No. 7. [29*th August* 1833.]

PATRICK CAMERON, Esquire, for GEORGE FENTON CAMERON, his infant son, Appellant.—*Lord Advocate (Jeffrey)—Jervis.*

JOHN MACKIE, Esquire, and others, Trust Disponees and Executors of the late JAMES DICK, Esquire, Respondents.—*Dr. Lushington—H. Robertson.*

Trust—Revocation—Foreign.—Held (affirming the judgment of the Court of Session), 1. That a trust disposition of heritable subjects in Scotland of which the granter should die possessed, and referring to trust uses as specified in any will executed or to be executed by him, constitutes, with a will executed in England according to the English forms, an effectual conveyance of the heritage in Scotland for the purposes set forth in the English will.

2. That it was no objection to the disposition that the disponees were described as executors under a will which was afterwards revoked, they being otherwise properly designed, and

3. That a Scotch conveyance of heritage cannot be revoked by a deed not probative by the law of Scotland, although probative by the place of its execution.

Expenses.—The expenses incurred in trying the validity of a trust conveyance for charitable purposes, and to the exclusion of the heir at law, ordered to be paid out of the trust funds.

1st Division. Lord Moncreiff. THE late James Dick of Finsbury Square, London, was a native of the north of Scotland; and his niece

was married to Patrick Cameron, sheriff substitute of Elginshire. Of this marriage there was a child, the appellant George Fenton Cameron, who was the heir at law of Mr. Dick. That gentleman had early formed the resolution to dispose of his property after his death, for the purpose of promoting education in the northern parts of Scotland, and had communicated his intention to his law agent in Edinburgh. His property consisted partly of money invested in heritable bonds in Scotland, and partly in the public funds, or otherwise, in England. He had, previous to 1823, made a will or testament in the English form; and under the advice of his agent in Scotland he executed, on the 14th November 1823, a disposition in these terms:—" Know all men by these " presents, that I, James Dick, Esq., residing in Fins- " bury Square, London, for sundry good causes and " considerations me hereunto moving, do hereby give, " grant, assign, and dispone, from and after my death, " to and in favour of John West of Gower Street, " Bedford Square, in the county of Middlesex, Esq.; " John Mackie the younger, of Fenchurch Street, in " the city of London, merchant; James Alexander " Simpson of Doughty Street, Mecklenburgh Square, " in the said county of Middlesex, gentleman; and " John Dick, a captain in the royal navy, executors " named and appointed by me, conform to will in " the English form already executed by me, and the " survivors and survivor of them, and the heirs of the " survivor, and their or his disponees and assignees, " declaring that a majority of them acting for the time " shall constitute a quorum, all and sundry lands and " heritages, with all debts heritable and personal, and " whole sums of money and effects situated in Scotland,

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" which shall pertain and belong, or be addebted, " resting, and owing to me any manner of way at the " time of my death, with the whole vouchers, title deeds, " securities, and instructions thereof, and whole clauses " therein, together with all right, title, and interest " which I have to the said subjects, heritable and per- " sonal, in Scotland, belonging to me at the time of my " death. Moreover, I do hereby bind and oblige me, " my heirs and successors, to infeft and seise the said " John West, John Mackie, James Alexander Simp- " son, and John Dick, and the survivors and survivor " of them, and the heirs of the survivor, and their or " his foresaids, in the whole of said subjects above dis- " poned requiring infeftment; and for that purpose to " make, grant, subscribe, and deliver to the said John " West, John Mackie, James Alexander Simpson, and " John Dick, and the survivors and survivor of them, " and the heirs or assignees of the survivor, and their " or his foresaids, all writs, deeds, and conveyances con- " taining procuratories of resignation, precepts of sasine, " and other usual clauses requisite for fully vesting and " establishing the premises in their or his person; with " full power to the said John West, John Mackie, " James Alexander Simpson, and John Dick, and the " survivors and survivor of them, and the heirs of the " survivor, and their or his foresaids, to call and pursue " for, uplift, receive, assign, convey, sell, and dispose of, " discharge and renounce, the whole of said subjects, " heritable and personal, hereby disponed and assigned, " and generally to do every thing in relation to the " premises which I might have done before granting " hereof; but always to and for the uses, ends, and " purposes, and under the declarations specified and

" contained in my will in the English form already
" executed by me, or to be specified and contained in
" any other will, codicil, or other writing which may
" yet be executed or signed by me, and to all which
" express reference is hereby made; reserving always,
" not only my own life-rent of the subjects, heritable
" and personal, before disponed and assigned, but also
" full power and liberty to me to alter and revoke these
" presents, in whole or in part, as I shall think fit, at
" any time in my life, or even on deathbed—dispensing
" with the not delivery hereof, and declaring these
" presents to be a good, valid, and effectual deed,
" though found lying by me at the time of my death,
" or in the custody of any person to whom I may
" entrust the same undelivered: And I consent to the
" registration hereof in the books of Council and Ses-
" sion, or other Judges books competent, therein to
" remain for preservation; and thereto constitute Sir
" John Hay, advocate, my procurator. In witness
" whereof, these presents, written on stamped paper by
" Adam Pearson, clerk to Alexander Pearson, W. S.,
" are subscribed by me at London the 14th day of
" November in the year 1823, before these witnesses:
" James Stewart Henry, of No. 9, Finsbury Square, in
" the county of Middlesex, gentleman, and George
" Newton Browne, of No. 40, Great Coram Street,
" Russell Square, in the said county of Middlesex,
" gentleman. (Signed) JAMES DICK.—JAS. S. HENRY,
" witness; G. N. BROWNE, witness."

The will here referred to was afterwards either cancelled or destroyed; and on the 18th of May 1827, Mr. Dick made another will or testament, by which he revoked all former wills, and gave, devised, and bequeathed

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" all and every my lands, tenements, and hereditaments, " money, and securities for money, stock in the public " funds, goods, chattels, and all other my real and per- " sonal estate and effects whatsoever and wheresoever, " not herein-after otherwise disposed of, unto John " Dick, Esq., a captain in the royal navy, John Mackie, " of Fenchurch Street, in the city of London, merchant, " and James Alexander Simpson, of Doughty Street, " Mecklenburgh Square, in the said county of Middle- " sex, solicitor, whom I hereby nominate my executors, " their heirs, executors, administrators, and assigns, " upon trust," &c. to pay debts and legacies. " And as " to all the rest, residue, and remainder of my property " whatsoever and wheresoever, I direct my executors to " pay, assign, and make over the same from time to " time as the same shall be received or come into pos- " session, and all interest, dividends, and annual pro- " duce thereof, in the meantime, to the principals and " professors for the time being of the King's and " Marischall Colleges, Aberdeen, to be by them invested " in or upon government or heritable security, in their " names, and with full power to the said principals and " professors for the time being to vary such securities, " and to manage the fund hereby directed to be formed, " in such manner as to them shall seem best. And it " is my will, that the said principals and professors " shall pay the interest, dividends, and annual produce " of such securities, from time to time as the same shall " become due, to the professors of the faculties of " arts and divinity in the said colleges for the time " being, to be by them applied in manner and subject " to the regulations herein-after mentioned, to the main- " tenance and assistance of the country parochial

" schoolmasters as by law established in the three
" counties of Aberdeen, Banff, and Moray, excluding
" the royal burghs; it being my wish to form a fund
" for the benefit of that neglected, though useful class
" of men, and to add to their present very trifling
" salaries. And with regard to the distribution of the
" income arising from the said fund, and to the selec-
" tion of the objects to be benefited thereby, I wish the
" following rules to be observed :—1. That the country
" parochial schoolmasters by law established in the
" three counties of Aberdeen, Banff, and Moray, ex-
" clusive of the royal burghs, shall alone be entitled to
" the benefit of the said fund: 2. That the income
" thereof be applied in such manner as not in any
" manner to relieve the heritors or other persons from
" their legal obligations to support parochial school-
" masters, or to diminish the extent of such support,
" and so as not to interfere with the rights or power of
" heritors and presbyteries over schoolmasters, or the
" schools entrusted to their care, as the same rights or
" powers are by law insured to them: 3. That the said
" professors for the time being shall have full power
" to pay and distribute the income of the said fund
" from time to time to or among all or such one or
" more of the parochial schoolmasters aforesaid, in such
" proportions, and generally to dispose of the said
" income among them, in such manner as to such pro-
" fessors shall seem most likely to encourage active
" schoolmasters, and gradually to elevate the literary
" character of the parochial schoolmasters and schools
" aforesaid; and for these purposes, to increase,
" diminish, or altogether to discontinne the salary or

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" allowance to be from time to time made to all or any " of such schoolmasters, without being accountable for " so doing. And I particularly recommend the said " professors to pay great attention to the qualifications " and diligence of the several parochial schoolmasters " for and in superintending the education of students " in the said colleges, during the intervals between the " sessions thereof, and for and in preparing youths for " the said colleges,—taking care, at the same time, that " the common branches of education are properly at- " tended to at the said parochial schools. And in order " to enable the said professors to perform the several " trusts aforesaid more easily, I authorise them to " appoint a proper person from time to time as they " shall see fit, to act as their clerk, who shall be properly " qualified, and fully competent to such office, and to " allow such clerk such a salary as the said professors " shall think fit, and with power to them to remove any " such clerk whenever they think proper. And I em- " power the said professors for the time being to " manage and dispose of the funds to be paid to them " generally, in such way as shall seem to them best " calculated to effect the purposes aforesaid," &c. " In " witness whereof, I, the said James Dick, have, to this " my last will and testament, and to a duplicate thereof, " each contained in eight sheets of paper, set my hand " and seal; that is to say, my hand to the first seven " sheets, and my hand and seal to this eighth and last " sheet thereof, this 18th day of May, in the year of " our Lord 1827.

" (Signed) JAMES DICK."

He came to Scotland in the same year; and when

in Aberdeen he there executed, on the 6th of July, a deed, in which, after reciting the provisions in the above will relative to the charitable bequest, he set forth—" And being desirous, in as far as in me lies, to " ensure the success of the scheme on which I have so " resolved, and to render the same as perfect as circum- " stances will admit of for answering the purposes " expressed in my said will, and making the residue of " my estate available in the easiest and simplest way to " the object of improving the condition of the parochial " schoolmasters of the counties above mentioned, and " advancing the interests of literature and general edu- " cation in these counties, have resolved with that view " to execute the supplemental deed underwritten, which " I desire to be taken and held as part of my said will; " that is to say, I give, grant, assign, and dispone to my " executors aforesaid, viz. the said John Dick, John " Mackie, and James Alexander Simpson, and the sur- " vivors or survivor of them, in trust for the uses, ends, " and purposes expressed in my last will and testament " above mentioned, all and sundry lands, heritages, " debts, sums of money, mortgages, adjudications, bonds, " heritable and moveable, bills, accounts, and other " estate, real and personal, of whatever kind, and " wheresoever situated, which shall belong or be resting " and owing to me at the time of my decease, together " with the whole vouchers, evidents, and instructions of " the same; and I bind and oblige myself, my heirs " and successors whomsoever, to make, grant, subscribe, " and execute all such deeds, instruments, or writings " as may in any way be requisite or necessary for " effectually vesting the premises in the persons of my " said trustees and executors, and rendering complete

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"their title to my said estate, in trust for the purposes
"of the said will: But providing always, as it is hereby
"specially provided and declared, that my said will,
"jointly with the present supplemental deed, is to be
"taken and understood, and carried into effect, with
"and under the conditions and qualifications herein-
"after specified; viz., that my said trustees and execu-
"tors, instead of paying, assigning, and making over
"the residue of my property, with the interest, divi-
"dends, and annual produce thereof, to the principals
"and professors for the time being of the King's and
"Marischal Colleges, Aberdeen, to be by them invested
"and disposed of in manner directed by the said will,
"shall pay, assign, and make over all the rest, remain-
"der, and residue of my said property whatsoever and
"wheresoever, from time to time as the same shall be
"recovered or come into possession, and all interest,
"dividends, and annual produce thereof, in the mean-
"time to the Reverend Doctor Duncan Mearns, pro-
"fessor of divinity, the Reverend Doctor Patrick
"Forbes, professor of humanity and of chemistry,
"William Paul, professor of natural philosophy, and
"Hercules Scott, professor of moral philosophy, all in
"King's College, Aberdeen, and to the Reverend
"Doctor George Glennie, professor of moral philo-
"sophy and logic, Doctor James Davidson, professor
"of civil and natural history, Doctor William Knight,
"professor of natural philosophy, and John Cruick-
"shank, assistant professor of mathematics, all in the
"Marischal College, Aberdeen, and to the survivors of
"them, or such persons as shall be chosen to succeed
"them in manner after mentioned, to be by them
"invested in or upon government or heritable securi-

" ties in their names in trust, to remain under their " charge as a constant perpetual fund, of which the " interest, dividends, rents, and other annual income " or produce shall be paid and applied by them to the " maintenance and assistance of the country parochial " schoolmasters as by law established in the counties " of Aberdeen, Banff, and Moray, excluding the royal " burghs; but subject always to the rules and regula- " tions mentioned in my said will, which I hereby ratify " and confirm, except in so far as the same are con- " trolled and qualified by the terms of this supplemental " deed, and subject also to the following conditions " and regulations, which I have resolved to annex " thereto."

He accordingly gave a number of new directions as to the administration of the trust. He did not reserve his life-rent or any power of revocation, nor did he revoke the deed of 1823. The testing clause was in these terms:—" In witness whereof, these presents, written " by Duncan Davidson, advocate in Aberdeen, on this " and the five preceding pages of stamped paper, I have " subscribed my name, and set my seal, at Aberdeen, " the 6th day of July in the year 1827, before witnesses; " viz., Alexander Dick, Esq., residing in Edinburgh; " John Forbes, son of the said Doctor Patrick Forbes; " and the said Duncan Davidson. (Signed) JAMES " DICK.—ALEX. DICK, witness; JOHN FORBES, wit- " ness; DUNCAN DAVIDSON, witness.

He delivered this deed to Dr. Glennie.

Doubts having occurred, whether, contrary to his intention, Mr. Dick might not, by the execution of the above deed, lose all control over the institution of which he contemplated the establishment, and of the disposal of

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the funds during his life, and being reminded of the general disposition which he had executed in 1823, and which apparently he had forgotten, he caused the deed executed at Aberdeen to be sent to him, and he cancelled it by cutting off his signatures and the seal; and on the 20th November 1827, he executed a codicil in these terms:—"This is a codicil to the will of me, "James Dick of Finsbury Square, in the parish of "St. Luke, Old Street, in the county of Middlesex, "Esq., which will bears date the 18th day of May 1827. "Whereas in and by my said will I have directed my "executors therein named to pay, assign, and make "over all the residue of my property, subject to the "bequest therein contained, to the principals and pro- "fessors for the time being of the King's and Maris- "chal Colleges, Aberdeen, to be by them invested as "therein mentioned, and with directions to the said "principals and professors to pay the interest and "annual produce thereof to the professors of the "faculties of arts and divinity in the said Colleges for "the time being, upon the trusts therein mentioned, "for the benefit of the country parochial schoolmasters "in the three counties of Aberdeen, Banff, and Moray, "excluding the royal burghs: And whereas I am appre- "hensive that if the residue of my said property shall "be paid to the said principals and professors, my "intentions in favour of the parochial schoolmasters "aforesaid may be partially frustrated; I do therefore, "by this codicil to my said will, revoke the said direc- "tions contained in my will to my executors, to pay the "residue of my property to the said principals and "professors, and I revoke and make void all the be- "quests contained in my said will to them, or in their

" favour, or to the said professors of the faculties of
" arts and divinity in the said colleges, or in their
" favour; and in lieu thereof, I direct my executors, in
" case I shall not by any deed make such a provision as
" in my will is mentioned for the relief and benefit of
" the country parochial schoolmasters therein specified,
" to see that the directions in favour of the said school-
" masters, contained in my will, are duly carried into
" effect; and for that purpose I authorise and direct
" my said executors to pay, assign, and make over all
" the residue of my property, by my will given to the
" said principals and professors, to such individuals, or
" to such public or corporate body, as in the judgment
" of my said executors, or the survivors or survivor of
" them, or the trustees or trustee for the time being
" under my said will, shall be most likely to carry my
" intentions and trusts, which are fully expressed in my
" will, in favour of the said schoolmasters into effect:
" And for that purpose I authorise and direct my said
" executors, and the survivors and survivor of them, or
" the trustees or trustee for the time being of my said
" will, to execute and to procure such individuals, or
" public or corporate body, to join, if necessary, in
" executing a proper deed of gift or settlement of the
" said residue of my property, upon the several trusts
" and subject to the several directions in my said will
" mentioned in favour of or respecting the country
" parochial schoolmasters, therein specified, and to do
" all acts necessary to give full effect to the said trusts
" and directions, so that the residue of my property
" may be held by the persons or body to be appointed
" trustees thereof, upon the same trusts, and for the
" same purposes, and subject to the same directions in

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"all respects, as if such persons or body had been "nominated trustees thereof in my said will, in lieu of "the said principals and professors, and the said pro- "fessors of the faculties of arts and divinity, and in all "other respects I confirm my said will. In witness "whereof I, the said James Dick, have to this, a codicil "to my last will and testament, written and contained "in one sheet of paper, set my hand and seal, this 20th "November, in the year of our Lord 1827.

"(Signed) JAMES DICK."

He was in the course of getting certain other testamentary deeds prepared in May 1828, when he died on the 24th of that month in London. In October thereafter, the appellant, his grand nephew, was served heir at law to him; and being a pupil, his father as his administrator in law raised before the Court of Session an action of reduction, concluding to have the disposition of November 1823, the will or testament of May, and the codicil of November 1827, set aside, in respect that the disposition did not contain the proper disponing words to import a valid conveyance of real property, per verba de præsenti, and at all events was revoked by the will and testament executed upon the 18th of May 1827, or at least by the deed executed at Aberdeen; that the will and testament executed upon the 18th of May 1827 was destitute of the solemnities and requisites necessary for the conveyance of heritable property and securities in Scotland, and did not apply to any heritable property in Scotland; that, supposing the disposition to stand unrevoked, it was nevertheless void, as it had been granted to persons as executors appointed by a previous existing will, but which had been revoked by the will of 18th May 1827, so that the

office of these executors never came into existence, and therefore the disposition to them ceased to have any effect; and the executors named in the will of May 1827 were not identical with those named in the preceding will, nor with the disponees in the disposition of 1823: that, supposing that disposition were a conveyance de præsenti, and not revoked by the will of May 1827, and supposing that will with the codicil to be the last will and testament of Mr. Dick, the disposition was nevertheless void and inoperative, as no mention is made of it, or of the property described therein, in the will; and that will was insufficient to convey real estate situated in Scotland; and the uses and purposes specified in that will were limited to the property devised thereby, which did not include real property in Scotland.

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In defence the trustees pleaded, that the disposition contained proper disponing words, importing a valid conveyance of real property, and was executed with all the solemnities required by law; that it was not revoked by the will, which only revoked all wills previously executed and had no reference to the disposition, which was not a will, but a de præsenti conveyance; that although the will was ineffectual as a conveyance of heritable property in Scotland, yet it was valid as setting forth the testator's directions as to the disposal of his heritable property in Scotland previously conveyed by the disposition, and those directions must be held to be a part of that deed, in the same manner as if they had been engrossed in it; that the words in the disposition which designed the disponees as executors named in the first will were merely descriptive, and that their identity with the executors nominated in the will

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subsequently executed was not essential, although they were, with one exception, the same individuals.

The Lord Ordinary appointed the question to be argued in cases, on advising which he pronounced this interlocutor (11th January 1831):—"The Lord Ordinary, having resumed consideration of the closed record, with the mutual cases now lodged, Finds that the deed of trust executed by James Dick, deceased, according to the forms of the law of Scotland, of date the 14th November 1823, was not revoked by the last will and testament, also executed by the said James Dick, of date the 18th May 1827, or by any other deed, instrument, or act: Finds that the said deed of trust is subsisting, and effectual to convey to the persons therein named, and to the survivors or survivor of them, the whole heritable property of the deceased, situated in Scotland, in which he was vested at the time of his death, subject to the effect of the obligations of trust therein expressed: Finds that, it being admitted that the said last will and testament of date the 18th May 1827, and the codicil of 20th November 1827, executed according to the forms of the law of England, where the testator had his domicile, are in all respects valid and effectual to their purposes under that law, and there being no ground for alleging that there is any technical ambiguity in the terms or clauses thereof, the question as to the effect of the obligations of trust, expressed in the said trust deed, in relation to the testator's property in Scotland, by reference to the purposes specified and contained in a last will previously executed, or to be specified and contained in any will, codicil, or other writing which the testator might

" afterwards execute in the application of the said ob-
" ligations of trust to the purposes actually specified
" and contained in the said last will and testament of
" the 18th May 1827, and the codicil of the 20th
" November 1827, is a question which must be deter-
" mined exclusively by the law of Scotland: Finds it
" fully settled as a matter of the law of Scotland that
" an heritable estate may be effectually conveyed by a
" trust deed in the form of the trust deed executed by
" James Dick, and that the obligations of trust pro-
" visionally created by reference to any will to be after-
" wards executed may be effectually perfected and de-
" fined by a testamentary deed or will executed
" according to the law of the place where the testator
" is domiciled, though not bearing the forms of the
" law of Scotland: Finds that in this case the pro-
" visions of trust in the trust deed are so laid down and
" expressed as to apply with effect to the purposes
" specified and contained in the said last will and tes-
" tament, and the said codicil, and that there is no in-
" congruity which can prevent such application: There-
" fore sustains the defences, and assoilzies the defenders,
" and decerns, but finds no expenses due.

" *Note.*—The cases of election quoted by the pursuer as
" being held to depend on the law of England are entirely
" different from this case. In them the question de-
" pended wholly on an English deed, but here the
" operative deed is a Scotch deed; the English deed
" is but incidental to it. And though an English lawyer,
" looking at that deed alone, might very possibly say
" that the purposes expressed do not go beyond the
" property carried by it, he could give no legal opinion
" as to the effect of the trust deed, to extend the opera-

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" tion of the same purposes to the Scotch heritable " estate, because that would plainly be to judge of the " effect, not of the English deed, but of the Scotch " deed. The questions arising under the law of Scot- " land from the facts in the record are so clearly treated " in the cases, and the argument of the defenders ap- " pears to the Lord Ordinary to be so conclusively sup- " ported by the authorities referred to, that he thinks it " unnecessary to express the grounds of his opinion on " the several points discussed more particularly than " he has done in the above interlocutor. The way in " which a title is to be completed, and the testator's " design carried into effect, is a matter in which the " pursuer has no interest, if he cannot reduce the set- " tlement."

Against this judgment the appellant reclaimed to the First Division of the Court, who (19th May 1831) adhered, "with this explanation and alteration, that the " expenses incurred by the pursuer in this action shall " be paid by the defenders out of the trust fund."*

Mr. Cameron appealed.

Appellant.—1. The first point is, whether a Scotch deed conveying heritage can be revoked by an English deed, or a deed not probative by the law of Scotland. It certainly must appear rather singular, if the law of Scotland were to hold, that an imperfect trust conveyance may be filled up by a deed in the English form, and not probative according to the law of Scotland; and yet that a conveyance of property cannot be revoked in the same manner. But the law appears to be

* 9 S. D. B., p. 601.

nearly the reverse; for while the power of filling up an imperfect Scotch deed by an English will, so as to effect by their union a valid conveyance, is still a point of the greatest doubt, the power of revoking such a conveyance by an English will has long ago been established.* If, then, a Scotch conveyance of property may be revoked by an English will, the next question is how that will is to be construed. The meaning of the deed is a fact which must be ascertained by the evidence of those who have made that law their study, and are acquainted with its technicalities. Now, the appellant has averred, "that by the law of England the word 'will' is not limited "in its legal meaning to bequests of moveables or per- "sonal estate merely, but applies also to a demise or "settlement, and to instruments by which real as well "as personal estate passes;" consequently when the testator revoked all former wills, the trust conveyance of 1823 must be held to be included under that revocation. It has been said that the same point had previously occurred in the case of Fordyce against Cockburn †, and that of Brack against Hogg ‡, in both of which the Court held that a revocation of former wills did not recal a previous trust disposition of heritage. But there are two important points of distinction between these cases and the present. For here, after revoking all former wills, the will proceeds to appoint a series of trustees, different from those under the deed of 1823, and with different powers, so that that previous deed must have been held superseded by the will; and in

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* Simpson v. Barclay, December 11, 1751, Elchies voce Testament, Mor. 15585; Lang v. Whitelaw, Shaw, Appeal Cases, vol. ii. p. 13, note.

† July 5, 1827, Shaw & Dunlop, vol. v. p. 897, new ed. 832.

‡ Nov. 23, 1827, Shaw & Dunlop, vol. vi. p. 113, ante v. 61.

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the cases of Fordyce and Brack no new deed was contemplated or executed when the revocation in the will was made. Consequently if the revocation had been held to apply to the previous trust deed, while the testator never went on to execute any new one, he must be supposed to have committed the absurdity of frustrating his own object, and leaving his property undisposed of. Influenced by that consideration, the Court certainly did hold, in these cases, that the testator could not have intended to revoke the trust deed. But here, after the revocation of former wills, Mr. Dick instantly executed and delivered a new trust conveyance of the very same property in favour of different individuals from those to whom the first disposition was made. When a testator follows up his revocation by the execution of a new deed, his intention must be supposed to have been to alter some of the particulars of the previous conveyance, which would of course be done most clearly and satisfactorily by a new deed. And therefore, as the same grounds do not exist here which existed in the cases of Fordyce and Brack for limiting the meaning of the word, it must be entitled to receive the usual construction which it bears in the law of England, and according to which it would include the trust disposition of the property in Scotland. Nay, the execution of the supplemental deed must, per se, be held to operate a virtual revocation of the former disposition; for though it is at an end, as a regulating conveyance of Mr. Dick's property, the facts relative to its execution and its delivery are of material importance, both in reference to the question of revocation, and to the ulterior question, whether the will is to be considered as filling up and declaring the purposes

of the trust deed. By this supplemental deed, the same subjects which had been disponed to the respondents were transferred to individuals who were not identical with the previous trustees. It superseded the trust deed of 1823; and had it never been cancelled, there could not have been a question that, taken along with the will to which it bore express reference, it would have been the regulating settlement of Mr. Dick. But though the supplemental deed was cancelled by Mr. Dick it by no means follows that the effect of its being so cancelled was to revive the first.* It is true that in the ordinary case, where a person who has indirectly revoked one deed by the execution of another afterwards destroys the deed containing the revocation, and stops there, the presumption will be that he intended to rear up the first; but if it be apparent that he merely destroyed the deed as a preliminary to the execution of another, different from both, then the first deed will not come into operation.† Now, here the cancellation of the supplemental deed was done, not with the view of rearing up the deed of 1823, but as a step to the preparation of a new series of deeds.

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2. But, supposing the disposition of 1823 not to have been revoked, it is void in respect of having been granted to the disponees therein named, and the survivor of them, as the executors of a will previously executed, and as the office so conferred, and in contemplation of which the disposition was granted, never came to exist in their persons,

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* Muir v. Muir, June 1, 1813, Fac. Coll.

† Müller Promptuarium Juris, vol. vii. p. 426; Voet, lib. 27. tit. 3. sec. 5; Vinnius, Inst. lib. ii. tit. 18. sec. 6; Lord Meadowbank's opinion in Howden v. Howden, July 8, 1815, Fac. Coll.

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that will having been revoked by the will of the 18th of May 1827. The parties named as trustees are not the same with those who are ultimately named as executors under the only existing settlement of Mr. Dick. The name of Mr. West is entirely omitted in the Engish will, although Mr. West was alive at the date of its execution, and is alive still; and the provision relative to the appointment of new trustees, in the event of death or declinature to act, is different under the will from that under the trust deed. It is true that Mr. Dick would have been entitled to have named as his trustees any individuals designed as executors even under the will of another party, if he had so seen fit; but the objection is, not that Mr. Dick might not have named trustees who were not his executors, but that in point of fact he did not mean them to act as his trustees unless they were also his executors. Neither in Auchterlony's case*, nor in Fordyce's, nor Brack's, was the disposition to the trustees made to them as executors. The intention of Mr. Dick was, that the existence of the trust in favour of the respondents was conditional on their being the executors who should act under his English will; for had Mr. Dick died after destroying the original will, which preceded the trust deed, without naming any executors by whom the purposes of his will were to be fulfilled, the trust could not have stood.

3. It was incompetent for Mr. Dick, by a deed executed in the form of an English will, and improbative according to the law of Scotland, to fill up and declare the

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* Willoch v. Auchterlony, Dec. 16, 1769, M. 5539.

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purposes of the trust conveyance which he had granted of his heritable property in Scotland; and at all events he could not, by such a will, nominate new trustees. But granting that it was competent for Mr. Dick to do so, the question remains, has he done so? and how is the legal meaning of this will to be gathered? Being an English deed it must be judged of by Scotch Courts according to the law of England alone. This principle has long been fixed by various cases in questions of election, where the point was, whether or not the terms of an English will were such as to put the heir to his election.* Now the appellant has offered to prove, that the "last "will and codicil do not contain any instructions rela- "tive to the disposal of the property attempted to be "conveyed by the trust deed of 1823, nor any expres- "sions importing that the directions contained in the "said instrument should be applicable to Scotch pro- "perty; and the same would not, by the law of "England, be held to express any intention whatever "as to the heritable property in Scotland, or to contain "any instructions in regard to such property." Besides, this case is distinguished by the specialty, that there is no reference in the one deed to the other. Thus, in the case of Wilson Bowman†, reversed in this House (29th May 1802), where, among other questions, the point arose, whether a reserved power of nomination contained in a deed of entail had been duly exercised by Walter Bowman or not, Lord Thurlow laid down this doctrine:—

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* Robertson, Feb. 16, 1816, Fac. Coll.; Trotter v. Trotter, Dec. 5, 1826, affirmed on appeal; 5 S. D., p. 78, new ed. p. 72, June 10, 1829, ante iii. 407.

† Henderson v. Wilson, Jan. 31, 1797, Mor. 15444.

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"There is indeed," he observes, "a power of nomination contained in the deed 1757, which Walter Bowman might have exercised by an accessary 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 the reservation gave a power to engraft a new succession by a relative instrument." Had Mr. Dick intended that the purposes of the English will should be those which he had reserved to himself power to declare, in relation to the trust conveyance, he would have referred expressly to that conveyance as previously executed by him, and declared that the purposes it contained should apply, not only to the English property carried by it, but to the Scotch heritage also, which formed the subject of the previous and separate conveyance. Such was the manner in which he did act on another occasion; for when he came to frame the supplemental deed he expressly narrated the will he had already executed, and declared that its directions should be also the directions according to which his Scotch property conveyed by the supplemental deed should be distributed and managed. At all events, whether a reference in express terms to the trust deed was, necessary or not, it is clear that Mr. Dick, having reserved the power of declaring the purposes of his Scotch trust by his English will, it lies with the respondents, who say that these purposes are declared by that will, to show what expressions in that instrument are applicable to Scotch property, or bear reference to the subjects conveyed by the trust deed. The cases of Fordyce, Brack, and Lady Essex's trustees, which were founded on by them, rather tend

to confirm than to shake the principles for which the appellant contends. It is true that it may perhaps be held that these cases establish the point that the purposes of the trust deed might have been declared by Mr. Dick in his English will; but they also, by implication, establish that there must be a reference in the will to the trust deed, or at least such expressions as clearly show that the purposes in the will apply to the same property which was conveyed by the trust deed. Neither does the case of Auchterlony support the respondents argument, for the only question really argued in that case was, whether the purposes of the trust deed could at all be declared by the will? No argument was raised as to whether the will was intended to declare the purposes of the trust or not. And instead of being made, like the will in question, at the distance of years from the date of the trust disposition, and when the granter had forgotten it, the will was executed within a month of it, and the property conveyed by the trust disposition, and that with regard to which the will declared the intentions of the testator, were coincident; for it does not appear that he had any English property, so as to complicate the question, or to create a doubt what were the purposes referred to.

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Respondents.—1. The question whether a Scotch deed conveying heritage in Scotland has or has not been revoked by an instrument sufficient to produce that effect, must be determined by the rules of the Scotch law. For it is established law, that in regard to the form of conveyances of real property, as well as of revocations of such conveyances, the lex rei sitæ must govern.

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The case of Simpson v. Barclay* is by no means hostile to this doctrine. The testator made an entail by a deed containing a power to revoke. He afterwards, while at Buenos Ayres, and in a situation where "he had no lawyer to advise him better," executed a will, which revoked the deed of entail, and then bequeathed the estate to his sister. This will must have been holograph, and therefore probative by the law of Scotland, because the testator had no one to assist or advise him about it. As a revocation of the entail, therefore, it was quite unexceptionable. In the case of Dundas v. Dundas † the Court of Session held that a Scotch deed of entail was revoked by a subsequent English will; but this House ‡ "ordered and adjudged that the interlocu-"tor complained of be reversed, in so far as it finds "that the deed of entail libelled on is effectually re-"voked by the deed executed by Sir Laurence Dundas "on the 14th February 1779." In the case of Wilson § the Court of Session laid it down as a principle that a regular entail could be revoked by a subsequent procuratory and will, both of which were destitute of the solemnities required by the law of Scotland, in respect they were "formally executed according to the lex loci, "although not according to the solemnities of the law "of Scotland;" but this House ‖ reversed, and found that the succession fell to be governed by the deed of

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* Simpson v. Barclay, 10th January 1752, Elchies voce Testament, No. 12.

† Dundas v. Dundas, 25th February 1783, Mor. p. 15585.

‡ May 21, 1783.

§ Henderson v. Wilson, 31st January 1797, Mor. p. 15444.

‖ May 29, 1802, Morison, App., Tailzie, No. 3.

entail. The cases of Fordyce v. Cockburn and of Brack v. Hogg establish the proposition contended for by the respondents; and accordingly, in Lang v. Whitelaw, Lord President Blair observed,—"We must therefore "come ultimately to the doctrine already considered, "that by the law of Scotland deeds of revocation are "exempted from the statutory solemnities; and I do not "think this doctrine well founded." The appellant has observed, that in those cases no new deed was executed when the revocation was made; whereas Mr. Dick, after revoking all former wills, executed and delivered a new trust conveyance of the same property, in favour of different individuals from those to whom the first disposition was made. There is, however, no such distinction in law as that pointed at by the appellant; and the fact is, that although Mr. Dick at one time intended to alter the machinery by which he wished to accomplish his purpose, the deed executed at Aberdeen was meant to carry that purpose into execution. The question, whether a man intends to revoke a deed, cannot be solved by inquiring whether he has substituted any other deed in its place; for it is just as likely that an intention to revoke a settlement may be attended with a design to die intestate, as with a design to execute a new settlement. A strong example of this occurs in those cases where the heir at law seeks to set aside a liege poustie disposition executed to his prejudice, by means of a subsequent death-bed disposition of the same subject, also to his prejudice. In such cases, the plea of the heir is, that the liege poustie disposition is revoked by the death-bed deed, whilst the death-bed deed is insufficient to constitute a new disposition to his prejudice;

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that the death-bed deed is valid to the effect of revoking the other; but that, quoad ultra, it is ineffectual. Now, here the success of the heir at law entirely depends upon the distinction in question. If the death-bed deed contain an express revocation of the other, it is held that this revocation may take effect, whilst the new disposition contained in the same instrument is ineffectual. So it was found in the noted case of Crawford v. Coutts*, which has been followed by the decision in Batlay v. Small † and other cases. On the other hand, if the death-bed deed contain no express revocation of the former, it cannot operate as a revocation, unless by constituting in itself a new and effectual conveyance. And thus, as the heir cannot set aside the one deed without admitting the validity of the other, his interest to challenge either is cut off. ‡

2. The appellant has argued that the deed of 1823 is void, in respect the trustees are described as the executors appointed by the previous English will, which will was afterwards revoked; that, the office of executor under that will having thus never come into operation, the description under which they were appointed trustees was incorrect; and that the executors appointed by the last will and codicil, are not the same persons with the trustees nominated by the deed of 1823. It is true that the trustees are described as executors, and the de-

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* Crawford v. Coutts, 3d Feb. 1801, Mor. No. 3, Apx. Death-bed, remitted 14th March 1806, 12 Fac. Col. note.

† Batlay v. Small, 2d February 1815, Fac. Col.

‡ Rowan v. Alexander, 22d November 1775, Mor. 11371; Donaldson v. Mackenzie, 20th July 1776; Roxburgh, 13th December 1816, affirmed 25th May 1820, Bligh's Reports, vol. ii. p. 619; Toller's Law of Executors, p. 15, 6th edit.

scription at the time was perfectly correct, so far as it went; but the trustees were otherwise sufficiently designed, so as to ascertain their identity. Mr. Dick did not provide that the office of trustee under the one deed was to depend upon the subsistence of the other; on the contrary, he anticipated that the will might be altered or revoked by a subsequent will, whilst the trust deed remained permanent and capable of connecting with each successive will that he might happen to make. In the case of Fordyce v. Cockburn the circumstances were precisely the same in regard to this objection: The trustees had been previously appointed executors under a will which was afterwards revoked, and were expressly so designed in the trust deed; yet no serious objection seems ever to have been founded upon this circumstance. Indeed it was not necessary that the trustees under the Scotch deed should be the same persons as the executors under the latter will of 1827. The purposes of both deeds being the same, it might no doubt be necessary that the trustees and executors should act in concert; but the estates which they had to administer were different, and therefore there would have been nothing anomalous in the Scotch trustees being different from the English executors. But in fact the accepting trustees are here identically the same persons as the executors nominated by his latter will: the defenders, who are three in number, are the executors under the latter will, and they are also trustees under the deed of 1823. Mr. West, who was the fourth trustee, had probably intimated to the testator his resolution to decline the office, which accounts for his not being appointed an executor along with the defenders.

3. It is not seriously disputed, that by the law of Scot-

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land it is competent to declare the uses and purposes of a trust deed relative to Scotch heritage by an English will, or other writing probative by the law of the country in which it is framed, although improbative by the law of Scotland. This general point is now finally settled by the cases of Willoch v. Auchterlony, Fordyce v. Cockburn, Brack v. Hog, and of Ker v. Ker's Trustees. But it is said that there is no sufficient connexion between the deed of 1823 and the will of 1827, and no such reference from the one to the other as to prove that Mr. Dick intended the uses and purposes set forth in the will to be extended to the Scotch property carried by the deed of 1823. It is clearly proved by the correspondence that Mr. Dick's sole purpose in framing the trust deed was to give him the power of disposing of his Scotch heritage by will; and that with this view it was so drawn up as to refer to any subsequent will, as well as the will he had previously executed. His intentions therefore are beyond doubt. But farther it is not necessary by the law of Scotland that, between deeds intended to form parts of one general settlement, there should be a distinct and separate reference in each to the other, or that the later deed should specially refer to the former. It is quite enough, if between the two there exist such a connexion, even although constituted by the words of one of the deeds only, as sufficiently ascertains the granter's intention. This is sanctioned by all the cases which have occurred upon this subject; and particularly by that of Willoch v. Auchterlony*, which is the leading authority upon this point. But the appellant

* Willoch v. Auchterlony, 14th December 1769, Mor. p. 5539.

contends, that this question of reference ought to be determined by the law of England. For that purpose, both the Scotch and English deeds would require to be laid before counsel, so that their opinion would not rest on the English deed alone, but on a consideration of the two deeds. If there were any technical expressions contained in the English deed which required to be explained to a Scotch Court, it might be proper to take the opinion of English counsel; or if there were any expressions in the will which, when duly explained by English counsel, were considered as worthy of being taken into account by this Court in determining the question of reference, it might be reasonable to state this as an element to guide the decision. But this is very different from holding that the question of reference itself is to be delegated to English lawyers. The question of reference occurs upon the construction of the Scotch trust deed,—upon the construction of the clauses of reference contained in that deed. The discussion arises as to the disposal of Scotch heritable property, and resolves into this inquiry, whether the Scotch deed has been completed and rendered effectual by the execution of a declaration of uses and purposes, such as it contemplates and refers to? This is purely a Scotch question, and is altogether different from questions of election. In all such cases, the point at issue is with regard to the intention of the testator, as ascertained by the expressions contained in a particular deed. And where that deed is an English deed, drawn up in the English form, and replete with the technicalities of English law, it has justly been held that such deed shall be construed by the law of England. But these cases do not bear any analogy to the present. Here the question occurs on

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the construction of a Scotch deed. And although an English deed is referred to, still the particular contents and intentions of the testator, as developed in the English deed, are of little or no consequence in the question of reference, it being admitted in general that it is a will, and a will clearly declaring purposes.

LORD CHANCELLOR.—My Lords, this was an appeal from the Court of Session, in which Patrick Cameron, for his infant son, George Fenton Cameron, is the appellant, and John Mackie and others, trustees under the deed and will of the late James Dick, Esq., of Finsbury Square, London, are the respondents. James Dick, by a trust deed executed in England on the 14th of November 1823, but in the Scotch form, in the Scotch language, and upon Scotch property, and the provisions of which were entirely Scotch, vested his estates in trustees, according to the Scotch law, but always to and for the uses, ends, and purposes, and under the declarations, specified and contained in his will in the English form, already executed by him, or to be specified and contained in any other will, codicil, or other writing which might yet be executed or signed by him, and to all which express reference was thereby made. He had at that time, as he states, executed a will in England, but that will was subsequently cancelled, and no evidence or information whatever remains of the contents of it, supposing we were at liberty to go into it. But he afterwards made and published his will in England, according to the English form, and attested in such manner as to pass English real estates, on the 18th of May 1827; and by that will he gave, devised, and bequeathed all and every

his lands, tenements, and hereditaments, money, and securities for money, stock in the public funds, and so on, to trustees; and then he directed those trustees to call in all his debts, and to convert into money all that was not in money; and then he gave, after certain legacies, the rest, residue, and remainder of his property, whatsoever and wheresoever, to those trustees, with a direction to pay it over to the principals and professors of the two colleges of Aberdeen, for the purpose of their vesting it in certain of the professors of that university, in order to their applying it towards the increase of the stipends of the "parochial school-masters by law established in the three counties of "Aberdeen, Banff, and Moray, exclusive of the royal "burghs," and that these alone should be entitled to the benefit of the fund. He then directed that the income so to be applied should not in any manner relieve the heritors or other persons from their legal obligations to support parochial schoolmasters, or to diminish the extent of such support, or interfere with the rights and powers of heritors and presbyteries over schoolmasters, or the schools intrusted to their care, as the same rights and powers are by law secured to them. He then gave a power—a very necessary power, after making such a provision for the parochial schoolmasters —a power to the professors for the time being to pay those schoolmasters, in such a manner as to them shall seem most likely to encourage active schoolmasters, and elevate the character of the schoolmasters and the schools; and for those purposes to increase, diminish, or discontinue the salary or allowance to be made to all or any of such schoolmasters, without being accountable for so doing. He then directed that the professors

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should manage and dispose of the funds to be paid to them generally, in such way as should seem to them best calculated to effect the purposes which he had stated. He afterwards, by a codicil in November 1827, the same year, altered that disposition, only so far as regarded the persons who were to have the management and superintendence of this fund for the parochial schoolmasters, by substituting his executors in the place of the College of Aberdeen; and the question is, Whether the provisions contained in this English will can be taken to bear reference to the trust disposition in the Scotch form, executed some years before, so as to pass the Scotch estates to those trustees, subject to the trust for the benefit of the parochial schoolmasters?

My Lords, this case was very fully argued upon two occasions before your Lordships, and on one of those occasions your Lordships had the benefit of the assistance of two of the learned Judges of this country, for the purpose of ascertaining, if need be, the effect of this English will upon English property, supposing English property to have been the matter in question, and supposing one of the points raised in the Court below to be, whether or not the English law would affect this question of the execution as to the Scotch property? I was very clearly of opinion, and in that I had the concurrence of those two learned Judges entirely, that in this case the English law can have no bearing whatever upon the question,—that it is a question touching Scotch real estate alone; that the Scotch law alone must regulate the disposition of that real estate in Scotland; and that it does not signify at all to the decision of the present question, to inquire what would be the effect of the English will upon an

English power, given in an English deed, made as affecting English property, if that had been the question in this case. The point then for the consideration of your Lordships is simply reduced to this, Whether or not the Court below have well decided in coming to the opinion, that the English will executes the power,—what is called in the Scotch law the reserved faculty,—given or created by the trust disposition that passes to the trustees the Scotch estates to the uses pointed out in the will, namely, the support of the parish schoolmasters in the three counties; and I am of opinion, after the best attention I have been able to give to the subject, upon both the arguments at the bar, which were very able and very learned, that the Court below, in affirming the interlocutor of Lord Moncreiff, who appears to have bestowed extraordinary attention upon this question,—an attention well warranted by the great importance of the case in point of principle, as well as in respect of the amount of the estate,—that the Court of Session, in affirming the Lord Ordinary's interlocutor, have come to a right decision.

My Lords, as I entertained some doubt of this originally, and as I felt a very great and natural reluctance to affirm this decision, I thought it fit to postpone this case, for the purpose of further consideration, before finally disposing of the question,—being willing, if I could see any means of reconciling the contrary judgments in the Courts of Scotland, and the facts of the case, to take advantage of that circumstance. This reluctance, I have no doubt, was amply shared by the Court below; and it is grounded upon this, that there is nothing peculiarly judicious in the disposition in question, of this property. The burghs of Scotland are exempted from the bounty

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of this testator altogether. His object is to encourage parish schoolmasters, although it is perfectly well known that the want of a sufficient number of endowed parish schools is beyond all comparison greater in the towns of Scotland than in the country villages, as it is greater in the towns than in the country villages here; and yet he excludes by his will all those burgh schools and schoolmasters, which ought, if his will had been judicious for his own purposes, to have been the principal objects of his bounty. Again, notwithstanding the guards and checks he has appointed, by the powers vested in those who are to execute his intention in distributing the fund among the schoolmasters, it is quite clear that the tendency of this will and this trust disposition, when carried into effect, must be in a great degree to frustrate his own object, and that in two ways: In the first place, by providing so well for those schoolmasters, as to make them less dependent on their own exertions than might be desirable; and, in the next place, to relieve the heritors of the parishes from the burdens which he feels peculiarly anxious to leave upon them. The tendency of this disposition unquestionably is, to relieve the heritors of those parishes, and to take upon himself, or upon his estate, at the expense of his own relations, those burdens in respect of parochial schools. Another ground of that reluctance is this—a more general one than the former,—that I have always been of opinion, that where a person leaves relations, it is infinitely better that they should be made sharers in his property, than that it should go, however well meant, and however usefully, to many public purposes. Nevertheless, I have found, as the Lord Ordinary and the Court of Session found before me, that the law in this

case is too strong to be got rid of, and that, by the law of Scotland, this will is a sufficient execution of the power or sufficient declaration of the uses, whichever way you take it, in the trust deed; and that, accordingly, it must have the effect which has been given to it below.

The difference between the law of Scotland and the law of England, as to the execution of powers, is very great. Not only the principles whereupon that branch of the law rests in the two countries are not the same, but the principles on which the Scotch law appears to rest may be said, in some respects, to be opposed to those which are the basis of the English law in this branch. By our law, if there is a power, and a question arises whether an instrument has executed that power; it is necessary that the party maintaining the affirmative should make it appear that the intent of the party making the deed, will, or other instrument, which is alleged to be an execution, was to execute the power. In the Scotch law the reverse is the case; and unless it shall be shown that it was not his intention to execute the power, it shall be held a good execution. Here the burden of proof is thrown upon him who would support the execution,—there, the proof is rather thrown upon him who would deny the execution. In either case, I need hardly add, that the evidence is to be collected from within the instruments themselves; but the proof from the internal evidence of those instruments is thrown upon different parties in the two countries. Thus, although the rule is not with us that it is necessary that the instrument alleged to prove the execution should refer directly and explicitly to the instrument creating the power, nor that it should refer expressly to

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the property which is the subject of its provisions, yet if there be no such distinct references there must be some other means of connecting the two instruments together; if neither the power itself, nor the property or rights which are the subject matter of the power, are referred to, then there must be something in the instrument executed, which shows clearly, that unless it is held to be an execution of the power, such instrument will be inoperative. The rule has been laid down in the leading case of Andrews v. Emmott, 2d Brown's Chancery Cases, and subsequently by Lord Alvanley, in commenting upon that case in Hales v. Margerum, 3d Vesey, junior. Lord Thurlow says, in the former case, "If a man disposes of that over which he has a power, "in such a manner that it is impossible to impute to "him any other intention than that of executing the "power, the act done shall be an execution of the "power;"—and Lord Alvanley, in Hales v. Margerum, commenting upon Andrews v. Emmott, says, "There "must be either a direct reference to it, or a clear "reference to the subject, or something upon the "face of the will, or independent of it, some circum-"stance which shows that the testator could not have "made that disposition, without having intended to "comprehend the subject of his power." Now, in Scotland, it is quite different; for it should rather seem, that unless there be something in the instrument purporting to be an execution of the power, which shows that it cannot have been intended by the party to execute that power, if you produce an instrument, and if the instrument may apply to the power, so as to be an execution of it, then it shall be a good execution. The rule may be more generally laid down thus: That by

the Scotch law there is no technical principle—no line distinctly drawn to guide the Court in ascertaining what was the intent of the party, in the instrument alleged to be the execution, but you are to gather it in every way in which you can from the instrument itself; and if it may apply to the power, then it shall be considered to be an execution of it. It is hardly necessary, in this case, however, to go so far; for I agree with the Court below in thinking, that there is in this instrument sufficient internal evidence to bring it almost—certainly not altogether, but, if not altogether, almost — within the English rule; at least, nearer to this rule than at first sight might appear. The difference which is taken between real and personal property in this branch of our English jurisprudence exists not in the law of Scotland. Here a general devise of real estate, as will be found in Standen v. Standen, 2d Vesey, junior, 589, and which has been the law ever since Sir Edward Clare's case, in 6th Coke's Reports, will not dispose of what the party has only a power to dispose of, unless it is necessary to satisfy the words of the disposition, but it will execute the power, if there is no other real estate; but otherwise, with respect to personalty, which is a peculiarity of our law, introduced by the language of the statute of Harry the Eighth, the statute of Wills, which only operates upon that which is the property of the devisor at the time of making the devise.

Now, my Lords, a very important matter of fact has been left undecided, and apparently uninquired into in the Court below, namely, Whether or not there was in fact any other real estate than the Scotch estate belonging to the testator, either at the date of the trust instrument, or at the date of the will? One of the learned

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Judges, on the second argument, here called the attention of your Lordships to the second article of the condescendence, folio 6 of the appellant's case, by which it is averred, that "the said James Dick was possessed of "large property, heritable and moveable, both in "England and Scotland;" and that in the answer is admitted,—for the answer admits the whole of the second part of the condescendence, except the concluding paragraph; but then there is something vague in this phraseology, and it is very possible that, reddendo singula singulis, it might be intended, and might be so taken by the pleader of the other party in his answer, that the heritable property was only in Scotland, though in England he had moveable—though the presumption would be from the words, that he had heritable property, that is, real estate, in both countries. I understand, however, there is no doubt whatever—and that seemed to be admitted at the bar—that he had real estate in Scotland, and nowhere else; if so, the execution of the power would, even according to the strict principles of the English law, under the authority of Standen v. Standen, and other cases, be made out sufficiently by the second instrument; but, in either view, I am of opinion that even if he had real estate out of Scotland, according to the principles of the Scotch law, the will would pass that real estate to the trustees.

The case of Willoch v. Auchterlony was very much relied on by the respondents; and it was principally with a view to that case that the second argument was originally ordered, though it afterwards took a wider scope. Two points were to be ascertained; first, the authority due to that case, and whether it had ever been shaken; and, secondly, its application to the present question.

Upon both these points, after a full argument at your Lordships bar, I have no doubt—and the learned Judges, the benefit of whose assistance we had, agreed with me in the view I have taken—first, that that case is still the law of Scotland upon the subject,—that it had been acted upon ever since, and that its authority has been recognized repeatedly in subsequent cases by the Judges in the Scotch Courts; secondly, that the case is applicable to the present in a remarkable degree, even down to some of the minuter details of both cases; and that it makes the law of Scotland, or at least declares the law of Scotland, with sufficient distinctness to form a perfect ground-work for the decision of the case at the bar.

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My Lords, upon these grounds, I have no hesitation in recommending to your Lordships, that the interlocutors complained of should be affirmed; but for reasons which are obvious without being referred to, that no costs of the appeal should be paid, in this case, by the party against whom your Lordships decide; on the contrary, that your Lordships should affirm, among other parts of the judgment below, that part of the interlocutor of the Inner House by which they varied the Lord Ordinary's interlocutor, and threw upon the fund the costs of the proceedings up to that time; to which I shall beg leave now to add this further proposition,—that all the costs of the appeal—all the costs both here and below, as between solicitor and client, meaning, in the most ample form, and to the greatest extent in which those costs can, quasi costs, be given, shall be paid out of this fund.

The House of Lords ordered and adjudged, That the interlocutors, so far as complained of, be affirmed: And it

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is declared, That the full and whole charges and expenses of all parties of the proceedings in the Court of Session and in this appeal shall be paid by the respondents out of the trust funds: And it is further ordered, That the cause be remitted back to the said First Division of the Court of Session to ascertain the amount of such charges and expenses respectively, and to give directions for the payment thereof.

A. and R. MUNDELL—SPOTTISWOODE and ROBERTSON, Solicitors.