NO. 1. a deed granted to have effect at death, if it be so granted as to be irrevocable, and if delivered to the person in whose favour it is conceived, has the effect to denude or bind the party *inter vivos*. Bonds or other rights undelivered or delivered, but containing a power to revoke, may no doubt be held as donations *mortis causa*; Bankt. B. 1. Tit. 9. § 48. But neither of these is the case in the present question; and this author's authority is accordingly with the pursuers, as well as the rest.

As to the moveables, the deed 1767 is not a testament, but a disposition of the effects, and was not therefore alterable by the granter, even as to them.

The Lord Ordinary had pronounced an interlocutor, "sustaining the "reasons of reduction, and finding, that the deed 1767 was the rule for de- "termining the defunct's succession, and preferring the pursuers to the of- "fice of executors or general disponees to the defunct." The Court, by interlocutor (13th January 1774) found, "That the deed 1767, so far as re- "lates to the executry or moveables, was revocable, and actually revoked by "the deed 1771; and that Elizabeth, Agnes and Janet Leckies, and their "husbands for their interests, have an equal interest in said executry and "moveables, and ought to be conjoined in the confirmation; and as to this "point, remitted to the Commissaries to proceed accordingly." With regard to the heritage, a condescendence before answer was ordered, for proving that the said deed was a delivered evident. A proof followed upon the condescendence, from which it appeared, that though the deed was registered, yet it was not certain whether this was done at John Leckie's desire or not; and some of the witnesses likewise mentioned, that Leckie seemed to think that he had a power to alter. The Court were of opinion, that when the granter gives a deed out of his hands, a legal presumption of delivery takes place: That registration is to be considered as a public delivery; and that it would require, in order to set it a side, a proof of fraudulent registration. And an interlocutor was accordingly pronounced, (22d November 1776) finding the deed a delivered evident.

Lord Ordinary, *Monboddo.* Act. *Ilay Campbell.* Alt. *Dean of Fac. Lockhart, Geo. Wallace.*

*J. W.*

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1776. *Dec.* 11.

Miss REBECCA MONTEATH and OTHERS, *against* ARCHIBALD DOUGLAS of Douglas and OTHERS.

NO. 2.

Whether by a deed in cer-

MARGARET, Dutchess of Douglas, executed at different times, several settlements in favour of the family of Mr Monteath of Kep, who was married

NO. 2.

to her sister. More particularly, in May 1773, a contract was entered into between Mr and Mrs Monteath upon the one part, and young Mr Monteath and the Dutchess of Douglas upon the other part, by which old Mr Monteath obliged himself to make over to his eldest son, his whole lands and estates, and all debts and sums of money belonging to him, and to revoke all bonds of provision granted by him to his younger children. Young Mr Monteath, bound himself, on the other hand, to free his father of all debts contracted by him preceding the date of the contract, with an annuity of L. 100 Sterling to be allowed him during his life, and another annuity to Mrs Monteath of L. 50 Sterling, in the event of her surviving her husband. For the payment and performance of these articles, the Dutchess became bound along with young Mr Monteath, who was at the same time taken bound to relieve her of these obligations. An additional provision to the younger children was also contained in this deed, for which the Dutchess and her heirs were taken bound.

tain terms, former settlements were revoked? See No. 33. p. 11372.

About three months after the date of this contract, the Dutchess executed a total settlement, dated 18th August 1773, of her whole estate and effects, in favour of Archibald Douglas of Douglas, and others as trustees, and burdened with a variety of legacies in favour of Mr Monteath of Kep's younger children, and with the payment of all her just and lawful debts. This settlement contained the following clause: "And I hereby revoke and recall "all former settlements made by me of my said estate, goods or effects, or "any part thereof, excepting a settlement of L. 100 Sterling *per annum* "lately made by me upon the said Walter Monteath of Kep, and Jane "Douglas my sister his spouse, and longest liver of them in liferent."

Upon the death of the Dutchess of Douglas, Mr Monteath's younger children applied to the trustees for payment of all the different sums which they contended to be due to them, whether as creditors under the contract, or as legatees under the trust-settlement. The trustees not complying with these demands, an action was brought in the name of the children against the trustees, which having came before Lord Monboddo Ordinary, his Lordship ordered informations, and took the cause to report.

Pleaded for the pursuers:

There is no ambiguity in any of the deeds upon which they found their claim. Both are clearly expressive of the sums for which the demand is made; neither are they in any degree incompatible with each other, but both may subsist at the same time, and receive full execution. The trustees accordingly have founded their defence upon a presumed intention on the part of the Dutchess, that both the deeds should not have effect, and the children should not be permitted to draw the legacies bequeathed to them, unless upon the condition of repudiating the benefit of the contract. But in order to support this defence, there is a necessity either for interpola-

No. 2. ting a clause, of which there is no vestige in the trust-settlement, or of giving an interpretation to a clause already in it, which it cannot admit by any species of construction whatever. There is not a word in the whole settlement which talks of burdening the pursuer's legacies with any such condition, as that of repudiating the benefit of a former contract. There is, indeed, a clause of revocation in the trust-settlement; but this clause cannot be considered as an effectual clause of revocation, even upon the defender's own plea; for they cannot deny, that, in any event, the pursuers should be entitled to the benefit of either of the deeds they thought proper.

With regard to this clause, no person can revoke what is not in their power to alter; and such is the case with regard to the contract in question.

From the whole of this contract, it appears to be clearly onerous, and irrevocable by any of the parties. And a revocation by the Dutchess of Douglas of all former settlements of her *estate goods or effects*, can never operate with regard to monies provided by an onerous contract, and which were no longer a part of the estate goods or effects of the Dutchess of Douglas.

If this clause cannot operate as a revocation, neither can it operate as a condition. There are not *termini habiles* in this case, to talk of a *quæstio voluntatis*; for, however much the Court may be at liberty, in construing different deeds of gratuitous settlements, to investigate ideas of will and intention, no such discretion is admissible, in order to give effect to a revocation beyond the power of a supposed revoker, or upon a vague or presumed intention to interpolate a condition no where to be found in the deed itself.

Several settlements besides these were executed by the Dutchess. It was natural for her to insert a clause of revocation applicable to such settlements as were in her power. And it is therefore unnatural to apply it to an onerous contract, which, as it was not in the power, could not be within the intention of the Dutchess to revoke.

Supposing even the intention of the Dutchess to have been, that the pursuers should not reap the benefit both of the contract and of the trust-settlement, yet the maxim of law, *Quod voluit non fecit*, would most strictly apply. It is not sufficient that the Dutchess entertained an intention, unless she has carried that intention properly into execution. It might even be admitted with safety, that she had actually believed the contract to be revocable at her will, and had inserted the clause of revocation, in order to defeat it; for still this would not vary the argument. The Court can never conceive itself at liberty to supply defects in the execution of wills, merely because parties had neglected to take proper advice with regard to the extent of their own powers, and the proper manner of carrying their intention into execution. It is the business of courts of law to give effect to deeds pro-

perly executed, not to make deeds by the interpolation of clauses, or by an unwarrantable construction of them. And it is impossible, without the most manifest violence to this clause of revocation, to make it apply to a deed not in the power of the Dutchess to revoke. NO. 2.

Answered for the defenders:

The present is entirely *quæstio voluntatis*, not a question of *power*. The Dutchess was under no obligation whatever to give the pursuers a sixpence by the last deed; and if she chose to give them any thing, she was entitled so to do, under what qualities or conditions she thought proper. It is a new doctrine, indeed, to maintain, that though her will under this deed be clear, yet an effect must be given to it, contrary to her will. And it is of no importance, whether the contract in May 1773 was in its nature revocable or not. The Dutchess evidently thought, that it was revocable, and did accordingly revoke it. And if it was unalterable by the Dutchess, the only consequence is, her intention being so evident, that the pursuers may have their option to take under the one or under the other, but cannot claim under both deeds.

The trust-settlement contains not only a clause of revocation, but a clause of exception, saving from the general revocation, the annuity to Mr and Mrs Monteath. Now, as *exceptio firmat regulam in casibus non exceptis*, the manifest intention of the Dutchess to revoke the provisions in the contract, is thus completely established.

Let it be supposed, however, that there had been no clause either of revocation or exception in the trust-deed, still the pursuers' plea would have been ill-founded. Questions of this kind have frequently occurred, and have always been determined upon circumstances, and the weight of evidence appearing upon either side. In the case of two independent deeds, containing each of them a legacy or provision in favour of a particular person, without reference from the one to the other, and without any clause of revocation or of satisfaction, the will must necessarily be gathered from circumstances, or what is called the *evidentia facti*, which may often denote the parties' intention, as strongly as the most explicit language.

Decisions upon this point have varied, because they are dependant upon circumstances, and are merely the judgments of wise men upon the import of evidence. There are, however, some legal rules which come in aid of the determination, when matters are otherwise doubtful. Thus, it is a rule, that *donations* are not to be presumed, if the deed can receive any other construction; and it is therefore more natural to suppose, where the contrary does not appear, that the sum granted by a posterior deed, is in implement of the contents of a former one. And the Court, accordingly, *in dubio*, has always presumed the second deed to be in satisfaction, where a *jus crediti* arose from the first; for *debitor non præsumitur donare*.

NO. 2. It is likewise a maxim, that *nemo facile præsumitur gravare hæredem*. In the present case, the heir is clearly burdened to a certain extent in favour of the pursuers, and it is not to be presumed, that a double burden is laid upon him, unless the very clearest and most explicit evidence of it be produced.

The Court (22d November 1776) pronounced an interlocutor, "sustaining the defences, and assoilzieing from the action." A reclaiming petition against this interlocutor, was, (11th December 1776) refused without answers.

Lord Reporter, *Monboddo*. Act. *Dean of Faculty Dundas*. Alt. *Ilay Campbell*.

*J. W.*

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NO. 3. 1799. *December* 12. COLONEL HOPE *against* The EARL of HOPETOUN.

A person who had the prospect of succeeding to a large estate, granted a personal bond, obliging himself, and his heirs who should enjoy it, to pay certain additional provisions to the granter's younger children, when the expected succession should open. He afterwards entailed his own estate, under burden of the provisions he had made, or might

JOHN, Earl of HOPETOUN, possessed the old family estate, under a strict entail.

But he held the lands of Ormiston in fee simple.

He was, besides, heir of line to the Marquis of Annandale, who was unmarried, and insane.

In 1771, the Earl executed a bond in favour of his younger children, in the following terms: "Whereas, if George, Marquis of Annandale, "should happen to die without issue, and intestate, his heritable estate in "Scotland would, in the course of succession, devole upon my family; and, "seeing I have bestowed much time, pains, and expences in managing the "said estate, whereby it has been greatly improven, it would therefore be "most just and reasonable, that, in the event of so great a succession to my "family estate, that my younger children should be more amply provided "for than they can otherwise be: Therefore, I hereby bind and oblige me, "and my heir, male or female, who may happen to succeed to the said "estate of Annandale, in that event, to make due and lawful payment to "my other lawful children, already born, or that may hereafter be born, "and to their heirs and assignees, of the respective sums under written.' &c.

In 1773, he executed a strict entail of his lands of Ormiston on himself, and the heirs succeeding to him in the title of Hopetoun, with reserved