[28*th February* 1839.]

(Appeal from Court of Session, Scotland.)

Sir CHARLES HALKETT, Appellant.[1]—*Sir William Follett* (No. 3.)
—*H. Robertson.*

The TRUSTEES of the late WILLIAM NISBET and others, Respondents.—*Attorney General* (*Campbell*)—*Solicitor General* (*Rutherfurd.*)

Service — Entail — Teinds (Augmentation of Stipend) — Warrandice.—A. being infeft in an entailed estate, and becoming afterwards entitled to another entailed estate, devolved the first to his brother under burden of debts, for which it was afterwards brought to sale by his brother's apparent heir. Neither entail contained the statutory fetters against alienation and contracting debt. Upon A.'s death, B. his son was served lawful and nearest heir of line, taillie, and provision to him, in special, in the estate last above mentioned, and was infeft therein accordingly: Held (affirming the judgment of the Court of Session) that B. was liable in an obligation of warrandice against future augmentations granted by an ancestor of A. in the first-mentioned estate.

Practice.—Additional printed cases having been lodged by permission of the Court, without objection, containing a ground of action not originally founded on: Per L. C. A Court of Appeal will not readily listen to an objection of this kind, not made in the Court below, if it appears from the whole case presented to said Court, that no injustice has been done.

IN the year 1682 John Wedderburn, then of Gosford, sold to Sir John Nisbet of Dirleton the lands, lordship,

2D DIVISION.

Lord Ordinary Medwyn.

[1] 13 S, D & B. 497.

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and barony of Innerwick, and others, with the parsonage and vicarage teinds of the same, being a part of the parsonage and vicarage teinds of the parish kirk and parish of Innerwick, which of old were part of the patrimony of the abbey of Paisley, and thereafter pertained to James Earl of Abercorn as part and pertinent of the lordship of Paisley, together with the advocation, donation, and right of patronage of the said parish kirk and parish of Innerwick.

The disposition contains this clause: "And in regard "the foresaid teinds are disponed by me for the "same price that I got for the stock, therefore I bind "and oblige me and my foresaids to warrant the "foresaid teinds, parsonage, and vicarage of the lands "and baronies above disponed from all future augmen-"tations of ministers stipends or schoolmasters sala-"ries, and from all annuities of teinds payable to his "Majesty or his donators," &c. &c.

John Wedderburn (afterwards Sir John Wedderburn) was succeeded by his next brother Peter, afterwards Sir Peter Wedderburn, Bart., who married Dame Janet Halkett of Pitfirrane.

In September 1706 Sir Peter and Dame Janet Halkett executed mutual taillies of their respective estates of Gosford and Pitfirrane in the form of procuratories of resignation.

The entail of Lady Halkett's estate of Pitfirrane proceeded on the narrative, that it was granted "for "certain onerous causes, good respects, and con-"siderations me moving," &c.; and therefore Lady Halkett with consent of her husband, granted procuratory for resigning her estate of Pitfirrane for new infeftment to be granted to herself and husband, and

longest liver of them, in life-rent, and to Peter Wedderburn their eldest son in fee, and to the heirs male of his body; which failing, to the daughters or heirs female of his body successive without division; which failing, to their second son and the other substitutes therein specified, under provisions, and conditions,—first, of assuming and bearing the surname, title, and arms of Halkett of Pitfirrane; secondly, that the estates of Pitfirrane and Gosford should be kept separate and disjoined, or if they should coincide in one heir, provision was made for their separation in the succeeding heirs; and, thirdly, a prohibition to alter or infringe the taillie, and an irritancy in case of contravention.

By the other entail, executed in 1706, Sir Peter Wedderburn, then called Sir Peter Halkett, granted procuratory for resigning his estate of Gosford in favour of himself in life-rent, and Charles Wedderburn his second son in fee, and the heirs male of his body; whom failing, to the daughters or heirs female of his body without division; whom failing, to James Wedderburn his third lawful son, and the other substitutes therein specified. The clauses in this taillie are the same as in the taillie of Pitfirrane, mutatis mutandis.

There was a provision in the taillie of Gosford for the separation of the two estates in the following terms:—

" In case failing of the said Peter Wedderburn and the " heirs of his body, the said estates shall happen to " coincide and be united in the person of the said " Charles Wedderburn, then and in that case it shall " be in the option and election of the said Charles " either to keep, hold, or retain his right and posses- " sion of the said estates of Gosford, in which case he shall be holden and obliged to denude himself, omni habili

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modo, of the said estate of Pitfirrane," &c. in favour of the said "James Wedderburn and the other heirs of "taillie and provision substitute to him, with and under "the haill conditions and provisions contained in the "foresaid taillie thereof; or otherwise it shall be leisom "to the said Charles to enter to the right and posses-"sion of the said estate of Pitfirrane and others con-"tained in the foresaid tailzie thereof, in which case "he shall be holden and obliged to denude himself of "the said estate of Gosford and others above written "contained in this present tailzie, haill rents, &c., "from the time of the succession foresaid, omni habili "modo, in favour of the said James Wedderburn," &c. &c.

And providing that the "said Charles shall make his "election of the said estate of Pitfirrane within the "space above appointed, then and in that case it shall "not be leisom nor lawful to him to burden and affect "the said estate of Gosford, or his succession therein, "with any debts or deeds to be contracted or done by "him the said Charles after the right of succession "to the said estate of Pitfirrane happens to devolve, "viz., after the decease of the said Peter Wedderburn, "the said James being always bound and obliged to "free the said Charles and to disburden the estate of "Pitfirrane of any debts or deeds contracted or done "by the said Charles during his remaining in the right "of the estate of Gosford before the right of succession "to the estate of Pitfirrane be devolved on him as "said is," &c.

The statutory fetters against alienation and contracting debt were not inserted in either of these entails.

In 1725 Sir Peter executed a disposition in favour

of Charles, proceeding on the narrative that he had thought fit, for the better preservation of their name and family, to settle Gosford on Charles, and the heirs of his body, in manner mentioned in the bond of taillie, and that he had disponed to Peter, his eldest son, his furniture, &c. at Pitfirrane, with the rents of Pitfirrane due at his death, and various other sums, for the payment of certain debts specified in the disposition; and that it was just and reasonable that he should also secure Charles in the goods, &c. after assigned "for "the better enabling him to pay my debts, wherewith "I have burdened him in manner after specified;" he therefore assigns to Charles and his heirs several bonds and sums, among which there was a wadset for 62,000 merks over Dirleton, besides all debts and sums of money "which pertained to Sir P. Wedderburn, my father, "or John Wedderburn, my brother; it being specially "provided and declared, that the said Charles Wedder-"burn and his foresaids, by their acceptation hereof, "are and shall be burdened with, and bound and "obliged to pay, my haill just and lawful debts that "shall happen to be resting at the time of my decease, "excepting allenarly in so far as the said Peter Halkett, "my eldest son, stands bound to pay by a bond of "relief granted by him to me."

Dame Janet Halkett was succeeded in 1713 by her eldest son Peter, afterwards Sir Peter, who married Lady Emilia Stuart, daughter of the Earl of Moray. A charter and infeftment were expede upon the procuratory in the entail of Pitfirrane, in favour of the said Sir Peter Wedderburn; and thereafter Sir Peter and Lady Emilia executed a post-nuptial contract of marriage, whereby he granted procuratory for surren-

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dering the estate of Pitfirrane "to himself and his "heirs male already procreated or to be procreated "betwixt him and the said Lady Emilia Stuart and "the heirs whatsoever of their bodies; whom failing, "to the heirs male of the said Peter Halkett, &c.; "whom failing, to the other heirs of tailzie appointed "to succeed by the above tailzie of Pitfirrane, 1706."

Of this marriage there were three sons; viz., first Peter, second Francis, third James. Peter the eldest son being fatuous, his father, Sir Peter, executed in 1751 a new entail of his estate upon Francis his second son, and the same series of heirs, and under the same conditions as in the taillie of 1706.

Sir Peter the father was killed in America in the year 1755; and upon his death his second son then Major Francis Halkett expede a charter and sasine of the estate of Pitfirrane in his favour, in virtue of the procuratory contained in the entail of 1751, and continued to possess the estate till his death in 1760 without issue. His youngest brother James died two years before him, in 1758, also without issue. Thus all the family of Sir Peter Halkett and Lady Emilia Stuart became extinct, except the eldest son, Sir Peter, who was fatuous.

Charles the second son of Sir Peter Wedderburn and Dame Janet Halkett his wife, succeeded to Gosford, and had two sons, John the father of the appellant, and Henry father of Lady Cumming.

Charles Wedderburn died in 1754, without having made up titles. A charter was then expede upon the procuratory in the entail of Gosford in favour of the appellant's father John Wedderburn, afterwards Sir John Halkett, on which charter he was infeft in Gosford in

1754. In the following year he sold part of the estate for £8854, and he retained possession of the remainder till the death of his cousin Major Francis Halkett of Pitfirrane in 1760. He then claimed Pitfirrane as heir under the second entail, but his succession was suspended by a decree of reduction of that entail at the instance of Sir Peter Halkett, who was cognosced, and his tutor at law.

The decree of reduction having been reversed upon appeal, and Sir Peter having died about the same period, John Wedderburn made up titles to Pitfirrane, and executed a deed of devolution of Gosford in favour of Henry, and he also conveyed to him the above mentioned wadset over Dirleton for 62,000 merks, but subject to a reserved security over said estate of Gosford, and wadset for relief of the debts attachable thereto.

Henry Wedderburn died in 1777, when the estate of Gosford was brought to judicial sale by his apparent heir Lady Cumming. John Wedderburn, then Sir John Halket, ranked upon the estate for the debts above mentioned, and he also obtained a reconveyance of the wadset. The balance of the price of Gosford, after satisfying these debts, with interest, was carried off by a creditor of Henry.

In 1793 Sir John died, having executed a conveyance to trustees for payment of debts of his whole estate and effects, with the exception of Pitfirrane and furniture, &c. pertaining thereto; and in the following year the appellant expede a special service, and was retoured as "legitimus et propinquior hæres lineæ, talliæ, et "provisionis speciali dicto demortuo Domino Joanni "Halkett de Pitfirrane, baronetto, patri suo, in totis et

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" integris dictis terris et baronia de Pitfirrane," &c., and soon afterwards he was infeft in said estate on a precept from chancery proceeding on the said retour, and his infeftment duly recorded.

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The lands of Innerwick continued in the Nisbet family without any augmentation of the stipend until the year 1790, in which year, and subsequently in 1807 and in 1813, augmentations were granted, and a portion of each was finally localled upon the lands of Innerwick in 1825. The excess of stipend having been paid by Mr. Nisbet during his life, and after his death by his daughter and heiress the respondent Mrs. Ferguson, her trustees, along with himself and husband, in 1832, raised an action of relief against the appellant under the warrandice contained in the disposition of 1682. The Lord Ordinary having made avizandum to the Lords of the Second Division, their Lordships, after allowing additional Cases, (in which there was urged for the first time without objection the reconveyance of the wadset in connexion with the deed of 1751 as a further ground of representation,) pronounced the following judgment on the 20th February 1835:—

Judgment of Court, 20th Feb. 1835.

" Decern in terms of the libel as to the pursuer's (the
" respondent's) right of relief, and remit to the Lord
" Ordinary to ascertain the amount of the sums due,
" and to proceed as his Lordship shall deem just, and
" decern; but find no expenses hitherto incurred due
" to either party."

The appellant appealed.

Appellants Argument.

Appellant.—The defence chiefly relied upon by the appellant is, that he does not represent the granter of the

disposition in 1682, so as to be liable in the obligation contained in it.[1] The appellant in no shape represents John Wedderburn, the granter of the obligation in 1682: he has inherited none of his property; he has made up no title as his heir; and therefore it is impossible on this ground to maintain the present claim against the appellant.

The facts are not disputed; and it is not alleged that the appellant, either at the present period or at any time, inherited or enjoyed any part of the property belonging to the Wedderburns of Gosford.

An important distinction exists between the present case and every other which has hitherto occurred in Scotland relative to relief from augmentations. There have been several such cases, in which severe and unexpected claims have been sustained under ancient obligations; as, for example, in the case of the trustees of the Earl of Aberdeen against the Trustees of Lord Belhaven[2], where a claim of relief was sustained in 1821 on an obligation of warrandice dated ninety years before; and in the case of Justice against Callender[3], where effect was given to a similar claim at the distance of eighty years. But in these and all the other cases of the same kind which have occurred, there was property of the original obligants extant, which fell justly to be subjected for his debts and obligations, if these were onerous and effectual in law.

The present is entirely a different case; the appellant neither is nor ever was in possession of any property of

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[1] Horne v. Sinclair, 23d Jan. 1835, 13 S., D., & B., 296.

[2] Shaw's Rep., 22d Nov. 1821.

[3] Shaw's Rep., 1st Dec. 1826.

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the original obligant; on the contrary, the whole of his property was carried off by legal attachments of the creditors of the heir last in possession of Gosford, upwards of fifty-two years prior to the institution of the present suit.

It has been urged by the respondents that, whatever may be the succession or inheritance of the appellant, at least his father Sir John Halkett intromitted with property and funds of the Wedderburns to a large amount; and it was further assumed that the appellant represents his father universally, and so is liable to the same claims that his father would have been.

But the appellant denies expressly that he represents his father universally, and no sufficient evidence has been produced or referred to in order to fix such representation on the appellant; nor have the respondents attempted to shew that the appellant on his father's death took up any property from him (Sir John), other than the lands and estate of Pitfirrane, which was destined to and tailzied upon the heir male of the family, under the deeds of tailzie and provision before specified. On the contrary, the appellant stated on the record that his father Sir John Halkett, prior to his death, "conveyed all his property, heritable and "moveable, to trustees, excepting always 'the entailed "'estate of Pitfirrane, thereby expressly reserved from "'the trust' for payment of the various debts, annui- "ties, and provisions which he became bound to pay. "He also excepted the household furniture, bed and "table linen, books and plate, and farm stocking of "Pitfirrane, which he conveyed to the defender; but "this was under burden of his paying such balance of

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" his debts and annuities as the trust funds and estate " might be insufficient to answer; and that balance " far more than absorbed the moveables assigned to " the defender."

The respondents' plea is of a technical and very rigid nature; viz., that he was served and retoured " ut " legitimus et propinquior hæres lineæ, talliæ, et pro- " visionis in speciali, dicto demortuo Domino Joanni " Halkett de Pitfirrane, baronetto, patri suo, in totis " et integris dictis terris et baronia de Pitfirrane," &c. It has been argued, that the terms of the retour fix indelibly on the appellant the character of universal heir and representative of his father Sir John Halkett. But if the whole scope of the instrument be carefully taken into view in connexion with the subject matter to which it refers, it will be seen that the appellant was not served as a universal representative, his service was a special service in the lands of Pitfirrane only, connecting him with the tailzie executed by his great grandmother Dame Janet Halkett, and with no other right; it never was intended to have, and in point of fact has not, any other effect than simply to vest a title in the appellant as heir of tailzie and provision in the estate of his great grandmother Dame Janet Halkett.

The question then is this, Whether a special service as heir of line, tailzie, and provision to an ancestor in certain lands descending to heirs of tailzie where the ancestor left no property descendible to heirs of line, and where, even if he had left such property, the heir would have been bound to have made it over to trustees of the ancestor, subjected the heir so served universally to the ancestor's debts? The appellant conceives that

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such severe responsibility is opposed to every principle and authority in the law of Scotland.[1]

Respondents.—John Wedderburn, the granter of this warrandice, was succeeded by his younger brother Sir Peter Wedderburn, who in the year 1688 made up titles to him by service as his heir of line, thus unquestionably representing him in all his debts and obligations.

As heir of provision in Gosford, Charles would assuredly have been liable, supposing the warrandice to have been brought into operation during his possession, at least to the value of that estate; and, as grantee under a general disposition with the express burden of debts, his liability must have been held to extend to all the obligations of his father; for, whatever may be the case of an ordinary simple disposition, omnium bonorum, the insertion of a clause burdening generally with all debts must, if it be allowed any force at all, be effectual to create an universal liability. It is, in fact, a contract between the parties, whereby the receiver of the right, in consideration of the benefits which he obtains, engages to become responsible for all the granter's debts, without limitation or restriction of any kind. It is in this manner and in this sense that the respondents maintain that Charles Wedderburn was his father's general representative, and liable for his debts and obligations.

If the liability was once clearly in Charles, by what-

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[1] Maitland of Pitrichie, 1757, Mor. 11166; Blount v. Nicholson, 26th Feb. 1783, Fac. Col. 9. 159. No. 100., Mor. 9731; Lord Fife v. General Duff, March 1828, 6 S. & D. 698.

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ever title or on whatever grounds established, it is obvious that in order to transmit it against the appellant, no more can be required than to shew that he stands related, by service as heir of line, taillie, and provision, to a party who was Charles's universal representative.

Now the intermediate person who formed this link of connexion was Sir John Halkett the father of the appellant, and who was Charles's eldest son, and made up titles by a general service to him as heir of line, taillie, and provision, thereby at once establishing in his person a right to the unexecuted procuratory in the settlement of 1706, upon which he obtained a charter and was infeft, and at the same time fixing upon himself the character of his father's universal representative. In this way he not only became liable, as Charles's heir of line, for all the debts which he had contracted, but, by taking directly as heir of provision of his grandfather Sir Peter under the investiture of Gosford, he incurred a clear representation of that party also, and a consequent liability for all his debts and obligations; and thus, when he succeeded to Pitfirrane he united in himself every ground of representation, whether derived through the line of the eldest or of the second son of Sir Peter and Lady Halkett. He died in the year 1793, and was succeeded by his son Sir Charles, the present appellant, who made up titles to him by special service as nearest and lawful heir of line, taillie, and provision; and the only question that remains in this case is, whether Sir Charles thereby represents his father to the effect of being liable in this obligation. He took Pitfirrane as his father's heir of taillie and provision, a character in

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which it seems impossible to deny that he represents him, and is answerable for all his debts and obligations, from whatever source derived, at least to the value of the succession. There is no proposition more absolutely fixed in the law of Scotland, than that an heir of provision under any settlement short of a strict entail, is liable to that extent. But it is not contended that the settlement under which Pitfirrane has descended to the defender is at all of the nature of a strict entail; it is, in reality, a simple destination, not containing any of the usual prohibitions against selling and contracting debt; and this is most material in a question of representation. Sir John Halkett's creditors might have carried off the estate by diligence, or he might have charged it with his debts, or sold the whole of it, without risk of challenge from any of the substitutes; and shall it be said that, because, instead of allowing it to be affected in any of these ways, he has chosen to transmit it entire to his son, it is no longer to be liable in that son's person for any of the father's debts or obligations? The debts of the ancestor, so long as they remain undischarged, must be burdens upon his successors and the estate which they inherit; and it matters not in what way these debts may have originated, — whether in the act and deed of the last predecessor himself, or of some remote party, a stranger, possibly, in blood to him, but with whom he is connected by a progress of titles through intermediate heirs; and the only point to be looked to in a question with a creditor is, whether it was truly an obligation on the predecessor or no. If that point be fixed, the liability which attached to him is transferred to his heir, and the estate, if not protected by the sanctions

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of a strict entail, must be answerable for the debt to the last farthing of its value. Upon these facts, and under these circumstances, the respondents contend, that, as heir of line and intromitter with the moveable estate, Sir Charles represents his father universally; and even as heir of provision in the estate of Pitfirrane he is liable to the full value of the succession.[1]

Ld. Chancellor's Speech.

Lord Chancellor.—My Lords, the only point in this case which requires particular observation is, whether the appellant Sir Charles Halkett is liable to the obligation of warrandice entered into by Sir John Wedderburn in 1688; for of the respondent's title under it there does not appear to be any doubt, notwithstanding the defences which were set up against their claim.

Sir Peter Wedderburn, the brother of Sir John, was served heir to him as heir of line; he therefore, by the law of Scotland, was clearly liable to all the obligations of Sir John, and amongst others to the warrandice in question without regard to the value of the property he inherited. Sir Peter settled the estate of Gosford upon his second son Charles; another estate, Pitfirrane, the property of his wife, being settled upon his eldest son. He also settled other property, including a wadset right to 62,000 merks Scots, which had remained unpaid of the purchase money upon the sale of the estate as to which the warrandice had been given, upon his son Charles, upon condition of Charles taking upon himself the payment of all his debts. Charles, upon Sir Peter's

[1] Stair, b. i. tit. 7. sec. 13.; Gordon v. Maitland of Pitrichie, 1st Dec. 1757, Fac. Col. 2. 101. No. 63., Mor. 11161; Blount v. Nicolson, 26th Feb. 1783, Fac. Col. 9. 159. No. 100., Mor. 9731.

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death, entered into possession of and enjoyed the Gosford estate and the other property, including the wadset, till his death, but did not make up titles to the estate. Upon his death in 1754 his son John made up his title by a general service to him as nearest heir male of line, of taillie, and provision, and succeeded to the estate of Gosford and the other property settled, whereby he became heir of provision to his grandfather the entailer, and universal representative of his father Charles. He afterwards sold part of the estate to Lord Elibank for 8,855*l.*

At a subsequent period, namely in 1770, Sir John was infeft in the lands of Pitfirrane, which had been enjoyed by the sons of the eldest son of Sir Peter Wedderburn. Both estates being thus united in Sir John Wedderburn, he surrendered Gosford to his younger brother Henry, and assigned to him the wadset for 62,000 merks. He took upon himself all the obligations to which Sir John was subject, as had been provided for in the original settlement of Gosford. Upon the subsequent bankruptcy of Henry 17,205*l.* was claimed and allowed to Sir John on that account, and the wadset was again assigned to him in part satisfaction of that sum.

This state of circumstances seems to leave no doubt of the liability of Sir John the defender's father to the obligation in question. Upon his death the defender was served heir of line, taillie, and provision to his father, and succeeded to Pitfirrane and the other property, which imposed upon him the liability to all the obligations to which his father had been subject, and amongst them to the charge in question, although the event which has occasioned the demand had not then

occurred. The estate of Pitfirrane, to which the defender succeeded, though subject to a destination, was not secured against a sale or the contracting of debts by the party entitled.

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Ld. Chancellor's Speech.

It was contended that the judges below were not justified in founding their judgment upon these circumstances, inasmuch as it was not properly put in issue that Charles the son of Sir Peter had taken upon himself his father's debts, or that Sir John, upon the sale of Gosford, received part of the proceeds, and that the deed of the 27th of October 1725 was not in issue. This objection, it was said, was not relied upon below; and it appears, in the case laid before this House on the part of the appellant, that, upon the production of the documents relied upon to prove these facts, permission was given to both parties to add to these cases, and the appellants accordingly prepared an additional case with reference to those documents, in which the objection to their admissibility upon the ground of their not being in issue does not appear. A Court of Appeal will not readily listen to an objection of this kind which was not made in the Court below, and in a case in which it appears that no injustice has been done, both parties having had and having availed themselves of the opportunity of discussing the facts alleged not to be regularly in issue.

It is true the ground upon which the defendant's liability is now contended for differs materially from the grounds insisted upon by the pleas in law, inasmuch as the documents produced in the progress of the cause, and which form the substance of the additional cases, shew that Charles the son of Sir Peter, when he took the

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Gosford estate, took also the wadset and other property, and by the acceptation thereof he and his heirs and assigns whatsoever became burdened with and bound and obliged to pay all the debts whatsoever of Sir Peter which might happen to be existing at the time of his decease; for such are the words of the disposition and assignation of 27th October 1725. The debts and obligations of Sir Peter, of which the warrandice in question is one, became the debts and obligations of Charles, and Sir John the son of Charles was his heir, and made up his titles as heir of line and provision to him, and the defender was son and heir to his father, and made up his title as heir of line to him. So that if the obligations in question became the debt of Charles, the liability of John his son and heir, and the defender his son and heir so claiming titulo universali, seems sufficiently clear.

It is however to be observed that these additional facts are no more than additional evidence to prove the representation upon which the pursuer founded his original claim, and that if they are to be considered as raising a new ground of claim, they were by leave of the Court made the subject of additional cases on each side; and although the fact of their not being in issue is stated in the additional case of the appellants, no objection appears to have been raised or relied upon below upon that ground, but each party having exhausted their observations and arguments upon those additional documents, the judgment of the Court was taken upon the whole case. Under these circumstances I cannot suppose that your Lordships will think it right to give any weight to this objection; but, if

satisfied of the liability of the defender upon the whole of the case, that your Lordships will think it right to affirm the interlocutor appealed against, with costs.

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutor, so far as therein complained of, be and the same is hereby affirmed, with costs.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL, Solicitors.

[18*th March* 1839.]

(Appeal from the Court of Session, Scotland.)

(No. 4.) JAMES FARQUHAR GORDON and others, Trustees and Executors of the deceased DAVID CLYNE, Appellants.—*Tinney—James Russell.*

DAVID CLYNE (poor), Respondent.[1]—*A. Haldane.*

Death-bed.—A party, in the event of his predecease, made a conveyance to his parents and the survivor, whom failing, to any persons whom he might name, whom failing, any person they might name. His parents predeceased him, leaving a trust conveyance of their whole property in favour of trustees named. He thereafter executed a deed on death-bed, conveying his whole estate to trustees named, declaring the purposes, and revoking all former settlements so far as they interfered therewith.—Held (affirming the judgment of the Court of Session) that the first deed, neither singly, nor taken in connection with the second deed, was effectual to disinherit the heir, and that the death-bed deed could not be coupled with the first, or with the first and second deeds, so as to exclude a challenge of it by the heir.

Practice.—In a reduction the defender pleaded certain pleas, which he designated preliminary. A record was ordered to be made up on these pleas, upon which the defender reclaimed, when the Court (on the ground that the defences pleaded as preliminary were the only defences pleadable in causâ upon which it might be necessary to make up a record) adhered. The record was then prepared, and the defender repeated his former pleas, but without again designating them as preliminary. The Lord Ordinary "repelled the dilatory defences,"

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[1] 15 D., B., & M., 911.

reserving a question arising out of these pleas to be discussed with the defences on the merits, and found expenses due. On reclaiming, the Court adhered. Held, that an appeal against the judgment was competent without leave of the Court.

Execution Pending Appeal.—Incompetent to appeal against a warrant of the Court of Session for interim execution and payment of costs, so as to stay execution of such order as has been thereon made.

Pauper—Costs.—No objection to a warrant for interim execution that a printed copy of the petition has not been laid before each of the Judges, nor is it an objection to such warrant for payment of costs, that the party obtaining the warrant has sued in formâ pauperis, and that his own agent alone signed the bond of caution.

Pauper.—A respondent suing in formâ pauperis, allowed to be heard on presenting his printed cases at the bar, but costs refused him on that account, although there were otherwise sufficient grounds for awarding them in his favour.

2D DIVISION.

Lord Ordinary Cockburn.

ON the 22d of August 1815 the late Mr. David Clyne, S. S. C., executed a disposition whereby, in the event of his predeceasing his parents without leaving lawful heirs of his body, he gave, &c. &c., to and in favour of William Clyne his father and Margaret Swanson his mother, "during their mutual lives, and the longest "liver of them two; and after the death of the longest "liver, to and in favour of any person or persons, or "for such uses, ends, and purposes, as I (Mr. Clyne) "may name and appoint by any deed I may execute "at any time of my life, and even on death-bed; and "in case of my dying without having executed such "deed, then to and in favour of such person or persons "as shall be named and appointed in any deed that "shall be executed (according to law or agreement

CLYNE'S TRUSTEES v. CLYNE.

18th Mar. 1839.

Statement.

" between themselves in such deed) by my said " parents, and for the same uses, ends, and purposes, " with the same powers, and under the same provisions " and declarations; which deed of theirs, when so " executed, I do hereby declare shall form a part " hereof, and that this my deed shall be as effectual " for conveying my whole means and estate, and " regulating the succession to the same, in the same " way and manner as shall be appointed by the said " deed of my parents as if their said deed were already " executed and herein copied verbatim, any law or " practice to the contrary notwithstanding." The deed then proceeds to convey his whole estate, heritable and moveable, real and personal, wherever situated, and of whatever description, which then belonged, or which might belong to him at the time of his death; and he farther appointed them (his parents) and the foresaid persons to be named by himself, and failing such nomination, the persons to be named by his parents in their deed, his sole executors and intromitters; and containing other usual clauses, with a reservation of full power, at any time of his life, to revoke, alter, or innovate, in whole or in part, as he might think fit, and in so far as not altered or revoked should be valid and effectual, and dispensing with the delivery.

On the 13th September 1815 Mr. Clyne's father and mother executed a mutual trust disposition and settlement, by which, on the narrative of the love and affection which they had to each other, and to David Clyne, S. S. C., their only surviving child, and for other causes and considerations, they with consent severally give, grant, assign, dispone, convey, and make over to and in favour of each other during their lifetime, and to the