induced the humble individual addressing your Lordships to make that motion. After the most anxious consideration, I have been unable to reach any other conclusion than that, in conformity to the law of Scotland, this was a redemption consolidating the wadset with the superiority, that superiority having been originally entailed by Earl Robert in 1648, and is brought within the fetters of the entail; and that, on the second question, the Court of Session are also right in determining that, until the first interlocutor of the Lord Ordinary, there was a bona fide possession, that might be carried, and has been carried by your Lordships down to a later period; for, in a case last Session, it was carried down to the decision of the House of Lords. It appears to me that there has been a bona fide possession; that the trustee has received these rents bona fide according to the laws of Scotland, according to which law this question must be decided; and that he has, as far as he could, applied these rents to the discharge of the trust imposed upon him; and that the Court of Session have therefore adjudged rightly in saying, that these bygone rents cannot be recovered by the Duke of Roxburghe, until the period of the first interlocutor of the Lord Ordinary. Having stated to your Lordships my view of the case, I have only further to move your Lordships that the judgment be affirmed.

March 9. 1825.

Duke of Roxburghe's Authorities.—(WADSET.)—2. Ersk. Inst. 8. 16.; Grant *v.* Donaldson, March 11. 1786, (8689.); Campbell *v.* Spiers, Dec. 14. 1790, (8652); Campbell *v.* Common Agent of Edderline, Jan. 14. 1801, (App. Adjudication). —(RENTS)—2. Ersk. Inst. 1. 25.; Ogilvie *v.* Ogilvie, (Note to Roxburghe *v.* Wauchope, June 13. 1822); Stair's Inst. 1. 28.

Wauchope and Others' Authorities.—(WADSET.)—Earl of Peterborough *v.* Creditors of Fraser, Feb. 4. 1736, (3086.); Kerr *v.* Turnbull, Feb. 15. 1758, (1555.); 2. Ersk. Inst. 8. 18.; Hope's Minor Practics, 170.; Ross's Lectures, vol. ii. p. 369.; Bell's System of Deeds, vol. ii. p. 74. et seq.; M'Lellan, Jan. 7. 1780; Grahame *v.* Galbraith, Jan. 14. 1814, (F. C.)—(RENTS.)—2. Ersk. 1. 25.; Bonny *v.* Morris, July 30. 1760 (1287.).

J. RICHARDSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

PETER M'ARTHUR, Appellant.—*Sol-Gen. Hope—Fullerton.*

No. 8.

ANDREW JAMESON and Others, Trust-Disponees of LYDIA TURTON or FALCONER, deceased, Respondents.—*Adam—Abercrombie.*

Implied Revocation—Clause.—A husband having purchased landed estates at a judicial sale, and executed a deed of conveyance and settlement, proceeding on the narrative, that 'I am now resolved, in the event of my death, before my titles to the said lands 'and estate are made up and completed, to convey the said purchase to and in favour

'of my dearly beloved wife,' and assigning and conveying such and such lands to his wife, 'her heirs, assignees, and disponees;' and having thereafter taken from the Crown a charter of sale and resignation of these lands to 'him, his heirs and assig-'nees;'—Held, (affirming the judgment of the Court of Session), in a question between the wife and the heir of her husband, that the conveyance to his wife was not revoked by the Crown-charter.

March 22. 1825.

Lords Gillies and Meadowbank.

JOHN FALCONER purchased at a judicial sale the estate of Durn, comprehending, first, The barony of Durn, holding of the Crown; secondly, The lands of Westside and others, formerly part of that barony, now holding of Keith Dunbar; and, thirdly, The lands of Dykehead and others, holding of the Duke of Gordon. These lands, from being contiguous, were known by the general name of the estate of Durn; but the decreet of sale expressly sold, disponed, and assigned, decerned, and declared, 'all and haill the foresaid lands of Durn, comprehending the 'mains of Westside, Rosswell, the twenty boll tack, &c. lying 'within the parish of Fordyce, and shire of Banff; as also sold 'and disponed, adjudged, decerned, and declared, all and haill the 'foresaid lands of Meikle and Little Dykehead, the town and 'lands of Redstocks, &c. lying within the lordship of the forest 'of the Boyne parish foresaid of Fordyce and shire of Banff.'

Shortly after making this purchase, Falconer executed a deed of settlement in these terms:—'Know all men by these presents, 'that I, John Falconer of Catney, in the county of Surrey, pro-'prietor of the lands and others after-mentioned, considering 'that at a judicial roup and sale of the lands and estate of Durn, 'upon 4th August last, proceeding in a process of ranking and 'sale at the instance of Sir Robert Abercrombie of Birkenbog 'against Mr James Dunbar of Durn, John Robertson, writer in 'Edinburgh, offered for me the sum of L.16,500 sterling for 'the said lands, and being the only offerer was preferred thereto, '&c.; and that I am now resolved, in case of my death before 'my titles to the said lands and estate are made up and com-'pleted, to convey the said purchase to and in favour of Lydia 'Turton, alias Falconer, my dearly beloved wife, to whom I have, 'by a former settlement, conveyed my whole personal estate, out 'of which the price of the said lands and estate must be paid: 'Therefore, and for the love, favour, and affection which I have 'and bear to her, wit ye me to have assigned, conveyed, and 'made over, likeas I hereby assign, convey, and make over, to 'and in favour of the said Lydia Turton alias Falconer, my wife, 'her heirs, assignees, and disponees, all and whole the said lands 'and estate of Durn, lying in the parish of Fordyce and shire of

'Banff, as the same are more fully described in the articles of roup, on which the said sale and roup proceeded; together with the said articles of roup themselves, minutes of roup, and enactments following thereon in my favours; together with the interlocutor in the sale to be pronounced thereon in my favour by the said Lords; with all that has followed or may be competent to follow thereon; surrogating and substituting her and her foresaids in my full right and place of the premises, with full power to her and to her foresaids, in case of my death before I shall have made up my titles to the said lands and estate, and made a settlement thereof, to obtain the said decreet of sale, and make up her titles thereto, in virtue of these presents, in the same manner that I could have done myself if in life; declaring always, that the said Lydia Turton alias Falconer, shall be bound and obliged, as she, by acceptation hereof, and of the former settlement made by me in her favour, binds and obliges her, her heirs, executors, and successors, to make payment of the price of the said lands, and to get up and deliver to the said John Robertson the bond above-mentioned, granted by him and me; therefore, and reserving always full power and liberty to me at any time in my life to alter and revoke these presents by any writing under my hand, and declaring that, in so far as these presents shall not be revoked or altered by me in manner foresaid, the same shall have the full force and effect of a delivered evident, though found in my custody, or in the custody of any other person, undelivered at the time of my death, whereanent I hereby for ever dispense, consenting to the registration,' &c. March 22. 1825.

Mr Falconer completed his titles to that part of the lands held of the Crown, by taking a charter of sale and resignation to himself, his heirs and assignees; and was in course of making up titles to the rest of the property, held of subject superior, when, in 1788, he was killed by a fall from his horse.

Mrs Falconer then entered into possession under the settlement of 19th September 1786, led an adjudication in implement against Margaret Falconer, considered to be the heir-at-law of the deceased, and took from her a disposition of the lands in implement of the obligation in the settlement, and completed a title to the whole estate, whether holding of the Crown or of subjects superior. Subsequently to the date of the settlement in favour of his wife, Falconer had acquired right to the superiority which had remained in the person of Keith Dunbar, and this, along with the other subjects, was included, though ineptly, in the titles Mrs Falconer thus made up.

March 22. 1825. She enjoyed the estate under these titles until 1804, when John Falconer, the true heir of line of the deceased, commenced an action of reduction of the titles she had made up, on the grounds that Margaret Falconer was not the heir of line, and therefore any titles flowing from her were null; that Mrs Falconer's right was radically bad, inasmuch as her claim rested on the conveyance and settlement by Mr Falconer, which included only the lands and barony of Durn proper, and which, even as it regarded those lands, was vacated by the titles subsequently made up by him in favour of himself, his heirs and assignees; and that the right of superiority from Keith Dunbar having been acquired subsequent to the date of the settlement, could not be carried by the settlement. Besides the reductive conclusion, the summons concluded to have it declared and decerned, 'that the assignation 'and conveyance by the said deceased John Falconer in favour 'of the defender Mrs Lydia Turton, was granted under the 'condition and in the event of his dying before obtaining the 'decreet of sale, and making up titles to the lands and barony 'of Durn, and limited to that period solely; but by the sur-'vivance of the said John Falconer for ten months after making 'up his titles, his taking the decree of sale to himself, his heirs 'and assignees, the said conveyance was not only virtually re-'voked, but the condition under which it was granted was never 'purified by the decease of the said John Falconer before his 'titles were completed:'—'That the barony of Durn is alone 'comprehended in the said conveyance, and that the other sub-'jects, viz. the lands of Westside, &c. holding feu of the deceased 'Keith Dunbar, depute-clerk of Session; also the lands of 'Meikle and Little Dykeshead, &c. holding of the Duke of Gor-'don; and also the Moss-tolerance, obtained from and held feu 'of the family of Park—are separate and distinct tenements, 'unconnected with or disunited from the barony of Durn and 'others, described in the conveyance by the deceased John Fal-'coner in favour of the defender Mrs Lydia Turton, and there-'fore not disponed as a part or an appendage of the barony of 'Durn thereby; but that the said whole lands, and others 'foresaid, belong in property to the pursuer, as the undoubted 'heir and representative of the deceased John Falconer of 'Durn.'

In the course of the litigation the pursuer and defender died, and the action was insisted in by their disponees. The Lord Ordinary sustained 'the reasons of reduction of the several

'title-deeds libelled, expede by the deceased Mrs Lydia Turton or Falconer, and her disponee, for the purpose of vesting them in the right of the lands and other subjects in question, in so far as the titles flow from Margaret Falconer, sometime at Tarriff, or proceed upon adjudications in implement, deduced and followed out by the said Lydia Turton or Falconer against the said Margaret Falconer, and reduced, decerned, and declared accordingly; and particularly, in so far as these titles contain or relate to the superiority of the lands of Westside, Hogswell, Broomhillock, and others, formerly vested in the person of Mr Keith Dunbar, and acquired by the late John Falconer of Durn from him, decerned and declared in terms of the declaratory conclusions of the libel to that extent accordingly; but, quoad ultra, repelled the reasons of reduction, sustained the defences, assoilzied the defenders from the reductive and declaratory conclusions of the libel, and decerned.' March 22. 1825.

To this judgment the Court, on advising a petition with answers, on the 19th November 1822, adhered.*

The Judges were of opinion, that it was the manifest intention of Falconer to convey to his wife all he had acquired under the decree of sale; that, accordingly, he had assigned to her that decree, and that the subsequent charter was not intended to defeat her right.

M'Arthur (Colin Falconer's disponee) appealed.

Appellant.—The deed of conveyance and settlement of 19th September 1796 carried the 'lands and estate' of Durn,' but not the other lands contained in the decreet of sale. It is quite irrelevant in a question of the present nature to go into the intention of parties. The terms of the dispositive clause must be the regula regulans. There was no pre-existing onerous contract to which reference can be made as inferring an obligation to make an additional conveyance. The settlement was entirely gratuitous, and the obligation imposed on Mr Falconer's heirs must be therefore measured by the precise terms of the conveyance. The preamble cannot be let in to affect the discussion. Besides, the conveyance was virtually revoked. While holding the personal right to the lands, Mr Falconer conveyed them (so far as the settlement did convey them) to his wife; but thereafter he made up titles to them, and conveyed them to himself, his heirs and assignees; thus altering the conveyance to his

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* See 2. Shaw and Dunlop, No. 23.

March 22. 1825.

wife into a conveyance to his heirs-at-law. The expression 'heirs and assignees' denotes 'heirs general;' and although the original design of adding the word 'assignees' might have been to reserve a party's right to exclude heirs-general, that object would be accomplished by a deed of date posterior to the titles made up: using that term would not keep alive the right of a party called by a prior deed; for it is a settled law, that an investiture to heirs and assignees completely effaces every prior personal destination. There is no authority for the distinction taken by the respondent, that the charter to Mr Falconer cannot be considered a revocation of his conveyance, because under that conveyance he had no right; it only binding him and his heirs, and merely to take effect at his death. Whether a mortis causa deed, or not, the destination was changed. The charter completed his investiture, and extinguished the previous settlement. Even as it is, the settlement was to be limited in its effect to the contingency of Mr Falconer's right remaining personal at his death, a contingency which did not happen.

Respondents.—The conveyance and settlement of 19th February 1786 was intended to convey, and did convey, the whole lands purchased by Mr Falconer at the judicial sale. In using the words 'lands and estate of Durn,' he comprehended the whole lands, 'as the same are more fully comprehended in the 'articles of roup;' and by that appellation they are known. Land certainly cannot be conveyed without dispositive words, whatever may be the intention; but here the deed sufficiently designates and dispones what the disponer meant to convey. This is not a competition between the respondents, founding on an obligation to convey, and a third party having acquired complete right by onerous titles. It is a question of obligation; and if the appellant claims as heir, he must implement the obligation imposed by the deceased on himself. The point of onerosity does not enter into the discussion; although gratuitous, the obligation fastens on the heir.—But in truth the obligation was not gratuitous. It came in place of the previous settlement of moveables, part of which were taken to make the purchase. This conveyance was never revoked, directly nor indirectly. The charter Mr Falconer took was in conformity to the terms of the decreet of sale; and by the term 'assignee,' he calls his wife, whom he had by previous settlement vested with that character. A party merely renewing his own titles, does not revoke or alter any previous destination he himself may have made of the estate, and which is not to take effect until his death. He

cannot be said to have a right to the estate under the conveyance. It was merely the written indication of its transference at his death. There was no change of investiture. He merely made his personal right real, retaining the same destination in favour of himself, heirs and assignees. In fact and law, the conveyance neither was nor could be part of the investiture. It was a mortis causa disposition, not to take effect until death; and its operation commences on that event arriving, and no sooner. The plea, that the conveyance was conditional, proceeds on a misapprehension of the intention, as well as words, of the deed. March 22. 1825.

The House of Lords ordered and adjudged, 'that the appeal 'be dismissed, and the interlocutors complained of affirmed, with 'L. 100 costs.'

Appellant's Authorities.—Clark, May 31. 1821, (1. Shaw & Ballantine, No. 52.); Molle, December 13. 1811, (F. C.)

J. RICHARDSON—A. MUNDELL,—Solicitors.

GEORGE PENTLAND, Appellant.—*Sol.-Gen. Hope—Fullerton.* No. 9.

WALTER STIRLING GLASS, Respondent.—*Bosanquet—Keay.*

Bankrupt—Prisoner.—Circumstances under which (affirming the judgment of the Court of Session) the benefit of the cessio bonorum was granted to a party, on condition of introducing into the disposition omnium bonorum a clause revoking all deeds granted by him 'which may have had the effect of excluding his jus 'mariti over his wife's estate and effects, heritable and moveable.'

GLASS raised a process of cessio bonorum, and was opposed by Pentland, on the grounds, that he had become embarrassed from indulging in extravagant expenditure, totally unsuitable to his means; that, to acquire loans, he had fraudulently misrepresented the state of his funds; that, with a view to disappoint his creditors, he had contrived that property devolving to him from his father should be placed altogether beyond their reach; that, with the same view, property to which his wife had succeeded, after incurring the debts on which he was incarcerated, was vested in his wife, to the exclusion of the husband's jus mariti; that there had not been a fair and complete disclosure of his means and estate, so as to make the disposition omnium bonorum March 23. 1825.

1ST DIVISION.