uninterrupted opinion of all lawyers, and thus the judges have determined.

Judgement, 23 Feb. 1718-19. After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the two interlocutors therein complained of be affirmed.*

For Appellant, *Ja. Stuart, Tho. Lutwyche, Hum. Henchman.*
For Respondents, *Rob. Raymond, Will. Hamilton.*

Vide the case Home *v.* Home, No. 15. of this Collection. One remarkable difference between that case and the present is, that here the son in the inventory, (which nevertheless is said to have had no effect for his benefit) gave up lands which were not settled upon him by his father's contract of marriage. In the case of Home *v.* Home, there were no lands to succeed to but those contained in the contract of marriage, and settled upon the heir.

Case 51. Fountainhall, 28 Feb. 1710. Forbes, 23 June 1713.

William Scott of Raeburn, an Infant, by his Guardians, - - - - *Appellant*;
Walter Scott of Harden, alias Highchester, an Infant by his Guardians, - - *Respondent.*

9th *March* 1718-19.

Tailzie—A person receives right to an estate from his father, and the son afterwards executes a procuratory of resignation for an entail of the estate, with prohibitory and irritant clauses, to himself in life-rent and to his father in fee, and failing of him to the heirs male to be procreated of his own body, and failing them to other heirs of entail: This procuratory was registered in the register of Tailzies, and inhibition used against the grantor, but no charter or sasine taken thereon: It is found, that there being no antecedent onerous cause for making this entail, especially in favour of heirs to be begotten and born, and seeing it remained in the terms of a personal right, without being perfected by charter or sasine, it was revocable by the maker thereof, with consent of his father the first institute.

SIR William Scott, the elder, of Harden, in the county of Berwick, had two sons, William and Robert, and two brothers, Gideon Scott of Highchester, (the respondent's great grandfather,) and Walter Scott of Raeburn, his youngest brother, (the appellant's great grandfather).

In March 1673, upon the marriage of William the son (who was then also Sir William) with Jane Nisbet, daughter of Sir John Nisbet of Dirleton, Sir William the elder bound himself to settle the lands of Harden and others on Sir William the son, and the heirs male of his body of that marriage, whom failing to the heirs male of his body of any other marriage, whom failing to his heirs and assignees whatsoever. In 1674, a deed was executed by Sir William the father in terms of the said obligation, upon which infeftment was taken by Sir William the son.

In

In May 1686 Sir William the ſon executed a procuratory of reſignation for a new entail of his eſtate; at the date of executing this procuratory, Sir William the ſon was under the diſpleaſure of the Government, and neither he nor his brother Robert had any iſſue; and the Earl of Tarras, ſon of Gideon Scott of Highcheſter, (who would have ſucceeded to the eſtate, failing iſſue of Sir William the ſon and his brother Robert,) ſtood forfeited for treaſon. By the ſaid procuratory of reſignation Sir William the ſon "for the well and ſtanding of his houſe and family, and "continuance thereof in the ſurname of Scott, and for certain "good and onerous conſiderations, bound and obliged himſelf, "his heirs and ſucceſſors, to make due and lawful reſignation of "his eſtate in the hands of the ſuperior in favour and for new "infeftments thereof to be given to Sir William Scott the elder "of Harden, his father; whom failing to the heirs male to be "procreated by himſelf of his then preſent or any future mar-"riage; whom failing to Robert Scott his brother, and the "heirs male of his body; whom failing to William Scott of "Raeburn," (the appellant's grandfather,) and the heirs male of his body; whom failing to the other heirs of entail therein mentioned, "the deſcendants of Sir Gideon Scott of Highcheſter "deceaſed, both male and female, being always upon great and "weighty conſiderations excluded and debarred from the ſucceſ-"ſion in all events." By this deed Sir William Scott the younger reſerved to himſelf his own life-rent of the whole entailed lands, and power to provide for a ſecond lady by a jointure not exceeding 220*l.* 4*s.* 5*d.* ſterling per annum, and the children of ſuch ſecond marriage with portions not exceeding 1666*l.* 13*s.* 6*d.* ſterling. It contains a proviſo, that it ſhould not be lawful to the ſaid Sir William Scott the father, and the other heirs of entail, to alter the ſame or the order of ſucceſſion, and in caſe any of them ſhould attempt it, the deed ſhould be void, and the perſon ſo doing ſhould forfeit his right, and the next in ſubſtitution ſhould be at liberty to enter; and it alſo contains a clauſe, that the ſame ſhould be valid, though it ſhould not be delivered by the grantor in his lifetime, but ſhould be found amongſt his writings after his death.

No charter or infeftment followed upon this procuratory; but, in the abſence of Sir William Scott, the younger, from the kingdom, his father in January 1691, ſent the ſaid procuratory to Mr. Menzies, his agent, (who had drawn the ſame,) with a miſſive letter, deſiring him to regiſter it with all convenience and ſecurity, for delays might prove dangerous. And Mr. Menzies, in July ſame year, preſented a petition to the Lords of Seſſion for Sir William Scott the elder, and the other members of the entail, praying that the ſame might be regiſtered in the regiſter of entails appointed by act of parliament, which was accordingly ordered and done. Sir William Scott the elder, Robert Scott his ſecond ſon, and William Scott of Raeburn (the appellant's grandfather,) the three perſons firſt named in the entail, uſed inhibition alſo in 1691 againſt Sir William Scott the younger, to prevent his

making any deed in prejudice of the entail. Theſe ſteps were taken without the privity of the grantor, when he was out of the kingdom, and ſeveral years before his return.

After his return to Scotland, in 1698, the father and ſon executed a deed, reciting, That though Sir William Scott the younger had for particular reaſons at the time ſubſcribed the deed of 1686, yet the ſame was left to be further conſidered by him, and no ways to be made uſe of but when and as he ſhould think fit; nevertheleſs that it was in his abſence and without his order put into the public regiſter, he being at that time out of the kingdom, and ſince both he and his father were reſolved to diſcharge and make void the ſaid deed, to the end that their ſucceſſion might either run in the tenor of the former infeftments of their eſtate, or be ordered by a new ſettlement of the ſaid Sir William the ſon; therefore they expreſsly declared the ſaid deed of 1686 to be void and null, and that the ſucceſſion to the eſtate ſhould by no means be regulated thereby: and the ſaid Sir William the father did thereby repone and reſtore the ſaid Sir William the ſon in his full right and place of the premiſes as before the making of the ſaid tailzie, which he for himſelf and all the other heirs of entail perpetually renounced in his favour.

In 1699 Sir William, father and ſon, raiſed an action of reduction improbation before the Court of Seſſion againſt the heirs of entail for reducing the deed of 1686; in this action the defenders did not appear, and decree of certification was obtained, declaring that the deed ſo reduced if produced in any Court was to be looked upon as falſe and forged, and to bear no faith.

For ſome time no new ſettlement of the eſtate was made; but, in 1705, Sir William the ſon executed a new entail of the eſtate, proceeding upon the recital, that "Whereas I have a plentiful eſtate "conveyed to me from my progenitors of the ſurname of Scott, "which I am reſolved to tranſmit and continue in the ſaid name "of Scott, for the laſting well and ſtanding of my family in the "ſaid name in all time coming;" therefore he ſettled his eſtate to himſelf and the heirs male of his body, whom failing to his brother Robert and the heirs male of his body, whom failing to the reſpondent (grandſon of the ſaid Earl of Tarras, who was ſon of Gideon Scott, the ſaid Sir William's eldeſt uncle) and the heirs male of his body, whom failing to Walter Scott of Raeburn (the appellant's father) and the heirs male of his body, whom failing to certain other heirs therein mentioned: reſerving a power to Sir William the grantor to alter this entail. The principal difference between this and the deed of 1686, was, that the deſcendants of the Earl of Tarras, who were totally excluded in the former deed, were by this latter deed called to the ſucceſſion in preference to the Raeburn branch.

Sir William Scott the father, Sir William the ſon, and his brother Robert, having died without iſſue male, the appellant was ſerved heir to his grandfather William of Raeburn, the perſon next called to the ſucceſſion by the deed of 1686; and thereupon an action was brought by him and his guardians beforethe Court

of Seſſion againſt the reſpondent and his guardians, for reducing and voiding the deed of revocation executed by Sir William Scott elder and younger, and the ſaid decreet of certification, and alſo for avoiding the ſecond entail. In this action the appellants inſiſted that the deed of revocation was void, becauſe neither father nor ſon apart nor jointly had power to recal the former entail, for Sir William the younger was diveſted of the fee, and only remained life-renter, and as ſuch could have no heir or ſucceſſor, and conſequently could not alter the ſucceſſion; neither could Sir William the elder do it, becauſe he had not an abſolute but only a conditional right by the proviſoes of the entail; which among others were, that the deſcendants of Sir Gideon Scott (the reſpondent's great grandfather) ſhould be excluded from the ſucceſſion in all events; and that he ſhould not alter the courſe of ſucceſſion in prejudice of the heirs of entail, and if he ſhould do in the contrary that ſuch deed ſhould be void; and they inſiſted, that the ſaid decree whereby the entail, under which the appellant claims, was declared to have been falſe and forged, was null, the action implying a contradiction. For the purſuers in that action, in their deed of revocation, and in their libel, ſet forth that the entail was made by them and recorded as the law directs, and yet in the ſame libel they conclude that the ſame deed ſhould be decreed to have been falſe and forged.

In this action the reſpondent appeared and made defences: and the cauſe being heard before the Lord Ordinary, his lordſhip, on the 18th of June 1712, "Repelled the allegation made for "the appellant againſt the decree of certification, and found the "ſaid decree ſufficient to exclude his title in that action;" and to this interlocutor his lordſhip adhered upon the 17th of February 1713. The appellant reclaimed to the whole Court, and their lordſhips, upon the 23d of June 1713, "Found that there being "no antecedent onerous cauſe made or done to Sir William Scott "the younger, of Harden, for making the former entail of his "eſtate, eſpecially in favour of heirs to be begotten and born, "and ſeeing the ſaid entail did remain in the terms of a perſonal "right without being perfected by charter and ſaſine, it was re-"vocable by Sir William the maker thereof, with conſent of Sir "William his father, the firſt inſtitute, and is actually revoked "by them conform to the revocation in proceſs; and therefore "found no need to adviſe the relevancy of the reaſons of reduc-"tion proponed againſt the ſaid decree, but aſſoilzied from the "reduction of the ſecond entail and the ſaid decree of certification "ſimpliciter."

The appeal was brought from "ſeveral interlocutory ſentences "and decrees of the Lords of Seſſion of the 18th of June 1712, "the 17th of February and 23d of June 1713." Entered, 1 Dec. 1718.

Heads of the Appellant's Argument.

Sir William Scott the younger having diveſted himſelf of his eſtate without reſerving any power to alter, and the entail being

delivered to Sir William the father, as inſtitute in the entail, and he having got the ſame recorded by authority of the Lords of Seſſion, and ſerved Sir William the younger with inhibition to prevent his making any deed in prejudice to the firſt entail, he could not thereafter recall or void the ſame at his pleaſure.

The maker of a gratuitous or voluntary deed, whereby the grantor is diveſted of the fee has no power by the law of Scotland to alter it at pleaſure, though no charter or infeftment followed thereupon. 1ſt, Any perſon may diveſt or oblige himſelf as firmly by a gratuitous deed, as by a deed for valuable conſiderations. 2dly, In this caſe the entail recites to have been executed for certain good weighty conſiderations and onerous cauſes, ſo that it was not gratuitous; for by the law of Scotland, an inſtrument or deed ſolemnly executed, containing any confeſſion or declaration concerning matters of fact, proves fully againſt the ſubſcriber of ſuch inſtrument, which muſt the rather hold in this caſe; eſpecially ſeeing, 3dly, The deed was made in favour of the father, from whom originally the eſtate flowed, and the other heirs of entail in their order, becauſe their eſtates were entailed to the ſame line of ſucceſſion that the eſtate of Harden was: So that the firſt entail is to be conſidered as a real and onerous ſettlement made betwixt the father and ſon, whereby they mutually agree to diveſt themſelves of the power of altering, for preſerving the eſtate in the line choſen by them. But, 4thly, By the courſe of deciſions in Scotland mutual entails have always been admitted as onerous cauſes for each other: as, for inſtance, if Sir William Scott the elder and younger on the one part had ſettled the eſtate of Harden in default of iſſue male of both their bodies to the appellant's grandfather, and at the ſame time he had ſettled his eſtate of Raeburn in default of iſſue male of his own body upon the ſaid Sir William Scott, and their iſſue male, theſe mutual entails would have been valuable conſiderations for each other, and could not have been altered by either party, and this was in effect the caſe. For the appellant's grandfather, in 1681, five years before Sir William Scott's entail was made, ſettled his eſtate upon his own heirs male, whereby Sir William Scott and his heirs male, would have ſucceeded in the courſe of ſucceſſion before the grantor's heirs of line; and Sir William Scott elder and younger are ſubſcribing witneſſes to this deed of ſettlement: and that this was a conſideration in making the firſt entail, does plainly appear from theſe words, which are part of the deed of entail, viz. "Be- "cauſe he" (the ſaid Sir William Scott, jun.) "knew their eſtates "were entailed upon their heirs male, and that they would not "alter theſe entails and courſe of ſucceſſion therein ſet down," as in reality they have not done. But whether the firſt entail was gratuitous or not, it is equal in this caſe; for it is not denied that the ſecond entail under which the reſpondent claims was gratuitous, and by the act of parliament 1621, c. 18. may be reduced at the inſtance of the heirs of the firſt entail, who, with reſpect to the heirs of the ſecond entail, are lawful creditors. Though

1621, c. 18.

no

no reſignation or charter and infeftment followed upon the firſt entail, yet Sir William Scott having reſerved no power to alter the entail, as is uſual in all caſes, when ſuch reſerved power is intended, was bound the moment he executed the deed of entail; and the making reſignation, and taking out charter and infeftment thereon, concerned only the heirs of entail, but not the maker thereof, he having given a power to any perſon they ſhould appoint, to ſurrender the eſtate, when the heirs of entail pleaſed; and though the ſaid Sir William the younger had objected againſt ſuch ſurrender, yet he could not have ſtopped it, and therefore the obligation muſt remain binding upon him and his heirs, who had no intereſt in the fee ſimple of the eſtate, except the foreſaid reſervations in favour of a ſecond lady and children, which exclude all other reſervations. For *exceptio firmat regulam in caſibus non exceptis.*

By the following words of the act of parliament 1685, c. 22. viz. "The original tailzie once produced before the Lords of "Seſſion judicially, who are hereby ordained to interpoſe their "authority thereto, and that a record be made in a particular re- "giſter-book, to be kept for that effect, wherein ſhall be recorded "the names of the maker of the tailzie, &c. and being ſo inſert, "his majeſty, with advice and conſent foreſaid, declares the "ſame to be real and effectual, not only againſt the contraveners "and their heirs, but alſo againſt their creditors, compryſers, "adjudgers, and other ſingular ſucceſſors whatſoever, whether "by legal or conventional titles;" it is plain the entail is a real and effectual right after the ſame is exhibited before the Lords of Seſſion and recorded as above. 1685, c. 22.

It is plain Sir William Scott the elder had the entail in his poſſeſſion, as appears from his letter to Mr. Menzies for recording the ſame, and Mr. Menzies's receipt for 3*l.* 8*s.* ſterling as the fees thereof; and the Scots law preſumes it was a delivered deed when it appeared out of the hands of the grantor; neither did Sir William the younger make any objection againſt the recording of the ſaid entail for ſeven years thereafter, nor did he ever ſay that his father had indirectly got up the ſaid deed of entail; and there is no doubt, if he had not delivered it to his father, he would have demanded his oath upon the way and manner how he got the ſame.

The appellant ſupports his caſe by the deciſion of the Court of Seſſion, affirmed by the Houſe of Lords, in the caſe of Sir John Shaw *v.* Dame Margaret Houſton and Sir John Houſton her huſband, 10 March 1717-18: the words of the decree of the Court of Seſſion are, that the irritances and clauſes not to alter were binding upon Sir John Shaw, who made the entail then in queſtion, even ſuppoſing Sir John Houſton's lady to have been a gratuitous ſubſtitute or heir of entail. That caſe of Shaw and Houſton was very much ſtronger than the preſent, for Sir John Shaw kept the entail in his own hands, and never perfected the ſame by charter and ſaſine. 2dly, That entail was made in favour of himſelf, as the firſt inſtitute with a power to alter; and the obligations or irri- No. 46 of this Collection.

tancies were only to commence upon the heirs of entail agreeable to the ſtatute 1685. 3dly, Albeit Sir John Shaw's entail was made in a marriage-ſettlement, yet that did not alter the caſe; that ſettlement was no further onerous than in ſo far as concerned the wife and children of that marriage; the entail, in ſo far as it extended further, was a choice gratuitous and free; and yet the Court of Seſſion in the one caſe decreed, that the two Sir William Scotts joining together could alter that entail, and in the other caſe, that Sir John Shaw was bound by the clauſes irritant not to alter.

Heads of the Reſpondent's Argument.

The deed in queſtion was not delivered, but on the contrary was intended not to be delivered, there being a clauſe in the deed diſpenſing with the not delivery in caſe of his death. It is true it was recorded, but that was done without either the order or privity of the grantor: for theſe are the words in the deed of revocation. "It was" (meaning this deed) "in my abſence and "without my order put into the public regiſter, I being at that "time abroad out of the kingdom." This therefore can never be looked upon as a deed delivered by Sir William.

Though it contain no power of revocation, that is of no conſequence, it being unneceſſary, becauſe by the law of Scotland, it is alterable of its own nature, being conſidered only as an intention or deſtination of ſucceſſion to take place after his death, in caſe he ſhould not make any alteration therein. This is the undoubted law of Scotland, and ſo it is laid down by the greateſt lawyers of that country when writing on this ſubject: and the judges as often as any queſtion of that kind has come before them, have ſo determined it, particularly in the caſe of Lord Lindores, where they found that a voluntary ſettlement, though under the ſtricteſt proviſions not to alter, was ſtill alterable at pleaſure by the firſt maker. So that clauſes of revocation are not of any uſe in deeds of this kind.

Lord Lindores's caſe. Dalrymple, 8 Dec. 1714. Bruce, 18 Feb. 1715.

Though Sir William the maker, obliged himſelf to reſign the eſtate, and make himſelf only liferenter; yet that reſignation or ſettlement never was made, and the deed continued only in the nature of a declaration of what was then intended; which, as has been ſaid, continued alterable at pleaſure.

As to the caſe of Shaw and Houſton; 1ſt, Sir John Shaw, who made the ſettlement, was expreſsly tied up from making any alteration; but in the caſe in queſtion, there is no ſuch reſtriction upon Sir William the ſon; theſe reſtrictions are only put upon Sir William the father, and the heirs ſubſtituted to him. Beſides, though the deed of 1686 be called an obligation, yet the ſaid Sir William the ſon was not bound to any other perſon; ſo that if it be to be called an agreement, it is only with himſelf, which ſhews it to be only in the nature of a will. 2d, In the caſe of Shaw and Houſton the ſettlement was by marriage-contract, and was a ſolemn agreement betwixt different parties, publickly, and with the greateſt ſolemnity executed and duly regiſtered with conſent

of

of all parties, and was made upon an onerous cauſe or valuable conſideration. For Sir John Shaw the father, who was a party to that agreement, had quitted his liferent of the lands thereby ſettled, and had made ſeveral other proviſions in view and conſideration of that very ſettlement; but in the ſettlement in queſtion there was no valuable conſideration, no contract with different parties, but a *deed poll* * containing a deſtination of ſucceſſion not intended to be delivered, and made purely to guard the eſtate againſt the dreaded forfeiture. 3d, In the caſe of Shaw there was a power to the father and ſon to alter the ſame together, which ſhewed that the father had an intereſt in the covenant, but here was no other party, nor any other intereſt than that of the maker of the tailzie.

By the law of Scotland, no man can diſpoſe of any eſtate of inheritance by will, but muſt do it by deed; ſhould then the appellant's doctrine take place, that a man who once by deed obliges himſelf to make any voluntary ſettlement of his eſtate muſt purſue that and cannot alter it, the conſequence would be, that no man could make any voluntary ſettlement but once in his life; which is attended with conſequences too obvious ever to be received.

The deed whereby the appellant inſiſts, that the reſpondent was excluded, was only made upon a certain view, on conſideration of the circumſtances of the family, as they then ſtood, which afterwards were altered; and that deed was not a contract or ſettlement, but only an intention to make one, which was never made, and the grantor was conſequently at liberty to alter it in favour of the reſpondent his heir at law.

After hearing counſel, *It is ordered and adjudged, that the ſaid petition and appeal be diſmiſſed, and that the ſaid ſeveral interlocutors therein complained of be affirmed.* Judgment, March 9. 1718-19.

For Appellant, *David Dalrymple. Thomas Lutwyche.*
For Reſpondent, *Rob. Raymond. Jo. Pringle. Wil. Hamilton.*

Vide the caſe Muirhead *v.* Muirhead, No. 2. of this collection; where a diſpoſition was found to be revocable even where infeftment had been taken thereon.

* I retain this technical Engliſh expreſſion, merely to mention what perhaps is not generally known in Scotland, that in England there are two ſorts of deeds, deeds *poll*, and deeds *indented:* a deed *poll* is a deed conſiſting of one part only; a deed *indented* conſiſts of more parts than one, and the parties to it interchangeably execute the ſeveral parts or copies. The latter is called an *indenture* becauſe the top of it is indented or cut in an undulating ſhape; whereas a deed *poll* is cut ſtraight or *polled*.