vote, neither so much land, nor so much price, would have been stated, as neither of these was necessary for that purpose. Neither would he, had this been the character of the transaction, have docqueted an account twelve years thereafter, in which credit was given him for the (£950) price, nor entered into the agreement, which, from beginning to end, supposes the disposition a *bona fide* sale.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed; and it is further ordered that the appellant do pay to the respondent £100 costs.

For Appellant, *Al. Wedderburn, Al. Forrester.*
For Respondents, *C. Yorke, H. Dalrymple.*

Note.—Unreported in Court of Session.

Dr. Andrew Heron, - - *Appellant;*
John Vining Heron, - - *Respondent.*

House of Lords, 31*st January* 1770.

Succession—Deed—Implied Revocation.—A father executed a settlement in form of an entail, in favour of his eldest son, and his heirs-male; whom failing, to his second son and his heirs-male, &c., but reserved power and faculty to himself to affect or burden the fee of the lands: Held that he was entitled to execute a subsequent disposition of the estate in favour of his second son, passing over the eldest son; reversing the judgment of the Court of Session.

Andrew Heron of Bargaly, in the county of Wigton, had two sons, Andrew and Patrick; Andrew, the eldest, he disinherited, by the deed after mentioned. Captain Patrick Heron, the second son, was married to a Miss Vining, only child of Mr. Vining in Hampshire, with whom he inherited a large fortune. Of this marriage there were two sons, of whom John Vining Heron, the respondent, was the eldest, and Dr. Andrew, the appellant, the second eldest. The present competition arose between these two brothers for the estate of Bargaly, left by their grandfather. The question between them depended on the effect of certain deeds executed by the grandfather. Of this date, a disposition was executed by him, disponing his estate in the shape of an entail, "to Andrew Heron, his eldest son, and the heirs-

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"male of his body; whom failing, to Patrick, his second "son, and the heirs-male of his body; whom failing, to the "second son of Patrick Heron of Heron (his nephew), if he "should have any; whom failing, to his eldest son; whom "failing, to Jean Heron, the granter's only daughter, and "the heirs-male of her body." It contained prohibitions against alienating the lands or woods, and contracting debts, and contained the usual irritant clauses. But it reserved power and faculty to the granter to affect and burden the fee of the lands with what sums of money and annuities he should think fit, at any time in his life. He thereafter revoked this deed, and of new executed a new deed, disponing the estate to the same series of heirs, but reserved to himself power to sell, annailzie, or to contract debt. Some years after this, and of this date, the grandfather was pleased to change the above destination of his estate; and, conceiving that his eldest son, from his marriage, was undeserving of his favour, he executed a disposition in the following terms:—"Forasmuch as Captain Patrick Heron, my (second) son, is to relieve me of the sum of £920 sterling, due by me to Patrick "Heron of that ilk (my nephew), and for which sum the "said Patrick hath an heritable security upon the lands of "Bargaly and others, the which sum extends to 19 years' "purchase of said lands, upon payment of which the said "Patrick Heron is to denude himself of all right to the "lands: Therefore, to have sold, annailzied, and disponed "to and in favour of the said Captain Patrick Heron, my "son, in liferent, and to Andrew Heron, his second lawful "son, in fee; which failing, to any other of his sons he "shall think fit, heritably and irredeemably," the lands of Bargaly, reserving his own and his wife's liferent. Two years afterwards, and of this date, this disposition was altered so far as to give the fee, in place of the liferent, to Patrick, the father, and the succession to his second son Andrew, the appellant.

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Jan. 24, 1726.

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The appellant, then coming to the knowledge of his rights, which were concealed from him by the respondent, entered appearance in the action brought against the nephew, (who, in the meantime, had taken possession of the estate under his bond,) and claimed under the deed of 1726, executed by his grandfather, which conveyed the estate of Bargaly to Captain Patrick Heron in liferent, and his second son, the appellant, in fee, contending that the deed of 1715, executed by the grandfather, and under which the respondent

claimed, was never a delivered deed, and was subsequently revoked by him. The respondent, on the other hand, contended that he was the heir-male entitled to take under the deed 1715, Andrew Heron, the substitute, having died without male issue. And the grandfather having been denuded of his estate by this deed of entail, and being restrained from making any settlement prejudicial thereto, had no power thereafter to execute the deed of 1726, conveying the same estate to his second son, Captain Patrick, and second grandson, the appellant, and therefore that this deed, with the one relative thereto in 1728, was null and void. The Lord Ordinary, of this date, "preferred the said "Doctor Heron (the appellant), on his interest produced." On representations, the Lord Ordinary adhered. But on reclaiming petition, the Lords, with much division of opinion, of this date, altered and found, "in respect the "transaction between Andrew Heron of Bargaly and his "son Patrick was not completed, therefore find that the "deeds 1726 and 1728 cannot be the rule of succession to "said estate. Find that the petitioner (respondent) has "the preferable right thereto in competition with Doctor "Heron (appellant), and remit to the Lord Ordinary in the "cause to proceed accordingly." The appellant reclaimed against this interlocutor, but the Court, of this date, adhered. And it was against these two interlocutors that he now appealed.

Nov. 30, 1764.

Jan. 21, 1766.

June 24, ——

Nov. 28, 1767.

Pleaded for the Appellant.—As the only debt or encumbrance on the estate was that due to Patrick Heron, the grandfather's nephew, and as it has now been extinguished by perception of the fruits had by his possession, the only question that remains is, which of the two brothers, the deceased's grandsons, has best right to the estate? The reason is clear and obvious for preferring the appellant, the second son of Captain Patrick, to his eldest brother, the respondent, because that brother was the heir richly provided for by the estate coming to him through his father and mother. This gives at once a reason and foundation for the deeds 1726 and 1728, and opens up a favourable view in support of these deeds. There can be no doubt that men may dispose of their property at pleasure, either with or without valuable consideration; and, therefore, it was wrong in the Court of Session to hold that the deeds 1726 and 1728 were ineffectual and incomplete, for want of consideration, in consequence of the condition on which they were

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granted not being complied with, namely, the payment by Captain Patrick Heron of the nephew's debt of £950, because there was no room for applying that doctrine in this case; but the deeds in question fell to be considered as voluntary conveyances on the part of the grandfather, not depending for their validity upon any valuable consideration, but to be judged of, especially *inter conjunctos personas,* as deeds settling the succession to the deceased's estate. The interlocutor of the Court is plainly founded on the non-payment by Captain Heron of this debt. It states that the transaction was incomplete, in consequence of this non-payment; but it did not follow from non-payment that the deeds were thereby invalid, ineffectual, or incomplete. Though they contain a recital that Captain Heron had agreed to pay, upon the nephew's denuding himself of all right on the lands, yet the estate given was absolute, depending upon no such payment, or time of payment. It was further clear that the grandfather's real intention was, to settle a separate representation of his own name and family on the appellant, his second grandson, passing by the respondent. And no letters or correspondence, such as has been adduced, are admissible as against the clear intention afforded by the deeds themselves, otherwise these imperfect writings might be receiveable, to overthrow the most solemn deed ever executed. As these deeds, therefore, were never recalled or revoked, they must be taken to contain his last will and intention in regard to his estate, executed *mortis causa,* and with a view to settle his succession at death. That he had power to execute these is beyond all doubt, because the deed of 1715, on which the respondent founds, was never a delivered deed, and was revoked by the deed of 1716, by which the grandfather reserves full faculty and power to sell, contract debts, or do every other thing that he might have done before granting thereof.

Pleaded for the Respondent.—The respondent, as heir-male of his grandfather, and heir to his father, Captain Patrick Heron, has a preferable right to the appellant, his younger brother, to the estate of Bargaly, in terms of the deed 1715. The appellant's only claim rests on the two deeds of 1726 and 1728. In regard to the first, no evidence exists to shew that it was accepted of by Captain Patrick. Indeed, the contrary is presumable; because the terms thereof were so disadvantageous, as compared with the deed of 1715, which gave him the fee in place of the liferent, as at once to

prove, when read with the deed of 1728, which professes to rectify this discrepancy, that *that* deed was rejected. The deed, besides, was merely conditional, and only to take place on the son's making payment of £950 to the grandfather's nephew. With regard again to the deed of 1728, the deed itself is not produced, but only a scroll; but even if extant, this disposition was also conditional; and from the correspondence produced, it was evident that the parties themselves viewed it in that light. Such therefore being the nature and circumstances of the transactions 1726 and 1728, and such the sense of the parties at the time, nothing can be more iniquitous than the attempt now made by the appellant, after the acquiescence of his father for more than forty years. The title of the respondent is indisputable under the deed of 1715, by which his father, Captain Patrick, became entitled to the estate under an absolute and irrevocable conveyance to him, and the *heirs male of his body*, with express obligation and warranty against any other deed or disposition, in prejudice thereof. After this absolute conveyance and warranty, the grandfather had no right or power to make any subsequent disposition of the estate, conveying it away to another. On these grounds, the deeds 1726 and 1728 are absolutely null and void.

After hearing counsel, it was

Declared that the deed of the 4th of January 1726 was a complete and effectual disposition and settlement of the estate of Bargaly by Andrew Heron, and it is therefore ordered and adjudged that the interlocutors complained of be reversed, and that the cause be remitted back to the Court of Session to proceed accordingly.

For Appellant, *C. Yorke, H. Dalrymple.*
For Respondent, *Al. Wedderburn, Tho. Lockhart.*

Note.—Unreported.

JOHN CAMPBELL of Ottar, - - *Appellant;*
ALEXANDER CAMPBELL, and WILLIAM WILSON, *Respondents.*

House of Lords, 10*th Feb.* 1770.

POSITIVE PRESCRIPTION—INTERRUPTION OF DO.—Citation in summons of exhibition *ad deliberandum*, does it interrupt? Disability by forfeiture is no *non valentia agere.* In counting deduc-