedes a prior one. But, even if he were to prevail in cementing them together, he would not thereby carry the succession; for he must take them as they are, with their qualities and conditions, and he must submit to the Duke's *alteration* upon *deathbed, in consequence* of his *reserved power*. This is clear as to the estates of Angus and Dudhope; for the Duke of Hamilton being called in as a stranger heir to these estates, under a condition of permitting the granter to make new settlements at any time, he cannot both approbate and reprobate; he must submit to the quality contained in the deed under which he claims. 7. This holds the more especially, when it is considered, that the writing, upon which alone the claim did arise, continued in the Duke's

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own hands, or which is the same thing, in the custody of him and his men of business, subject to his power of making away with it at any period, down to the last moment of his life; and being a latent deed in his own power, defeasible by the simple act of cancellation, no right of heirship could arise from it in favour of any person, unless he allowed it to become effectual by his death without alteration. An heir in a man's pocket is no heir at all—he has no hope of succession—he is not presumptive heir—he has only the chance of afterwards becoming an heir in case the granter persists in his intentions; but if he does not, the case is the same as if the deed had never existed. In short, the person called by such a deed, has no title or character in him which can be protected by the law of deathbed. 8. As to Bothwell and Wandell, it is true that the Duke of Hamilton was *aliunde* called to the succession by the investitures of that date; but this circumstance will not avail him in the argument, because the destination contained in these investitures was alterable, and was altered by the contract of marriage 1759, unless the Duke of Hamilton can prove himself to be called under the penult substitution in that contract; for if the penult substitution is laid aside, the *last* must necessarily be the rule, and the heir at law must prevail. The appellant is therefore reduced to the necessity of claiming under the contract of marriage, as referring to the deed 1744, and if the deed 1744 cannot be supported against the Duke's power of defeating it at any period of his life, the question is at an end. The Duke did not, in the contract of marriage, expressly name the Duke of Hamilton, but only referred to settlements made; and supposing this reference could be held as applicable to the deed 1744, yet as that deed certainly remained under the Duke's power to be destroyed at any time, so, when he altered it by the deathbed deed, there was an end altogether to this pretended settlement, as if it never existed; and, consequently, there was an end to the penult clause in the contract of marriage, so far as regards any reference to prior settlements.

April 6, 1778. The House of Lords pronounced this order:—"Counsel "having been heard, in which the Duke of Hamilton and "his Guardians are appellants, and Dunbar, Earl of Selkirk, "and Archibald Douglas of Douglas, Esq. are respondents; "the counsel for the appellant having waived all objections "to the decree appealed from, except what arose from the "deed 16th October 1744, and having been heard last Fri-

" day upon the nature and effect of the said deed; and the " cause having been adjourned for further hearing to this " day, the counsel for the appellant alleged, that last Satur- " day, upon inspecting the said original deed, they discov- " ered that the words in the marginal note were " and fe- " male," which they apprehended would be a circumstance " very important in their favour. The counsel for the re- " spondent Mr. Douglas alleged that it was a material cir- " cumstance on their side of the question; and that it had " been taken notice of in the pleadings in the cause deter- " mined 1762; but it was agreed on both sides, that no " notice had been taken of these circumstances on either " side, in the argument in this cause. Their Lordships, " therefore, without exercising any judgment as to the ma- " teriality of them, think fit to remit the cause to the Court " of Session, and to direct them to consider, whether the " marginal note, as it appears on the face of the said original " deed, makes any difference as to the question decided by " them in the cause, upon the nature and effect of the said " deed. It was ordered and adjudged that the cause be " remitted back to the Court of Session in Scotland, to con- " sider whether the marginal note, as it appears upon the " face of the said original deed of 16th October 1744, makes " any difference as to the question decided by them, in this " cause, upon the nature and effect of the said deed. And " it is further ordered that the further hearing of this ap- " peal be adjourned *sine die*, with liberty for either party to " apply to the House, when the said Court of Session shall " have given their opinion upon this reference."

In consequence of this order, the cause was again heard in the Court of Session, upon the points remitted.

Before the Court below, the Duke contended, 1st, That the occasion upon which the deed 1744 was executed, shewed that it must have been intended as a settlement, and a settlement adverse to the succession of the heirs general. It was made upon occasion of the Duke's being disgusted with his sister Lady Jane's conduct, and to prejudice her, as was repeatedly admitted by the respondent, Mr. Douglas, himself, in the earlier legal proceedings. 2d, That the appellant, the Duke of Hamilton, as heir-male of the Douglas family, is the person entitled to claim under the ancient investitures of the estates. 3d, That the deed 1744, taken either by itself, or in connection with the marriage articles 1759, is, by law, a valid and effectual set-

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tlement. The deed 1744 had all the required solemnities. It contained the will of the granter in clear and intelligible language. And it is no answer to say, that, taken by itself, it is invalid, as wanting the essential clauses necessary to convey heritable estate, because, when taken in connection with the marriage contract in 1759, the two deeds make up a complete conveyance. From the clause in the latter deed, whereby the Duke became bound to secure his estate, failing heirs of his own body, of that or any subsequent marriage, "to such heirs as the said noble Duke *hath*, or *shall name* "and *appoint*, in the settlement of his estate *made* or to *be* "*made* by him; and failing thereof, to his own nearest heirs "and assignees whatsoever." By this clause in the deed 1759, it is clear that the deed 1744, although defective in point of form, must be held as referred to in this clause of the contract 1759, and incorporated in it; and, accordingly, the destination of the contract will stand thus:—To the heirs-male of the Duke's body; remainder to the heirs-female of that marriage; remainder to the heirs named in the deed 1744, *i. e.* the heirs of the ancient rights and investitures, or heirs-male; remainder to the Duke's heirs whatsoever; and, in this view, every objection to the form of the deed 1744 is removed. 4th, That the deed 1744 was never legally altered. That it was confirmed by that in 1759, and these two prior deeds, if legally binding, could not be affected or altered by the deathbed deed of 1761. That the deed 1744 was meant by the Duke of Douglas to be a settlement of his whole estates, and the deed itself bore intrinsic evidence of this intention. It stood originally on failure of heirs-male, but afterwards was corrected by a marginal addition, so as to make it read, on failure of my heirs-male "and *female*" of my own body, my lands and estate may descend to, &c. This correction shewed that he knew they would be excluded, unless the marginal correction was made.

Dec. 19, 1778. The Court of Session, upon considering the memorials, pronounced this interlocutor, by way of report to the House of Lords, upon the reference of your Lordships; twelve of the judges being of the opinion contained in it, and two the contrary, "The Lords having resumed consideration of "the remit and order of the Lords Spiritual and Temporal in "Parliament assembled, of the 14th April 1778, &c., and "having in pursuance thereof, heard parties procurators in "their presence on the subject matter of the said remit and

" order; and having advised memorials given in for both " parties, they find the deed of revocation 1744 is not a set- " tlement of succession, and that the appellant Douglas, " Duke of Hamilton, has no claim under it: And they fur- " ther find, that the marginal note, as it appears upon the " face of said original deed of the 16th October 1744, and the " words ' after my death' in the clause of registration, make " no difference as to the question now and formerly decided " by them upon the nature and effect of said deed, and de- " cern and declare accordingly."

Upon resuming consideration of this case, and a petition moving the same in the House of Lords, setting forth that in terms of the above remit, the Court of Session had accordingly heard parties very fully upon the nature and effect of the deed of 16th October 1744; and upon the subject matter of the said remit; and had duly considered memorials for both parties thereon, and had pronounced this interlocutor: Jan. 25, 1779.

" Find that the deed of revocation 1744 is not a settlement of " succession, and that the appellant Douglas, Duke of Hamil- " ton, has no claim under it; and they further find that the " marginal note, as it appears upon the face of the said origi- " nal deed of the 16th October 1744, and the words ' after my " ' death' in the clause of registration, make no difference " as to the question now and formerly decided by them, " upon the nature and effect of said deed." The respondent prayed their Lordships " To appoint this cause to be further " heard, which they do accordingly upon Wednesday the " 17th day of March next."

On 29th March, their Lordships Mar. 27, 1779.

Ordered and adjudged that the appeal be dismissed, and the said interlocutors therein complained of be affirmed.

For EARL OF SELKIRK, *Andw. Crosbie, George Hardinge, Sir David Dalrymple, P. Murray, Alex. Wight.*

For DUKE OF HAMILTON, *Al. Wedderburn, J. Dunning, Gilb. Elliot, Alex. Lockhart, Sir John Stewart, J. Campbell, jun., Walter Stewart, Wm. Johnstone, Nairn, Sir Adam Ferguson.*

For MR. DOUGLAS, *E. Thurlow, Henry Dundas, Alex. Murray, Burnet, Montgomery, Garden, M'Queen, Rae, Ilay Campbell, R. Sinclair, John Pringle.*