Ex parte

Case III.

James Hamilton of Dalzell, Esq; - *Appellant;* Bruce, 12 Nov. 1714.

James Hamilton brother to William Hamilton, of Orbiestoun, deceased, and the creditors of the said William Hamilton, and James his Son, - - - *Respondents.*

18th *April* 1724.

Service of heirs.—An estate being disponed to a father and failing him to his eldest son, and the heirs male of his body, with other substitutions; and the eldest son having survived the father was infeft thereon, and died afterwards without serving heir to him: the Court found the right to the estate not fully vested in the son without a service, but the judgment is reversed upon appeal.

Death-bed.—The Court having found that death-bed could be pleaded by an heir cut off by two prior deeds, and by creditors, the judgment is reversed.

Did, contracting the sickness at the time of executing the deed, constitute death-bed?

Fiar absolute limited.—A father grants an absolute disposition to his son, which is not completed by infeftment or by making up schedules in terms thereof the son afterwards joins with the father in making two new settlements of the estate, and the father who still continued in possession grants a disposition to a third party, after the son's death: the Court having found these posterior dispositions were not of prejudice to the son's creditors, the judgment is reversed.

SIR John Hamilton of Orbiestoun, deceased, having granted several bonds for sums of money, greater than the value of his estate, to a Mr. Walkinshaw, in 1653, this Walkinshaw obtained decrees of appriſing of the said estate; and having thereupon taken out a charter from the then Duchess of Hamilton, the superior, he was duly infeft in the premises, in 1659.

This Walkinshaw afterwards disponed the said appriſing, and all his right to the premises to Sir James Hamilton, son of the said Sir John; whom failing to William his eldest son, and the heirs male of his body; whom failing to James Hamilton (the respondent) second son of the said Sir James, and the heirs male of his body; whom failing to the other persons therein mentioned. Under this disposition Sir James enjoyed the estate during his life; and, after his death, William his son entered thereto, and took infeftment upon Walkinshaw's disposition.

In 1699, William Hamilton made a voluntary settlement of his estate in favour of James his son, but he still continued in possession, and afterwards sold a considerable part of his estate for payment of debts by him contracted. In 1704, a contract was executed at Cramond, between William the father and James his son, whereby William the father agreed to settle the estate upon James the son, and the heirs male of his body; whom failing upon the heirs male of the body of the respondent James; whom failing upon the appellant, and the heirs male of his body, with several other substitutions of heirs; and this deed they agreed should be drawn and executed at the sight of Lord Whitelaw.

No

No deed was executed in terms of this contract; but in February 1708, William the father and James his ſon made a new entail or ſettlement of the eſtate, executed at Buoy of the Nore, whereby failing heirs male of their own bodies, they diſponed the ſame to Sir David Hamilton, (ſince deceaſed), and the heirs male of his body; with ſeveral other ſubſtitutions of heirs. In this deed, the reſpondent James, and the heirs of his body, were not only paſſed over, but it contained a clauſe, that if the ſaid Sir David Hamilton, or any of the heirs of entail, ſhould ever convey any part of the premiſes to the reſpondent James, or his heirs, the ſame ſhould be a forfeiture of the right of ſuch perſons; and this deed contained a power of revocation.

The ſaid ſettlements executed by the father and ſon were all gratuitous, and none of them was followed with ſaſine, or put upon record. And James the ſon having died without heirs of his body, William the father on the 26th of December 1711, diſponed his lands of Orbieſtoun, and others to the appellant; upon this diſpoſition the appellant was infeft; on the ſame 26th of December, William the father conveyed to the appellant ſeveral debts due to him by the Lord Sempill. This William Hamilton died on the 29th of January 1712.

After his death the reſpondent James his brother, and heir at law, applied to be ſerved heir of proviſion to Sir James Hamilton their father, paſſing by William the brother, in order to avoid all his acts and deeds. The ground of his claim was, that under the diſpoſition by Walkinſhaw, Sir James was veſted in the fee of the eſtate; and William his ſon having neglected to ſerve heir to him, the reſpondent, who was the next ſubſtitute in Walkinſhaw's diſpoſition, was entitled to take up the ſucceſſion by a ſervice to his father. The appellant oppoſed this ſervice, and the Court of Seſſion having appointed two of their number to be aſſeſſors to the macers, the appellant contended before them, that the title whereby the ſaid eſtate was poſſeſſed, was the diſpoſition from Walkinſhaw, in which Sir James Hamilton was merely life-renter, and his ſon William fiar; and therefore that William the ſon had a right to take the eſtate without ſerving heir to Sir James, to whom he was nominatim ſubſtitute in the deed. On the 29th of January 1713, the Court of Seſſion "found that James "Hamilton, the reſpondent, might ſerve heir in general to "William his brother, Sir James his father, and Sir John his "grandfather, notwithſtanding of the diſpoſitions to the appel-"lant; and that he might ſerve heir in ſpecial to William his "brother, Sir James his father, and Sir James his grand-father, "in any other lands not contained in the ſaid charter of appriſing "and ſaſine thereon." To this interlocutor, the Court adhered on the 25th of February thereafter.

The reſpondent was afterwards ſerved heir of proviſion to Sir James his father, in the lands contained in the ſaid charter; and the retour being oppoſed by the appellant, the Court on the 22d of January 1714, "allowed the ſervice as claimed to be retoured "with this proviſion that, before retouring, the reſpondent James "Hamilton ſhould give an obligation ſubjecting himſelf to the "lawful

" lawful debts and deeds of the ſaid William his brother, as heir " *cum beneficio inventarij* to the ſaid William."

Upon the application of ſeveral of the creditors of William Hamilton, the Court on the 11th of February 1714, " remitted it " to the Lord Fountainhall to hear parties on this point, viz. " Whether or not the eſtate diſponed by Walkinſhaw was after " the deceaſe of Sir James Hamilton, fully veſted and ſettled in " the perſon of the deceaſed William Hamilton, without the " neceſſity of a ſervice, and if the ſaid William was fiar, or if " the ſaid eſtate, or any part thereof was in *hæreditate jacente* of " the ſaid Sir James Hamilton." Parties were accordingly heard on this point, and after a report to the Court, their lordſhips on the 10th of June 1714, "found that the eſtate diſponed by " Walkinſhaw was not after the deceaſe of Sir James Hamilton, " fully veſted and ſettled in the perſon of the deceaſed William " Hamilton without the neceſſity of a ſervice; and therefore al- " lowed the ſervice to be retoured, in terms of the interlocutor of " the 22d of January laſt."

Pending this queſtion, the reſpondent James, and ſeveral creditors of the ſaid William Hamilton, brought their action of reduction of the two deeds executed by William in favour of the appellant, on the ground that they were in fraud of creditors, and executed not only when the grantor was in the eye of the law, a bankrupt, but when he was on death-bed. The appellant agreed that the creditors of William the father ſhould be preferred, ſo far as they were truly creditors, but he inſiſted that the ſaid conveyances could not be reduced as granted on death-bed at the ſuit of creditors, that being an action only competent to the heir; and that the heir in this caſe was cut off by two prior ſettlements made long before theſe in queſtion. The Lord Ordinary on the 28th of January 1713, " found that the reaſon of reduction, that the " ſaid writs were granted by the ſaid William Hamilton on death- " bed, at leaſt after contracting the ſickneſs of which he died, " without going to kirk, or market, or living 60 days after, rele- " vant to be proved: and alſo that the ſame were granted by the " ſaid William Hamilton, when he was bankrupt and inſolvent " and under diligence by horning and caption, and had retired, " abſconded or forceably defended himſelf, relevant to be proved;" and a time was limited for bringing ſuch proof. To this interlocutor, the Court adhered on the 12th of February thereafter.

Upon the application of the appellant, diligence was granted for recovery of the ſettlement made of the premiſes in 1708, upon Sir David Hamilton. Several witneſſes having been examined the cauſe was ſet down for hearing; but before the ſame came on the creditors of James the ſon, applied to the Court for liberty to concur with the creditors of William the father in the action, which was allowed. The cauſe coming to be argued the appellant contended that by the deed 1708, the reſpondent James, as heir at law, was expreſsly excluded, as well as by the contract at Cramond, in 1704. On the other hand the reſpondent James contended, that he was not excluded by the laſt ſettlement, but if he was, it was

jus

jus tertij to the appellant, who could claim no right by that settlement. The appellant in reply, contended that the power of revocation was to be by the father and son, if both alive, yet upon the death of the son, that such power survived to the father; and that the appellant being in possession, it was sufficient for him to shew, that the title was not in the respondent; but that the appellant had an immediate interest, he being next substituted by the deed at Cramond to the heirs male of the respondent's body, who were excluded by the subsequent settlement; and that therefore the estate descended to him. The Lord Ordinary on the 12th of July 1715, "found that by the contract dated at Cramond, the "estate of Orbiestoun was entailed to James the son, with power "to the said James, with consent of his father to alter, and that "in virtue thereof the said contract was altered by a subsequent "entail dated at *Buoy of the Nore*, and found that the father had no "power to alter the said second entail by himself alone, and found "that the respondent James, the right heir and the descendants of "his body are not excluded from the succession by the clause in "the said second entail. And in regard the appellant has no "right or title by the second entail, preferable to the respondent "James, that it is *jus tertij* to him so found thereon; and that "it was competent to the respondents, the creditors to quarrel the "dispositions granted by William the father, to the appellant "upon the head of death-bed." And to this interlocutor of the Lord Ordinary, the Court adhered on the 15th of June 1716.

After advising the proof of the alleged death-bed, the Court on the 7th of July 1716, "found it proved that William the "father contracted the sickness whereof he died, at the time of "granting the two dispositions to the appellant, and that he went "not to kirk, or market, after granting thereof." On the 17th of November thereafter, the Court "found the qualification "alleged on the act of Parliament 1696, not relevant to reduce "the disposition, except in so far as the same may be made use of "for the payment or security of debts anterior to the said dispo-"sition."

The respondents, the creditors of James the son, insisted that the dispositions to the appellant might be reduced in regard they were granted by the father, after he was divested by a conveyance made to his son in 1699. The appellant insisted that this disposition was varied by the articles at Cramond, and that the father still continued in possession and afterwards sold part of the estate. But the Court upon the 22d of December 1716, "found "that the minutes of contract entered into at Cramond did not "innovate the former disposition granted by the said William the "father to his son, in so far as concerns the lands of Orbiestoun, "in prejudice of the son's creditors."

The appeal was brought from "several interlocutors of the Lords "of Session, of the 28th and 29th of January, the 12th and 25th of "February 1713, the 22d of January, 11th of February and 10th "of June, 1714, the 21st of January, 11th of February, and 12th "of July 1715, the 15th of June, 7th of July, and 22d and 29th

Entered, 18 Jan. 1723-4.

" 29th of December 1716, and 3d and 10th of January next " following (*a*)."

Heads of the Appellant's Argument.

The eſtate in queſtion being conveyed by Mr. Walkinſhaw to Sir James Hamilton, and after his deceaſe to William his eldeſt ſon, and the heirs male of his body, Sir James was only life-renter, and William fiar; conſequently there was no occaſion for William to ſerve heir to Sir James. For this the authority of Lord Stair is expreſs: " if heritage (ſays he) ſhould be granted " for example to John, and after his deceaſe to William, and his " heirs, John would be thereby naked life renter, and William " fiar, who could not be ſerved as heir to John." Stair B. 3. Tit. 4. § 33.

Suppoſing Sir James had been fiar, yet William being nominatim ſubſtitute to him, he upon Sir James's death, became ſeiſed in fee of the eſtate, without any neceſſity of a ſervice: for in that caſe, *mortuus ſaſit vivum*, the conveyance to William *nominatim* being conſidered as an immediate conveyance or intereſt, veſted in William, ſubject and expectant upon the contingency of his father's death only.

William the ſon entered upon the eſtate without any ſervice, continued in poſſeſſion of it for about 40 years as abſolute proprietor, ſold the greateſt part of the eſtate, and granted heritable ſecurities over it to a conſiderable value. If a ſervice were neceſſary, then he had no right, and the ſale and heritable ſecurities are void; yet by one of the interlocutors appealed from the eſtate is ſubjected to all of them. If the eſtate is to be ſubject to William's other deeds, why not to thoſe in favour of the appellant; and if ſubject to them, by which the eſtate was conveyed to the appellant, there was no room for the reſpondent James to ſerve heir of proviſion to his father.

If the reſpondent James had no title to be ſerved heir, he had no right to bring any action for reducing the conveyances made to the appellant, as being granted upon death-bed, that action being only indulged to an heir.

But ſuppoſing he were heir, yet this action ought not to have been ſuſtained, becauſe there is no preſumption of the grantor's being impoſed upon to his prejudice in this caſe, for the reſpondent was expreſsly deprived of the right of ſucceſſion, not only by the contract in 1704, but by the deed in 1708, in the laſt of which the giving or conveying any part of the eſtate to the reſpondent, is declared a forfeiture upon the perſon making ſuch conveyance. At all events ſuch action was not competent to creditors.

Though William the father in 1699, made a voluntary ſettlement of his eſtate in favour of James the ſon, ſubject to his debts in a ſchedule annexed, and reſerving to himſelf a life-rent of certain lands; yet that was never completed, for the in-

(*a*) Some of theſe interlocutors are not ſtated in the appeal caſe.

ventory of debts was never made up, nor any ſchedule annexed. The very lands which the father was to life-rent were never filled up, but a blank was left for them; and the father ſtill continued in poſſeſſion and afterwards ſold the greateſt part of the eſtate. Beſides that was entirely varied by the agreement between the father and ſon in 1704; and if the ſon had any claim by the firſt conveyance, as it was but a perſonal right, he could certainly waive that, and the ſubſequent agreement in 1704, was an actual waiver thereof. All the debts claimed by the creditors of James were contracted after the ſaid agreement of 1704, by which he had waived the former conveyance.

Counſel appearing only for the appellant, they were fully heard, and due conſideration had of what was by them offered: and this cauſe having been formerly ſet down to be heard *ex parte*, in default of any anſwer of the reſpondents, or any of them, after a peremptory day appointed for that purpoſe, and the reſpondents having been after that ſo far indulged, as to have the cauſe put off to a further day, with liberty for them to be then heard, and in order thereto to put in their anſwer to the ſaid appeal; and yet this day not appearing, but deſerting their defence and oppoſition to the ſaid appeal,

Judgment, 18 April, 1724.

It is ordered and adjudged, that the ſaid ſeveral interlocutors complained of in the ſaid appeal be reverſed; and it is hereby declared, that it is the opinion of this Houſe that the ſaid William Hamilton, elder brother of James Hamilton the reſpondent, was in virtue of the diſpoſition from Walkinſhaw, in the pleadings mentioned, fully veſted in the fee and property of the eſtate of Orbieſtoun, without the neceſſity of ſerving heir to Sir James Hamilton, his father. And that the two diſpoſitions by the ſaid William Hamilton the 26th Day of December 1711, in the pleadings mentioned, in favour of the appellant were good and effectual deeds, and the ſame are hereby eſtabliſhed, ſubject to the true and lawful debts of the ſaid William Hamilton.

For Appellant, *Dun. Forbes.* *Will. Hamilton.*

On the point of the *ſervice of heirs*, the judgment of the Court of Seſſion, which is here reverſed, is ſtated as an exiſting caſe in the Dictionary of Deciſions, vol. II. p. 367. *Service and Confirmation.*

The other points appealed are alſo of great importance.