Case 129. Kaims, 26 Jan. 1726. Nos. 70, 71, 72, 73, 74.

James Marquis of Clydesdale, an Infant of tender Years, by James Duke of Hamilton and Brandon his Father - - - *Appellants*;
Thomas Earl of Dundonald - - - *Respondent*.

Et e contra.

2d *April* 1726.

Minor.—A minor, though with consent of his curators, could not gratuitously alter the settlements of his estate.

Death-bed.—Neither could he gratuitously alter them on death-bed.

Tailzie.—A tailzie executed in 1716, not registered in the Register of Tailzies, sustained in 1725 as a title on which to serve heir of provision.

Return.—A clause of return to the grantor of a deed after failure of heirs male, did not disable the heir in possession gratuitously to alter in favour of his daughters.

Destination simple.—Nor did a simple destination to heirs male in several deeds hinder this.

Prescription.—*Base Infeftment.*—*Hæreditas Jacens.*—A base infeftment is taken by a son on dispositions from his father in 1653 and 1656. In 1680 the father, after the son's death, resigns these lands by a procuratory of resignation, and takes new charters from the crown, under which the lands are held till 1725, without making up titles under the son's base infeftment. The objection of prescription is repelled. An objection that though the base infeftment contained lands in two counties it was only registered in one, is repelled. And it is found that these lands being still in *hæreditate jacente* of the son, a title to them could only be made up by a service to him.

Apparent Heir.—One passing by an apparent heir three years in possession not liable to implement such apparent heir's gratuitous bond of tailzie.

Construction.—A deed is executed, by which the grantor obliges himself and his heirs male, and of tailzie, provision, &c. upon failure of heirs male of his own body, and *heirs male of the descendants of his body*, to resign the same for infeftments to his daughters and the heirs male of their bodies without division, &c.; in a competition between the heir male of the body of his eldest daughter, and a person claiming as heir male of the descendants of his body, the former is preferred.

BY a contract, in September 1653, executed previous to the marriage of Wm. Cochran, eldest son of Wm. Lord Cochran, (afterwards created Earl of Dundonald,) with Lady Catherine Kennedy, daughter of the Earl of Cassillis, the said Wm. Lord Cochran obliged himself and his heirs to settle the lands of Ochiltree and Cochran, and others in the counties of Ayr and Renfrew, upon William the son, and the heirs male of the marriage; whom failing, to return to the said Lord Cochran himself, and his heirs and assignees for ever; reserving to himself his liferent of the whole lands, except the house of Ochiltree, and an annuity of 5000*l.* Scots for the son's maintenance during his father's life; and also reserving a power to redeem all the said estate, except the lands of Ochiltree and Trabrough, upon payment of ten merks Scots. This deed contained a procuratory of resignation, and a precept of sasine; and after the marriage took place, the son took an infeftment on the precept of sasine, but took no step in virtue of the procuratory of resignation in procuring

curing new titles from the Crown the superior. Part of the lands in which the son was infeft lay in the county of Ayr, and part in the county of Renfrew; but his sasine was only registered in Ayrshire.

In January 1656, a contract was executed between William Lord Cochran and William his son, whereby the son reconveyed to the father the lands of Ochiltree and Trabrough, in consideration whereof the father conveyed the lordship of Paisley, and other lands, to the son, and the heirs male of his said marriage, whom failing, to return to the father, reserving the father's life-rent, with the exception of some lands particularly mentioned, and with the exception of an annuity of 1000*l.* Scots, issuing out of part of the lands for the son's maintenance during his father's life. This contract also contained a procuratory of resignation and precept of sasine; but as Lord Cochran was himself only infeft base under the person from whom he acquired these lands, he obliged himself to procure his own infeftment to be confirmed by the Crown the superior. The son however only took a base infeftment under the precept of sasine.

A contract was afterwards executed, in 1657, betwixt the father and son, whereby Lord Cochran renounced the right of redemption reserved to him in the settlement 1653, and in consideration thereof the son obliged himself to give security for 20,000*l.* Scots to any of his father's creditors, or to grant bond for that sum at his father's option: and accordingly in December 1658 he granted a bond to his father for that sum.

The father afterwards in 1659 and 1662 obtained charters from the Crown of the lands contained in the before mentioned conveyances to his son, to him and his heirs and assignees whatsoever; upon which charters he was duly infeft. And he afterwards acquired other lands, the titles of which were taken to himself in life-rent, and to William his son, and the heirs male of his body in fee; but as to part of these purchases, particularly the lands of Kirkmichael and Dalmuir, the father reserved a power to sell and dispose thereof, and to charge the same with debts at his pleasure without consent of the son. In those new purchased lands, William the son took infeftment under the dispositions thereof.

In 1669, William Lord Cochran was created Earl of Dundonald; and in 1679 William the son, then William Lord Cochran, died in the lifetime of his father, leaving issue John his eldest son and heir, and several other children. This John, now John Lord Cochran, made up no title to his father by service.

In July 1680, the Earl of Dundonald executed a procuratory of resignation as well of the lands which he possessed in fee simple, as of the lands in which his late son was infeft, proceeding upon the recital that "he was absolute proprietor of the whole lands, "and had power reserved to him, so far as concerned any of the "lands, wherein the deceased William Lord Cochran his son was "infeft in fee, to dispone the same at any time in his life to any

 "person

"person he pleafed, without confent of his fon:" He thereby obliged himfelf to refign the whole lands "to and in favours of "John Lord Cochran his grandfon, and the heirs male of his "body; whom failing, to William Cochran his fecond grandfon, "(father of the prefent Earl) and the heirs male of his body; "whom failing, to his 3d and 4th grandfons fucceffively, and the "heirs male of their bodies; whom failing, to the Earl himfelf, "and the heirs male of his body; whom failing, to his heirs "whomfoever, referving his own life-rent of the faid eftate." It contains alfo this claufe, "that the faid John Lord Cochran "the grandfon, and the other heirs therein fubftituted, fhould be "obliged to pay and perform all the debts and deeds of the Earl, "and that he fhould have power to fell and difpofe of the faid "eftate without confent of his faid grandfon or the other heirs:" and it contained a power of revocation. A crown charter was in confequence obtained in terms thereof, with an additional claufe to this purpofe, that "in cafe heirs female fhould fucceed, "the eldeft fhould exclude heirs portioners, and they and their "defcendants fhould affume the name of Cochran, and carry the "arms of the family of Dundonald, or otherwife fhould lofe their "right of fucceffion." In virtue of this charter John Lord Cochran took infeftment in the lands therein contained.

In November 1684, by a contract executed previous to the marriage of John Lord Cochran with Lady Sufanna Hamilton, John Lord Cochran obliged himfelf to purchafe and obtain himfelf infeft and feifed as heir to the faid William Lord Cochran his father in all fuch of the lands and others therein mentioned, as his father died laft veft and feifed in, without any power to the faid Earl of Dundonald to difpofe thereof in his lifetime; as alfo to procure himfelf infeft in other lands therein mentioned, which had been purchafed by the Earl of Dundonald, and conveyed to himfelf in life-rent, and to William Lord Cochran his fon in fee (a); and the faid William Earl of Dundonald and John Lord Cochran thereby bound themfelves and their heirs to make refignation of the whole lands aforefaid for new infeftments thereof to be granted to the faid John Lord Cochran and the fame feries of heirs fpecified in the laftmentioned charter, with the fame claufe relative to heirs female; and William Earl of Dundonald renounced and difcharged all the faculties, powers, and liberties referved to him by the infeftments granted to John Lord Cochran, and the deceafed William Lord Cochran his father, or either of them, and obliged himfelf to grant a feparate renunciation of the faid referved power; and John Lord Cochran obliged himfelf to do no act in prejudice of the heirs male of the marriage, referving always to him as fiar of the eftate a liberty to contract debts, or to fell or difpofe thereof for any other caufe as he fhould think fit. This contract alfo contained a provifo, that the rights formerly granted by the earl to his fon fhould not imply the granting

(a) This contradicted the recital of the procuratory of July 1680, executed by the Earl of Dundonald.

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double rights, nor subject him to double warrandice. The earl afterwards in terms of this contract, by a separate deed renounced and discharged all the powers and faculties reserved to him, either by the settlements upon William the son or John the grandson, and such renunciation was registered in November 1684.

The earl died in 1685, and was succeeded in the honours by his said grandson John Lord Cochran. This Earl John in October 1688, executed a bond of tailzie, reciting that he intended to alter the order of succession contained in the infeftments of his lands and estates, and obliging himself to surrender the same, to himself in life-rent, and to the heirs male of his body; whom failing, to the heirs female of his body, the eldest heir female succeeding without division; whom failing, to his brothers successively in their order, and the heirs male of their bodies; whom failing, to his own heirs whomsoever, the eldest heir female always succeeding without division. This deed contained prohibitory, irritant, and resolutive clauses, upon all those called to the succession, except the heirs male of the grantor's own body none of the deeds before mentioned; executed by the father or grandfather of Earl John, contained such clauses prohibitory, irritant, or resolutive.

Earl John died in May 1690, without being served heir to his father, as he was bound to be by the contract 1684. He was succeeded by his eldest son William, the second of that name, Earl of Dundonald, who was served heir in general and in special to his father; and upon such service was infeft, but died under age. He was succeeded by his brother John, who in 1705 was served heir in general and in special to his late brother, and infeft.

By marriage settlement in March 1706, betwixt this Earl John the second, when under age, with consent of his curators, and Lady Ann Murray, the earl settled the whole lands and estate belonging to the family, to himself, and the heirs male of his body; whom failing, to his heirs male whomsoever, whom failing, to his heirs and assignees whomsoever, reserving a power to alter, in so far as he had power by any tailzies or deeds executed by his predecessors.

In October 1711, the earl having only one son of the marriage, executed bonds of provision to his three daughters in the aggregate sum of 16,000*l.* sterling; and upon the 16th of same month, he executed other bonds of provision to his said daughters for 7000*l*, more, to be a burden on his heirs male not descended of his own body, and succeeding to him in his lands and estate.

On the 29th of December 1716, he executed a bond of provision to his said daughters for 8000*l.* only, and revoked all former bonds of provision granted to them. And on the 31st of same month, he executed a bond of tailzie, reciting, that being fully determined, failing heirs of his own body, or heirs male of any of the descendants of his own body, to settle the succession of his estate in one person; and that the same might not be divided by

the succession of heirs portioners; he therefore bound and obliged himself and his heirs of line, male, conquest, and provision, and successors whatsoever, failing heirs male as said is, to provide and secure heritably, and to make resignation of all and sundry lands, lordships, &c. belonging to him and contained in his rights and infeftments, in the hands of his immediate superiors, to and in favour of Lady Ann Cochran, his eldest lawful daughter, and the heirs male of her body, whom failing to his other daughters therein named, and the heirs male of their bodies, whom failing to his other heirs male whatsoever, whom failing to his heirs or assignees whatsoever, the eldest heir female always succeeding without division.

This Earl John died in June 1720, leaving William his only son, and three daughters, Ann, Susanna, and Katherine. In 1722 Earl William was served heir male and of line to his father, and was thereupon infeft. On the 3d of August 1722, he being still a minor, with consent of six of his curators, executed a procuratory, reciting the said bond and deed of tailzie granted by his father, and that he as heir served and retoured to him, stood bound to implement the same, therefore he granted procuratory to surrender the said lands in favour of his sister Lady Ann, upon failure of heirs of his own body, and in terms of the bond executed by his father.

In January 1725, 14 days before his death, Earl William revoked the said procuratory by a deed signed by him and three of his curators; and he, same day, executed, with consent of these three guardians, a new settlement of his estate in favour of the respondent, his successor in the title, and the heirs male of his body, whom failing to two of his curators (who authorized him to execute the deed), father and son, and with other substitutions, being in favour of the heirs succeeding to him in the title. Earl William died on the 28th of January 1725, under age, and without issue.

After his death a competition arose relative to the property of his estates, between the present parties; the Marquis of Clydesdale, the only son and heir of the said Lady Ann Cochran, the sister of William the last earl, who was married to James Duke of Hamilton and Brandon in February 1723, claiming under the bond of tailzie, executed by Earl John on the 31st December 1716, and procuratory executed by Earl William, contending that the revocation and subsequent deed were void; and the present Earl of Dundonald, the great grandson of the first Earl of Dundonald, being descended from the second son of William Lord Cochran, who died in the lifetime of the first earl, claiming upon the revocation and deed executed by the last earl in 1725, but particularly upon his character of heir male to the said William Lord Cochran, the son of the first earl, who had died infeft in part of the lands, and whose succession had not been taken up by any person by service as heir to him; and claiming right to all the other lands by virtue of the settlements of 1680, 1684, and 1706.

Brieves

Brieves were take out for serving the marquis heir to the two last earls, but opposition being made by the present earl, both parties brought their actions of declarator before the Court of Session, for ascertaining their several claims to the estate. These causes being conjoined, and being fully argued before the Court of Session, their lordships, on the 16th of December 1725, "Found "that by the bond of tailzie 1716 years the daughters of the "grantor are called to the succession in their order, before any "heir male not descended of the grantor's body; and found that "William Earl of Dundonald could not on death-bed, nor in his "minority, though with consent of his curators, gratuitously "make any alteration of the destination of succession contained "in the said bond; and repelled the allegation that the alteration "was onerous because of the mutual tailzie, and therefore sus-"tained the bond 1716, though not registered in the register of tail-"zies as a title to the Marquis of Clydesdale to serve heir of provi-"sion; and found that neither the clause of return in the contract "1653 and 1656, or discharge 1657, nor the substitutions in the "procuratory of resignation 1680, or contract of marriage 1684, "did disable the last John Earl of Dundonald gratuitously to alter "the succession by a deed in favour of his daughters, in preju-"dice of the heirs male of the former investiture:

This first part of the interlocutor appealed from by the Earl of Dundonald.

"But further found, that the procuratory of resignation 1680 "years, and charter and sasine following thereupon in favour of "William Lord Cochran, joined with the subsequent infeftment "and possession of his heirs, did not effectually establish in the "person of the last John Earl of Dundonald the property of the "lands and estate, wherein William Lord Cochran, son to the "first Earl of Dundonald, died last vest and seised by either "public or base infeftments; and repelled the allegation of pre-"scription, pleaded for the Marquis of Clydesdale; and also the "allegation of not registration of William Lord Cochran's infeft-"ments 1653, in the register of sasines of the shire of Renfrew, "and that the infeftments 1653 and 1656 were not clothed with "possession; and therefore found, that the lands and estate "wherein William Lord Cochran died last vest and seised are "yet *in hæreditate jacente* of the said William Lord Cochran, and "that the present Earl of Dundonald may serve heir to him "therein: and found that the Earl of Dundonald, by so serving "heir to the said William Lord Cochran, passing by Earl John, "maker of the gratuitous bond of tailzie 1716, is not by the act "of parliament 1695 obliged to fulfil the said bond of tailzie, "and reduced, decerned, and declared accordingly."

This second part appealed from by the marquis.

Petitions were given in by both parties against this interlocutor, but the Court, on the 26th of January 1726, "adhered to their "former interlocutor of the 16th of December last; and found "that the lands and estate, wherein William Lord Cochran died "vest and seised, to which no title was made up by his succes-"sors by service or precept of clare constat as heirs to him, or by "disposition from him, are yet *in hæreditate jacente* of the said "William Lord Cochran and that the present Earl of Dundo-

Appealed from by both parties.

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"nald may serve heir to him in such of the said lands and estate "as are settled upon heirs male, and found that the Earl of Dundonald, by so serving heir to the said William Lord Cochran, and "passing by Earl John, maker of the gratuitous bond of tailzie "1716, is not by the act of parliament 1695 obliged to fulfil the "said bond of tailzie, and remitted to the Lord Cullen, Ordinary, to apply this and the former interlocutor, as to the particular lands, wherein the said Lord Cochran died vest and "seised, and whereto a title was not established in the person of "any of his successors."

Appealed from by the marquis.

And on a petition for the Earl of Dundonald, their lordships, on the 28th of January 1726, "repelled the allegation pleaded "for the Marquis of Clydesdale upon the bond of tailzie 1688, "as being liable to the same objections as the bond of tailzie "1716, and altered by the contract of marriage 1706 years; "but superseded to determine what heir should be liable to the "debts, until the services be expeded, leaving the creditors to "pursue the representatives of their debtors as accords (a)."

Entered, 11 Feb. 1725-6.

The original appeal was brought by the Marquis of Clydesdale from "part of two interlocutors of the Lords of Session of the "16th of December 1725, and 26th of January thereafter; and "from the whole interlocutor of the 28th of the same month."

Entered, 16 Feb. 1725-6.

And the cross appeal by the Earl of Dundonald from "other "parts of the said two interlocutors of the 16th of December and "26th of January."

On the Original Appeal—Heads of the Argument of the Appellant the Marquis.

By the settlements made upon William Lord Cochran, by his father the first Earl of Dundonald, it was optional to him to take infeftments in these premises, as holding them either immediately of the crown, or of the grantor. William the son chose the last, but he was at liberty any time afterwards to take new infeftments, holding the lands immediately from the crown, and such new infeftments would have rendered the former base infeftments void and useless, and established a complete right in his person, and those base infeftments could never have been taken up by any of his after heirs. But William the son not having taken such infeftments from the crown in his life, John his son and heir could not do so upon the former procuratories, for those were void by the death of the grantee. He had no way to supply this, but either by compelling William the father by an action at law to grant a new procuratory, or by William the father executing one voluntarily. William the father chose this last method, and in 1680 made a settlement of the same premises to John the grandchild, who had the only right by the first settlement, limited to the same heirs, containing a procuratory of resignation; which last procuratory was made use of, and a charter granted by the crown thereon, and John the grandson was thereupon infeft; and upon

(a) *Vide* this reserved point, in Kalms, January 1727, No. 75.

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this title the eſtate has been ever ſince poſſeſſed, and the ſeveral deſcendants ſerved heirs thereupon. It cannot be denied, but that if John the grandſon had commenced an action againſt William the grandfather, and obliged him to grant a procuratory, it would have been good, and the charter from the crown well founded; and it ſeems to be a ſtrange diſtinction to ſay ſuch procuratory would have been good if he had been forced to do it by ſuit, but not good where he ſubmitted to do it without ſuit.

The infeſtments of 1653 and 1656, in favour of William the ſon, never having been completed and made public by poſſeſſion, and the infeſtment 1653 not recorded in the regiſter of ſaſines for the ſhire of Renfrew, where a conſiderable part of the lands lie, the public infeſtment of 1680 in favour of John Lord Cochran is preferable, as being a complete deed attended with poſſeſſion.

The conveyance of 1680 proceeds upon a recital of full powers reſerved to William the father to diſpoſe of the eſtate at pleaſure; and as the powers might have been contained in diſtinct deeds, though they are now not to be found, the law at this diſtance of time preſumes there were ſuch deeds, and ſuch deeds muſt have been ſubſiſting at the time of the marriage ſettlement 1684, for they are then recited; and it cannot ſurely be imagined but that the counſel for the lady would ſee the Deeds there recited; and after ſo long a term as forty years, the law diſpenſes with not producing them; the rather, that theſe powers have been expreſsly acknowledged by John the grandſon, the only perſon who could be by them prejudiced, and his acknowledgment is ſufficient proof againſt all ſucceeding heirs.

This eſtate having now been poſſeſſed by virtue of the infeſtments 1680, and ſubſequent infeſtments following thereupon, there is a poſitive preſcription eſtabliſhed, which empowered the laſt Earl John, upon the footing of thoſe titles, to diſpoſe of the eſtate at pleaſure; and likewiſe a negative preſcription againſt the pretended ſeparate ſettlement, as is clear by the act of parliament, 1617, c. 12. anent preſcription of heritable rights.

By the act of parliament 1695, c. 24. any apparent heir paſſing by another heir, who had been three years in poſſeſſion, is obliged to fulfil the deeds of the intermediate heir, whom he paſſes by, and therefore the reſpondent cannot make up titles to any lands which belonged to William the ſon, without paſſing by John Earl of Dundonald, grantor of the deed 1716, who was more than three years in poſſeſſion, and therefore he muſt fulfil that deed in favour of the appellant.

Argument of the Reſpondent, the Earl of Dundonald.

Though an heir has it in his choice, whether he will ſerve to his anceſtor or not, and during his life no remoter heir can quarrel his poſſeſſion; yet if he does not ſerve heir, and thereby make up a lawful title to the eſtate that was in his anceſtor, the next ſucceeding heir, after his deceaſe, may, by the law of Scotland, ſerve heir to that anceſtor, and will be thereby entitled to the eſtate, as if the preceding heir had never exiſted. And before the act

act 1695, no debt nor deed, for whatever valuable consideration, of such person who did not serve heir, could have been effectual against the next successor, serving heir to the ancestor infeft; and it is plain John Lord Cochran the grandson was sensible that unless he served heir to his father, he had not a lawful title to his estate; for by his marriage settlement 1684 (to which his grandfather was a party,) he covenanted to obtain himself infeft as heir of his father, in the lands wherein his father died invested, without any reserved power to his grandfather.

Though, as the law then stood, the procuratories 1653 and 1656 in favour of William Lord Cochran, could not have been used after his death, but must have been renewed to his heir; yet the person to whom they were to be renewed, must first have been actually served heir, before he could have been entitled either to sue for, or even receive, a performance of Earl William's obligation to renew the said procuratories; but in this case the procuratory 1680, was so far from being a renewal of those of 1653 and 1656, that it does not only not mention them, but is in direct opposition to them; for by the procuratory 1680, the earl reserved a power in himself "to sell the estate, or charge it with "debts;" whereas by the former procuratories the fee simple was absolutely vested in his son, without any power at all reserved to himself. But if the procuratories, 1653, and 1656, had been renewed to John Lord Cochran, as heir of his father, yet his father's base infeftments would not have been thereby extinguished or consolidated, unless he had also been served heir specially to those base infeftments of his father, and been infeft himself thereon, or had taken the other method of being infeft by precept of *clare constat*.

William Lord Cochran had possession two ways, first by the possession of his father, whose life-rent was reserved, and in the eye of the law the life-renter's possession is the possession of the fiar: secondly, William Lord Cochran was in actual possession, of part of the estate which was allotted to him for his maintenance, and which was all he could be in the actual possession of during his father's life; and in the next place, base infeftments, though neither recorded nor followed with possession, are good against the grantor, and preferable to any subsequent infeftment made, without a valuable consideration, and in this case, the infeftment 1680 was voluntary, and from the grantor of the prior base infeftments to his heir apparent, who thereby became liable to make good the deeds of the grantor, and consequently those very deeds of 1653, and 1656.

It may be reasonably presumed, that the earl had forgot that he had by the deed 1657 discharged all the powers he had reserved by the deed 1653; but both the earl and his grandson soon afterwards, in effect, acknowledge that recital to have been a mistake, when by the deed 1684 the grandson becomes bound to make up his titles to the lands wherein his father had been infeft; and in the clause of warrandice in that deed, the earl excepts the rights formerly granted by him to his son; both which had been

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needlefs, had the earl had the referved powers pretended; but the powers recited to have been referved to the earl, can only be conftrued to be the power of felling or mortgaging the lands of Kirkmichael and Dalmuir, which the earl had referved to himfelf, in the infeftments of thofe lands to his fon.

Prefcription can only run, for a title, under which there has been an uninterrupted poffeffion of 40 years; or againft a title, under which there hath been no claim for 40 years; but in this cafe, the perfons who have been in poffeffion for 40 years paft, have had both rights, that is to fay, the right of poffeffion as heir male of William Lord Cochran, (an heir being legally entitled to poffeffion, though he be not ferved heir,) and the right now claimed by the marquis under the infeftment 1680; and therefore, as the poffeffion has been all along held by the fame perfons under both titles, no prefcription can run for one title, againft another title in the same perfon, at the fame time. Befides, one of thefe titles is but lately defcended to the prefent earl, who could not claim it during the life of any of the former earls, and it is a maxim in law, *contra non valentem agere non currit prefcriptio;* and, if he had been *valens agere*, he was a minor.

The marquis contended, that by the act 1695, c. 24. a perfon who paffes by his immediate anceftor, and ferves heir to a remoter, is liable for the debts and deeds of the anceftor paffed by, and therefore if the prefent earl ferved heir to William Lord Cochran, and paffed by Earl John the firft and fecond, he was obliged to perform their deeds; and, confequently, to perform the bonds of tailzie 1688, and 1716, which they made. But the title of this ftatute is " An act for obviating the frauds of apparent heirs:" and the preamble is, " confidering the frequent " frauds and difappointments that creditors fuffer, through the " contrivance of apparent heirs in their prejudice; and for remedy " thereof, ordains," &c. Now though the words of the act are, debts and deeds in general, yet from the title, preamble, and whole tenor of the act, thefe muft be conftrued to be, debts and deeds for a valuable confideration, but not deeds merely gratuitous.

On the Crofs Appeal.—Heads of the Argument of the Earl of Dundonald.

Suppofing Earl John the fecond had a power of altering the fucceffion of the eftate, yet he had not done it by the bond 1716, which recites, " that he had determined, failing heirs male of " his own body, or heirs male of any of the defcendants of his " body, to fettle the fucceffion of the eftate in one perfon, that " the fame might not be divided amongft heirs portioners, and " therefore he obliged himfelf, and his heirs of line, and heirs " male, failing heirs male as faid is, to make furrender of all his " lands contained in his infeftments thereof, for new infeftments " to be granted to his eldeft daughter, and the heirs male of her " body," &c. And then he " appoints his three daughters, " fucceffively, to be heirs of tailzie and provifion, to him and to " the

"the heirs male of his body, or heirs male of the defcendants of "his body, in the faid lands, with power to them to take out "brieves and obtain themfelves ferved heirs and infeft therein." Now it is plain, by the words of this bond, that the daughters of Earl John are not called to the fucceffion, till failure of heirs male of the defcendants of his body, which has not yet happened; for the prefent earl is the *heir male* of Earl William, who was defcendant of the body of the faid Earl John; and it is plain, that the intention of the bond is only to prevent the divifion of the eftate among co-heireffes, which would never happen till failure of all the heirs male, to whom it was limited by the former fettlements. And this is confirmed by the claufe, which empowers the daughters to obtain themfelves infeft by brieves and fervice, which method, by the law of Scotland, they could not purfue until failure of all the heirs male, who were preferred to them in the former infeftments. But the reafon of Earl John's making this bond, was to fupply a defect in his marriage-fettlement 1706, which had not provided that, in cafe of the defcent of the eftate to heirs female, the eldeft fhould fucceed without divifion, as had been done in all the former fettlements.

Argument of the Refpondent the Marquis.

John Earl of Dundonald, the marquis's grandfather, had an undoubted right to limit the fucceffion of the eftate to his own right heirs; for though by feveral of the former fettlements the limitations were to heirs male, yet thefe containing no prohibitory or irritant claufes, the faid earl, or any other of his predeceffors, had power to alter thofe fettlements; and as this was done by John firft Earl of Dundonald in anno 1688, fo it was effectually done by the marquis's grandfather, by the faid deed in 1716, whereby the eftate, upon failure of iffue male of Earl John's body, was limited to his eldeft daughter and the heirs male of her body, and the marquis being the heir male of her body is well entitled to the faid eftate, and the fame ought to be decreed to him.

A fettlement made by any perfon upon his heir apparent, with feveral remainders over to other perfons, and upon failure of them to return to him and his right heirs, is no more than a fimple deftination or nomination of feveral heirs, and upon failure of them to the grantor's right heirs, and confequently is no bar to any alienation or alteration by any of the remainder-men. Whatever effect a claufe of return might have to the perfons in whofe favour the laft limitation is made, or fuch claufe of return conceived, it can operate nothing in favour of any of the intermediate heirs who are prior to the laft limitation, the perfons to whom the fame is to return can only have the benefit of it, that is the marquis, who is the right heir of the faid William Earl of Dundonald; and whatever benefit the claufe of return can occafion will be in favour of him and him only. And fince he does not complain of any prejudice, none of the intermediate heirs can take any benefit of that claufe of return, efpecially fince their claim is to defeat the very perfon in whofe favour the claufe was inferted.

inserted. Those deeds, 1653, 1656, and 1657, in which the clauses of return are inserted, are not the subsisting titles of the estate, they were varied and altered by the after-deed 1680, whereby the estate was setled by the first Earl William upon John Lord Cochran his grandchild, and the several persons therein named, without any clause of return.

It is the general rule, by the law of Scotland, that no settlement of this kind, where no prohibitory clause is added, will prevent any alteration in the order of succession, especially when the alteration is in favour of the right heir descending of that very marriage; nor is there any particular thing in this case that can set aside the general rule, and such settlement is only considered as done for valuable consideration, in so far as concerns the heirs of the marriage; but is entirely voluntary as to all other heirs; and William the father, by the deed 1684 releases all power he had over the estate; and John the grandchild reserves to himself an absolute power of alienation, and charging the premises with debts: so Earl John, the appellant's grandfather, by his marriage-articles, reserved a power of alteration, and has accordingly executed that by the deed 1716.

Earl John intending to limit the estate to his own daughters, in priority to his collateral heirs male executed the deed in 1716, whereby he obliges himself, his heirs male, of taillie, provision, &c. upon failure of heirs male of his own body, and the heirs male of the descendants of his own body, to surrender the estates in favour of the marquis's mother, and her sisters respectively in tail male, that is, in case there should be no issue male of Earl John's own body, nor heirs male of the body of any issue male of his body, in each case his daughters were to succeed in priority to his collateral heirs male, especially since he obliges his heirs male to make this surrender, which could not possibly have any effect in case he had it in view, as the present Earl of Dundonald pretends, that his heirs male, though not descended of his own body, were to succeed before his daughters; then the deed was of no use, nor could any heir male be compelled to have completed the title. By the deed 1716, in case of failure of issue male of the marquis's mother and her sisters, the next immediate remainder is to Earl John's heirs male, which shews plainly that he intended his daughters should take first, and that his heirs male were only to succeed upon failure of issue male of his daughters; and yet, by the earl's construction, the heirs male are to succeed before the daughters, and their right only to commence upon failure of the remotest heirs male of Earl John. When the estates are limited to the collateral heirs male, Earl John charged his estate with the payment of 16,000*l.* as the fortunes of his three daughters, and likewise charged it with 7000*l.* more, in case the estate should descend to any heirs male but those of his own body; but having varied the former limitations, and thereby settled his estate upon failure of issue male of his own body upon his daughters, he diminished their fortunes, and charged the estate only with 8000*l.* The marquis not only claims by

by virtue of the deed in 1716, but by the settlement 1688, whereby the estate is limited to the heirs female of Earl John the grandson upon failure of heirs male of his body; and the last Earl William dying without issue, the heirs male of Earl John failed, and the estate, by virtue of that limitation, descended to the marquis; as the eldest son of the eldest heir female of Earl John the grandfather.

There is no law requires any deed of entail, either to be completed by infeftment, or recorded during the grantor's life; and this deed not being in favour of the Earl of Dundonald, he must, as the collateral heir male, be bound by the several covenants therein.

There was no valuable consideration granted by the Earl of Dundonald for the revocation executed by Earl William on deathbed; the present earl did entail his estate, failing heirs male of his own body, to the said earl and the heirs male of his body, a few days before he died, when it was obvious he could neither live to enjoy the estate, nor have heirs procreate of his body; and the deed 1716 being completed by the death of Earl William the infant, without any need of further delivery, the same became irrevocable; and the procuratory of resignation, granted by the last earl in 1722, being granted pursuant to the deed 1716, and completed by delivery, could not be revoked by him. All these deeds were not only granted while the said earl was on deathbed, but likewise while he was a minor; and no minor, even with consent of his guardians, can alter the former settlements of his estate, and more especially in this case, when the last earl, at the time of granting those deeds, was absolutely incapable by pressure of sickness, and the effects of a raging fever; and these deeds were only authorized by three guardians, two of whom had a very direct and manifest interest: for upon the failure of the respondent without male issue, the estate would descend to these two guardians, the father and son, in whose house the earl was then kept, and by whom those deeds were in a very extraordinary manner procured from him.

Judgment, 22 April 1726.

After hearing counsel, *It is ordered and adjudged, that as well the original appeal of the Marquis of Clydesdale, as the cross appeal of the Earl of Dundonald be dismissed; and that the several interlocutors in the said appeals complained of be affirmed.*

For the Marquis of Clydesdale, *P. Yorke. Dun. Forbes. Ro. Dundas.*

For the Earl of Dundonald, *C. Talbot. J. Fergusson.*