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will not be entitled to a way-going crop. And it is therefore ordered and adjudged that the cause be remitted back to the Court of Session to review the interlocutors complained of.

For Appellant, *William Alexander*, *M. Nolan.*

For Respondents, *Wm. Adam*, *J. H. Forbes.*

NOTE.—Under this remit back to the Court of Session, their Lordships (11th June 1802), found "In respect of the judgment "of the House of Peers, alter their two interlocutors of the 4th "July and 19th November 1801; and remit to the Lord Ordinary "to adhere to his interlocutor of 20th June, passing the bill of "suspension and interdicting the tenant." The case then proceeded, first, before the Lord Ordinary, and then before the Court, the discussion of the question being attended with much difficulty, as to whether the judgment of the House of Lords had foreclosed discussion upon the question of a way-going crop, and was thus exhaustive of the merits, or had left that open to be reviewed. The Court ultimately came to the conclusion (2d March 1803) to give effect to the judgment of the House of Lords, declaring the tenant not entitled to a way-going crop.—Mor. App. Tack, No. 8.

[Mor. 15444.]

GEORGE WILSON, Grand Nephew of the deceased WALTER BOWMAN of Logie, being the Grandson of JEAN BOWMAN, eldest Sister-germain of WALTER BOWMAN, } *Appellant;*

ROBERT HENDERSON, Bookseller in Cupar, Grandson of ISABEL BOWMAN, the youngest Sister-germain of the said WALTER BOWMAN, - - - - } *Respondent.*

House of Lords, 29th March 1802.

DEED. — IS A DEED DEFECTIVE IN SOLEMNITIES GOOD AS AN OBLIGATION TO CONVEY? — REVOCATION. — APPROBATE AND REPROBATE.—In 1757 a party executed a deed or procuratory of resignation of his land estate in Scotland in favour of particular heirs, valid in all respects, reserving power to alter at any time during his life, and even on deathbed. He afterwards, in 1763, executed a new deed, with a variation in the destina-

tion to the parties favoured, applicable to the same estate, but defective in the solemnities required in conveying heritage in Scotland. There was no express revocation in this latter deed of the former, but it was contended there was an implied revocation, from the destination being different. The Court of Session held, that the latter deed, although not executed according to the solemnities of the law of Scotland, yet contained an obligation or declaration of the granter's will; and being executed in virtue of reserved powers, was good and sufficient to found an action against the heirs to implement, and that these heirs having taken benefit from the deed 1763, could not approbate and reprobate the same deed, but were bound to implement the obligations which arose from their taking benefit. Reversed in the House of Lords.

Walter Bowman, a Scotsman, settled at Egham, near London. Besides inheriting from his father the lands of Logie, in Fife, he acquired in England a house and some land at Egham, and considerable personal property in the public funds, and died in 1782 without issue, male or female, of his body.

Before his death, and in the year 1757, he had executed a will in the English form, disposing of his real and personal estate in England. And, by a separate deed of the same date, he executed a deed of the nature of an entail applicable to the estate of Logie, and limiting the succession to that estate to heirs male and female of the granter's body, "which failing, to James Bowman, his youngest bro- 1757. 1757.

"ther of the half blood, and the heirs male of his body; "which failing, the heirs male of George Melville, son of "Jean Bowman, his sister-germain, and their heirs male; "which failing, certain other substitutes; which failing, "the heirs female of the body of the said George Mel- "ville;" which failing, the heirs male of a sister by the half blood, and their heirs male; "which failing, "the lawful heirs male of the body of Isabella Melville, "eldest daughter of Jean Bowman, (his eldest sister by "George Melville), and their heirs male;" (under this substitution the appellant was called), "which failing, to the "heirs male of the body of the second daughter of Isabella "Melville; which failing, to the heirs male of Agnes Hen- "derson, the eldest daughter of his youngest sister." (Under this destination the respondent was called.) And there were other substitutes called after; and then the clause wound up in the following terms:—"which all failing, to "any other person or persons who should be nominated and "called to the succession by any writing under his hand at

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" any time thereafter; and failing such nomination, to his " own nearest and lawful heirs and assignees whatever."

The deed reserved power "at any time in my life, *et* " *etiam in articulo mortis*, not only to alter and change this " present settlement and tailzie, but also to sell and wad- " set the lands.

1763. In the year 1763, Walter Bowman executed *another will*, in the English form, by which he expressly revoked *all other wills* and testaments, and validly devised his estate, real and personal, in England. And, of the same date, he executed a deed for the purpose of conveying his estate of Logie in Scotland, which was invalid, being defective in the solemnities required by the law of Scotland in the transmission of heritage. Hence the present question, arising upon the effect of the deed 1757, and of the will in 1763, together with the defective deed executed in regard to the Scotch estate of same date. There was no *express* revocation of the entail 1757; but there was an implied revocation, from the estate of Logie being of new conveyed to parties not exactly in all respects the same.

By this last deed (1763) applicable to Logie, the granter bound himself, and his heirs and successors, to resign, and granted procuratory for resigning the said lands, to and in favour of himself, and of the heirs male of his body, " whom failing, to James Bowman, merchant in Oporto, in " Portugal, his younger brother of the half blood, and the " heirs male of his body; which failing, to George Melville, " son of Jean Bowman, his eldest sister-germain, and the " heirs male of his body; which failing, to Robert Hender- " son (the respondent), grandson of Isobel Bowman, his " younger sister-germain, and the heirs male of her body," &c. It contained the usual clauses of a strict entail.

James Bowman, the first substitute, predeceased the entailer. The next substitute, by the latter deed, was George Melville. By the first deed, George Melville's son was next substitute.

The difference between the first and latter deeds consisted in George Melville's heirs male alone being called in the first deed, but not himself; whereas, in the last, George Melville himself, as well as his heirs male, was called.

The will 1757, as to the English estates, was found, after his death, in his repositories, cancelled; but the deed of entail 1757 was found uncancelled.

James Melville, the son of George Melville, made up titles to the estate of Logie, under the deed 1757, and possessed for

ten years before his death. After his death, he was succeeded under that entail by the appellant. But the respondent having served himself heir of tailzie and provision under the deed of 1763, he charged the appellant to enter heir under the deed 1757, to George and James Melville; and then brought the present action, concluding, 1. That the later deed of 1763, having been specially referred to in Walter Bowman's will, of the same date, and executed *unico contextu;* and George and James Melville, by taking benefit under that will, having become bound to ratify the deed of tailzie, the same was rendered a valid and effectual settlement of the estate of Logie. 2. That the appellant ought to be decerned to implement the deed of tailzie 1763, by making up titles, and denuding in favour of the respondent; and, 3. That it should be found and declared that the said deed of entail 1763, as connected with and executed in reference to the prior investitures, is valid and effectual in law, to the effect of being a good nomination of heirs, in terms of the powers reserved by the granter.

It was argued, that the first conclusion supposed that the instrument 1763 was in itself void, that the succession was open to the heirs at law, and that James Melville, as well as George, by taking under the will, were bound by the void instrument of 1763, to which the will referred. But James did not take under the will, and George, supposing him to have taken under the will, was heir at law only to a moiety of the estate of Logie. It further supposed, that George Melville had made his election; but, if he made his election, he would either have taken the whole estate, under the instrument of 1763, or one half of it, as heir at law of the testator, but he did neither the one nor the other. Moreover, the appellant did not take through George Melville. He took under the deed 1757. The conclusion also supposed the latter deed not in existence, yet this action is founded on a charge to the appellant to enter heir under this very deed. 2. The second conclusion was a necessary consequence of the first, and was liable to the same exceptions; while the third conclusion was a contradiction to the two preceding, namely, that the deed 1757 was valid, but that the deed 1763, being executed with reference to it, and, in virtue of reserved powers therein, was thereby validated, or at least good as a nomination of heirs, whereas, in point of fact, it was a distinct and separate deed of entail in itself, and being destitute of the statutory

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solemnities, could not validly convey heritage in Scotland, nor good even as a nomination of heirs.

Of this date, the Ordinary, (Lord Justice Clerk M'Queen), pronounced this interlocutor, "In respect that Walter Bowman's deed of entail of the estate of Logie, 1763, is specially referred to in his will, as the settlement of his affairs, and that George Melville was not entitled to approbate and reprobate any part of the said will; and that Melville having taken up the personal estate to the amount of £10,000, finds, That he was thereby bound to ratify the said deed of entail 1763. And as the defender, George Wilson, cannot now make up titles to the said estate of Logie, as heir of James Melville, under the said entail, without being under the like obligations with him: Therefore finds, the said deed of entail, 1763, was rendered, and is now, a valid settlement of the said estate of Logie; and decerns the defender, George Wilson, to implement the same, by making up titles, and denuding in terms thereof, in favour of the pursuer and the other heirs therein mentioned."

May and 11 June 1794.

On representation, the Lord Ordinary adhered; and on reclaiming petition to the Court, the Lords ordered memorials on the several points, to which the conclusions of the libel applied.

Thereupon, a counter action was repeated, *incidenter*, by the appellant, to have it declared, 1. That he had right to succeed to Logie by virtue of the entail 1757, on the supposition that it was not revoked; that he had a right to succeed to Logie, without any obligation to denude in favour of Robert Henderson. 2d. That supposing it revoked, then, and in that case, the foresaid title or service of James Melville, as heir of tailzie of Walter Bowman, and the foresaid charter and infeftment following thereon, together with the foresaid charges executed by the said Robert Henderson against the pursuer, ought to be set aside, and that the appellants, George Wilson and others, heirs *ab intestato* of the said Walter Bowman, may, independent of any settlement, make up titles to the lands of Logie.

The question, whether the entail of 1763, though ineffectual as a conveyance of the estate, could operate as a *good revocation* of the deed 1757, was brought into the discussion by Catherine and Christian Melvilles, daughters of Jean Bowman, the eldest sister of the testator, and mother of George Melville.

Of this date, the Lords pronounced this interlocutor :— 1802.
" Having advised this petition, with the memorials in the
" cause, alter the interlocutor reclaimed from, and find WILSON
" that the succession to the estate of Logie falls to be go- v.
" verned by the deed of entail executed by Walter Bowman HENDERSON.
" in the year 1757, and therefore assoilzie the petitioner June 25,1795.
" from the action brought against him by Robert Hender-
" son, and decern; and decern also in the declarator
" brought by the petitioner accordingly; but find it unne-
" cessary *hoc statu* to decide as to the residue of the per-
" sonal estate of the said Walter Bowman."

The respondent, and Catherine and Christian Melvilles, reclaimed, when the Court again altered, and found " the Jan. 31,1797.
" procuratory of resignation executed by Walter Bowman in
" 1757, was a valid and formal settlement of his estate, ex-
" cluding his heirs at law; but qualified with an express
" reservation of powers to invert or alter the order of suc-
" sion, and the other clauses and conditions therein contain-
" ed: Find that the procuratory 1763 being formally exe-
" cuted, according to the *lex loci*, although not according
" to the solemnities of the law of Scotland, contained a
" sufficient declaration of the granter's will with regard to
" his succession, in exercise of his reserved powers, and
" must be held as part of the total settlement: And far-
" ther, that James Melville and his father having, upon
" their succession, taken benefit from all the deeds, were
" not at liberty to approbate and reprobate; and that the
" subsequent heirs must be equally bound; therefore alter
" the last interlocutor. Find, decern and declare in favour
" of Robert Henderson, accordingly." And, on reclaiming petition, the Court adhered. Feb. 21,1797.

Against the interlocutors of the Lord Ordinary of 21st Feb.—May and 11th June 1794, and the interlocutors of the Court of Session of 31st Jan. and 21st Feb. 1797, the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The deed 1763, which revoked the entail of 1757, is not a valid deed, either as a nomination of heirs, executed under the reserved power in the deed 1757, or valid, from George Melville or James Melville having derived benefit from under the will; 1st. because, as a nomination of heirs, the deed 1763 is not executed with reference to the deed 1757, but is in all respects a substantive and independent deed, containing all the clauses in the latter deed, with a number of additions and

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alterations, which, if effectual, would have totally superseded that deed. In the second place, it is equally invalid as a nomination of heirs as it is as a substantive deed, because every deed relative to heritage must be executed according to the formalities required by the law of Scotland, otherwise it is null and void; and the deed 1763 not bearing the name and designation of the writer thereof, nor those of the witnesses who attested it, was therefore null and void to all intents and purposes. 3d. Because, as to the benefit derived by George and James Melville under the will, it is clear that the will and the deed 1763 were two separate instruments; and although the will makes reference to the entail 1763 of Logie, yet it is only in so far as it directs the residue to be laid out in the purchase of lands, which the will directs to be settled on the same heirs as in the deed 1763. They are not made with reference to each other. They are not one and the same deed, but distinct settlements. And, on these grounds, the plea of approbate and reprobate cannot apply. So that the instrument 1763, which is void in itself, cannot receive effect merely because the testator, in making reference to it in his will, executed of same date, imagined it was valid and effectual. 4th. *Separatim*, But the estate of Logie must be regulated by the deed 1757, unless it has been validly revoked by the instrument 1763. This latter deed contains no express revocation of it. The deed 1757 remained uncancelled at the testator's death, and it cannot be revoked merely by an instrument conveying the same estate, which in itself is absolutely void, for want of the statutory solemnities. But even supposing the instrument 1763 sufficient to revoke the deed 1757, then the succession to the estate of Logie is open to the heirs at law, and the appellant is entitled to one-sixth part thereof.

Pleaded for the Respondent.—By the instrument 1763 the estate of Logie now descends to the respondent Robert Henderson. And though this deed be not *per se* a complete and effectual conveyance, because of its wanting the statutory solemnities, yet it is nevertheless sufficient, as a nomination of heirs, when taken in connection with the other deed 1757. It must be viewed in connection with this latter deed, and taken as an exercise of the reserved faculty contained therein. The deed 1757 remained in the power of the granter. By it, he reserved power to alter in whole or in part. It cannot therefore subsist except in so far as it has been allowed to remain unaltered. But by the deed

1763, it was *virtually* though not *expressly* revoked. The deed conveyed the estate to another, and hence an implied revocation, which is as good as an express one. Although the actual transmission of a feudal right requires the particular forms and technical clauses adapted to that purpose, yet, in order to create a personal right in favour of a particular set of heirs, entitling them to get the investiture altered, nothing more is necessary than such a deed as contains *an obligation* express, or even *virtual*, to that effect, on the proprietor or his heirs. The instrument 1763 is, both in form and substance, binding on the *granter* and *his heirs*, to resign the lands of Logie, in favour and for new infeftment of the same, to the series of heirs therein named. And this is sufficient to sustain the present action; and although this procuratory of resignation is defective in point of solemnity, according to the law of Scotland, yet, as there was a last will and testament, of the same date, disposing of Mr. Bowman's personal estate to a considerable amount, and as James Melville, and his father George Melville, took benefit from that will, and by virtue thereof possessed themselves of the whole proceeds of the estate in England, real and personal, they became bound to confirm and make good the other part of the same settlement as to Logie. And, having accepted benefit, they could not approbate and reprobate the same deed. The case of Martin, &c. *v.* Martin, was applicable to the present, where the doctrine now contended received effect in the Court below, and the House of Lords.

Vide ante vol. iii. p. 421.

After hearing counsel,

LORD THURLOW said,—

" My Lords,

" The interlocutor of 1795 was accurately decided, and founded on the true principles of Scotch law. I read over the other interlocutors, feeling considerable prejudice in their favour, from the great authority of the judges by whom they were pronounced, and my personal respect for most of them, but without being able to comprehend the reasons upon which they are founded.

" I should have been glad to have gone more at length into the case, if my present state of health would have permitted it, and to have examined the different cases referred to. Most of them were originally cited by the respondents. They have little to say to the real point before us, but, so far as they have, they rather go to confirm the interlocutor of 1795. But I shall shortly state why I

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think the *interlocutor of* 1795 *ought to be affirmed*, and the others reversed.

"The clause in the deed 1757, reserving a faculty to alter and change it, is a power to dispone anew, and not a power to engraft a new succession upon the original settlement by an accessory deed. Such a power, exercised as it is contended it has been here, was never heard of as sustained in the law of Scotland. The counsel for the respondent being asked, whether he could produce any case, answers that he can produce no such case.

"There is, indeed, a power of nomination contained in the deed of 1757, which Walter Bowman might have exercised by an accessory deed; but, to have done so, he must have referred to the original instrument under which he exercised that power. Here there is no such reference to the deed of 1757 to render it effectual, even supposing that the reservation gives a power to engraft a new succession by a relative instrument.

"There never was a stricter entail, so far as seen or read of, than that created by the deed of 1757, so much so, that James Melville contravened by omitting to register it. Of the same date with that deed, there was a will relative to his English estate, of which I need say no more than that it was found cancelled at his death. There was also a subsequent will in 1763, but the deed of 1757 was found uncancelled.

"I agree with what was stated at the Bar as to the effect of a voluntary deed, like this of 1757, kept in the granter's custody, that it was completely in his power. If he had taken infeftment upon it, it might have been different, still, being absolute fiar of the estate, he might have done what he pleased with it. But if he once published the deed, it was no longer in his power. The clause, therefore, reserving the power of revocation, and to dispone anew by an original deed of disposition, was not totally inept, since a case might happen, under which a new disposition of the estate could only be made in consequence of this reservation.

"By the will of 1763, the testator desired his personal property to be laid out on lands, which he directed to be settled in the manner described by a deed executed of the same date. I call it a deed for the sake of perspicuity, though, not being duly executed, it is void by statute. Now, let us see how far the one is combined with the other, so that the will can be said to refer to it. In no other way than by ordering how the money is to be laid out in the purchase of land, and how that land is to be settled, does this appear. This mention of the void deed may render it sufficient in respect of binding the property thus purchased, but it does so in no other respect. The consequence contended for is by no means conclusive, that because it must engraft so much as relates to the settlement described in the will upon particular heirs, that therefore it adopts the clauses which refer to another and distinct estate. This puts an end to the idea of appro-

bate and reprobate, for the deed 1763, as to conveying the estate of Logie, is a perfect nullity ; and though it is said that it is expressive of an intention to dispose, it is, as I have already observed, referred to by the will, only so far as to settle the land which is to be purchased with the English property.

" There is said to be a revocation. But how can a void deed be a revocation ? The operation of a void settlement can be no more effectual to revoke than to convey. If the contrary were true, it would go to reverse all the interlocutors, for they all go upon the ground that the deed 1757 is an existing deed. The attempt to fetter it by the instrument of 1763, I consider as very idle. In all Courts of justice, but especially in Scotland, where written instruments are peculiarly sacred, it is of the greatest importance that they should be construed by fixed rules of interpretation. If we once depart from principles or established rules of law, under a notion of some peculiar hardship, it will be impossible to know what estate parties are to take under a conveyance. I don't mean to pass any particular reflection on the administration of justice in the Courts in Scotland. The same thing has, in some respects, taken place in this country ; for as old Wilbraham used to say, ' No man could tell what a will was, until he got to the House of Lords, owing to strained niceties and refined interpretations.' The old Scottish law was very simple in its regulations, as to heritable property, and there was no place in which titles were more secure. I cannot but say, however, that modern decisions have very much departed from that ancient simplicity.

" I therefore move—That the interlocutors complained of be reversed ; that the interlocutor of 1795 be affirmed, and that the appellant be assoilzied from the conclusions of the action brought by the respondent, and that it be decerned for him accordingly in the declarator brought by him."

It was therefore ordered and adjuged that the several interlocutors complained of in the appeal, so far as the same concern the estate of Logie, which belonged to the last Walter Bowman, be reversed. And find that the succession to the said estate falls to be governed by the deed of entail executed by Walter Bowman in the year 1757 ; and it is therefore ordered that the appellant be assoilzied from the action brought against him by the respondent Robert Henderson, and decern ; and decern also in the declarator brought by the appellant, according to the prayer of his declarator.

For the Appellant, *Wm. Alexander*, *Ro. Craigie*, *M. Nolan*.
For the Respondent, *Robert Blair*, *Wm. Adam*.