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DUKE OF QUEENSBERRY, - - *Appellant;*
SIR WILLIAM DOUGLAS, Bart., - *Respondent.*

DUKE OF QUEENSBERRY *v.* SIR W. DOUGLAS.

House of Lords, 30*th April* 1783.

WILL—INTENTION.—Circumstances in which a deed declaring an intention to settle £16,000, sustained as a sufficient obligation binding on the heir.

The respondent's father having become insolvent, the late Duke of Queensberry, out of respect for the family, interposed, with the view of saving it from ruin. The respondent's father's debts almost equalled the value of his estates, and his creditors being urgent, the Duke took a conveyance of the estate, and in return advanced £30,000 to pay off these debts, having it in view to sell the estate again, and after reimbursing himself, to pay the surplus to the family.

The estate of Kelhead, which belonged to the family, was afterwards sold accordingly for £36,000.

It would appear that the Duke had repeatedly expressed his intention of giving the family in gift a large sum, or at least to bestow all the amount of his demands on the Kelhead estate, on Sir William, in order to re-establish the family, with which he was related; and this was expressed in letters as well as verbally. Mr. Macconochie offered to purchase the estate under certain conditions as to the terms of payment. When the transaction in regard to the sale of the respondent's estate came to be adjusted, the Duke then residing in England, had sent up to him a deed drawn in the Scotch form, by which he was to signify his acceptance of the offer made for the estate, and also his agreement to the terms of payment proposed, viz. £20,000 at the term there specified, and £16.000 thereafter. The deed in regard to this last sum proceeds thus: "And also for payment to me "of the further sum of £16,000 at the term of Martinmas "1782, with interest in the meantime at the rate of 4 per "cent. per ann. to the said term of payment, and with inte- "rest at 5 per cent. thereafter during the nonpayment: *And* "*as* my intention is, to settle and secure the last sum, at least "as much thereof as my claims against the estate of Kelhead "shall amount to, over and above the said sum of £20,000 "upon the said family of Kelhead, I hereby authorize and ap- "point the said George Muir to make out and settle the ac- "counts of his intromissions with the rents of the said estate

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" of Kelhead, with all convenient speed, and to ascertain the " exact sum due to me thereon; and thereafter to make out a " settlement *by me* of what shall be due to me over and above " the said sum of £20,000, to and in favour of the said Wil- " liam Douglas in liferent during all the days of his life, whom " failing, in favour of the heirs male of his body, whom fail- " ing, in favour of the heirs male of the family of Kelhead for " the time being, in fee; but declaring that the same shall be " revocable by me at pleasure; and that no part of the said " principal sum nor interest shall be affectable by the debts " or deeds of the said William Douglas, or of Sir John Dou- " glas, or of any of the subsequent heirs.

The Duke died in October of the same year 1778, without having executed the settlement referred to in this deed; and the question raised by the respondent in the present action was, Whether the above deed of 1st May 1778, did not amount to an obligation binding upon the heir of the Duke, so as to entitle him to compel implement and payment of the £16,000?

The case was reported by the Lord Ordinary (Lord Hailes) on informations, and the Court pronounced this inter-

Jan. 18, 1782. locutor: " Find, that in terms of the agreement entered into " between the late Duke of Queensberry and Mr. Macconо- " chie, as trustee for the pursuer Sir William Douglas, the " said Sir William Douglas and his children have right to " the £16,000 in question, prefer them thereto for their se- " veral rights and interests, and remit to the Lord Ordinary " to proceed accordingly."

Aug. 7, 1782. On reclaiming petition against this interlocutor the Court adhered " to the interlocutors reclaimed against, and refuse " the desire of the petition; and remit to the Lord Ordina- " ry to hear parties on the nature and terms of the condi- " tions under which the sum in question is to be settled on " the respondent and his children, and to do therein as he " shall see cause."

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The concluding part of the instrument of 1st May 1778, upon the construction whereof this question arises, is an order by the late Duke of Queensberry to his attorney to prepare a draft of a deed for settling a sum of money upon the respondent and his family, introduced by some superfluous words, importing that such was his Grace's intention at the time; but, by the law of Scot-

land, no voluntary declaration of an intention to do or to give, is to be construed or taken as the actual deed or gift. Even signed instructions to make a will, or a memorandum, specifying the person's intended disposition of his estate in the clearest terms, can have no effect, though the law regards intention, and dispenses with forms in the case of wills more than any other writings. The legal succession cannot be barred but by words denoting a clear, immediate, direct and complete alteration of its course. Intentions to be executed at a future time, however declared, are presumed to have been changed, if the thing be not actually done—a presumption which no circumstances can redargue. Thus the late Earl of Morton, having by his will appropriated a sum for his younger son, but having occasion afterwards to change the security, while that transaction was going forward, signified repeatedly, and in the clearest terms, by letters to his agent, that the money was to be destined and vested in that son's name, and ordered that deed to be prepared accordingly. Such a deed was sent him, and actually signed, but it was tested informally, and it was held that it could not prejudice the heir-at-law's rights, and was void as against him.

Douglas *v.* E. of Morton. Jan. 21, 1773.

The doctrine that a deed or actual gift was necessary, prevailed both in the Court of Session and the House of Lords in the case of Duke of Hamilton *v.* Douglas, *vide ante*, p. 449. The Duke had executed a revocation of certain deeds, *to the end that his estates might descend to his heirs male:* there could be no doubt as to his intention; but it was held ineffective, as not containing any dispositive words. The rule of equity, that what one undertakes to do, shall be held as actually done, has no relation to this case, for there was no undertaking, promise, or obligation on the part of the Duke of Queensberry to settle the money in question upon the respondent and family.

Pleaded for the Respondent.—The avowed and invariable object of the late Duke of Queensberry, in accepting of a trust conveyance to the estate of Kelhead, and taking it under his own management, was the re-establishment of that family. It was for some time known that there would be no reversion from the estate itself to effect this object, and therefore the only hope was through the Duke's bounty. Accordingly, the Duke determined to settle upon them the sum in question. The deed of 1st May 1778 has declared this to be his will in terms so explicit, that no ingenuity

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can darken or illustrate them. Besides, every consideration of reason or justice urge the fulfilling of the Duke's will. Were it to be ineffectual, not only would his Grace's great object for a series of years before his death be defeated, but the tendency of his interference in the affairs of this family would be to accelerate its ruin—the ruin of a family nearly related to the Duke. While it is quite obvious that a declaration of the Duke's will was all that was necessary in this case. It is admitted that the Duke held the estate of Kelhead in trust for the family, and the deed in question may be considered as the terms on which the Duke surrendered that trust. For this no formal deed or technical language was necessary. There was no heritable estate in question; and the Duke not only declared his will in terms the most explicit, but he did so in a solemn and formal writing, regularly executed with all the forms required by the law of Scotland to give legal effect to any deed. It was written on stamped paper, signed before witnesses, and duly tested in terms of law. This declaration of the Duke's will was not only contained in a solemn and authentic deed, but it was part of a mutual contract between his Grace and Mr. Macconochie, acting as trustee for the respondent, and contains mutual obligations on the parties. A part of that contract was the re-establishment of the family in the manner set forth, and after being delivered to and accepted by Mr. Macconochie, it could not be resiled from; and the settlement of £16,000 being a part of that deed, is thereof obligatory on the Duke's heir. Besides, in the disposition thereafter granted to Mr. Macconochie, the Duke agreed to warrant the conveyance against a probable eviction of the heir as to part of the estate, by stipulating that the heir of Douglas challenging should forfeit the £16,000.

After hearing counsel, it was
Ordered and adjudged that the interlocutor be affirmed.

For Appellant, *L. Kenyon, Alex. Murray, Ja. Wallace, Ilay Campbell.*

For Respondent, *Henry Dundas, Robert Blair.*

Not reported in Court of Session.