reſpondent's mother, in preference to him, ſtill he is not thereby precluded from inſiſting in the preſent queſtion after her death.

Journal, 16 Feb. 1725-6. After hearing counſel, *It is ordered and adjudged that the petition and appeal be diſmiſſed, and that the ſeveral interlocutors or decrees therein complained of be affirmed.*

For Appellant, *C. Wearg. Dun. Forbes. Cha. Erſkine.*
For Reſpondent, *C. Talbot. Will. Hamilton.*

In this caſe both parties enter into a diſcuſſion of the proof led of Wm. MacCartney's Popery; but nothing can be diſtinctly ſtated thereon.

Caſe 126. Sir John Schaw, of Greenock, Bart. - *Appellant;*

Dame Margaret, the Widow of Sir John Houſton, Bart. Siſter of the Appellant - *Reſpondent.*

2d *April* 1726.

Preſumption.—Intromiſſion with the Settlements of a Perſon deceaſed.—Proof—In a reduction of a mother's ſettlements brought by her ſon and heir, againſt a ſiſter, who was benefited by them, on the ground that the ſiſter had acceſs to the repoſitories of the deceaſed, and took what ſhe choſe, and might have deſtroyed the reſt; the ſiſter ſtated in defence that the deeds had been given to her by her mother: it was neceſſary for the purſuer to prove that the defender's intromiſſion was unwarrantable.

The deeds produced were preſumed to contain the laſt will of the deceaſed.

A circumſtantial proof, brought by the purſuer, that the deceaſed had declared that ſhe had made other ſettlements, and of embezzlement on the part of the defender, found inſufficient.

BY a contract, executed in April 1677, previous to the marriage of Sir John Schaw and Helenor Nicholſon, the father and mother of the appellant and reſpondent, in conſideration of the then intended marriage, and of the portion of Dame Helenor, (which was very conſiderable), the lands of Eaſter Greenock were ſettled upon her in life-rent, for her jointure; and ſhe was likewiſe provided to the life-rent of one-third of all the real eſtate, which ſhould be acquired by Sir John during the marriage, and to one-third of all the houſehold furniture.

After the marriage, the lands of Carnock and Plain deſcended to the ſaid Dame Helenor and her two ſiſters, as heirs portioners; the yearly value of the whole being about 833*l.* 6*s.* 8*d.* ſterling.

By articles of marriage, in March 1700, between the appellant and Margaret, the daughter of Sir Hugh Dalrymple, Preſident of the Seſſion, it was agreed that the ſaid lands of Eaſter Greenock ſhould be ſettled upon the appellant and his then intended wife; and accordingly Dame Helenor releaſed the ſame of her life-rent By another deed, of ſame date, Sir John, the father,

in

in conſideration of ſuch releaſe by Dame Helenor, bound himſelf to pay her 2500 merks Scots *per annum* for her life in caſe ſhe ſhould ſurvive him.

On the 19th of Auguſt ſame year, Dame Helenor, by a deed reciting, that it was agreed between Sir John Schaw the father, and Dame Helenor his wife, that ſhe ſhould renounce her right to the houſehold furniture, the acquired eſtate, and other proviſions made for her by the marriage ſettlement; and alſo that ſhe ſhould make a ſettlement of her eſtates of Carnock and Plain to herſelf in life-rent, and to the appellant her ſon in fee, ſubject to a power to Dame Helenor to burden the ſame with any ſum not exceeding 50,000 merks Scots; and that Sir John the father ſhould oblige himſelf and his heirs to pay her an annuity of 8000 merks Scots ſo long as ſhe ſhould continue his widow; therefore releaſed all the proviſions made for her by her marriage contract, and ſettled her part of the eſtates of Carnock and Plain accordingly. And of ſame date, Sir John the father with the conſent of the appellant, by his bond reciting the laſt-mentioned deed, and in conſideration thereof, obliged himſelf and his heirs to pay to Dame Helenor an annuity of 8000 merks, ſo long as ſhe ſhould continue his widow. To both theſe deeds Preſident Dalrymple was a ſubſcribing witneſs.

Sir John the father died in 1702, leaving the appellant and reſpondent, his only children: and Dame Helenor afterwards remained a widow during her life. After the father's death, diſputes aroſe between the appellant and his mother, on the queſtion whether ſhe was entitled to the annuity of 2500 merks, contained in the deed of March 1700, or to the annuity of 8000 merks contained in the bond of 19th Auguſt 1700. In 1709 ſhe brought her action againſt the appellant, for this laſt-mentioned annuity, before the Court of Seſſion: to this action the appellant appeared, but the cauſe was delayed for ſome time by his inſiſting on his privilege of parliament.

The appellant afterwards brought an action for reduction of the ſaid bond of 19th Auguſt 1700, upon the ground that the ſettlement of the eſtates of Carnock and Plain, which was the valuable conſideration for the ſame, did not exiſt; and in his libel he ſet forth, "that the lady did at diverſe times declare before ſeveral "witneſſes, and particularly upon the 7th of June 1702, that ſhe "had cancelled that diſpoſition ſome days before ſhe was "delivered of a poſthumous child; and that when ſhe did ſign "the ſaid diſpoſition, it was retained in her cuſtody, and ſhe then "declared, that ſhe would conſider theſe deeds further, and if "they did not pleaſe her, ſhe would tear them." Dame Helenor denied that ſhe had cancelled the deed, but that the ſame was abſolute and irrevocable on her part; ſhe alſo offered to execute a new deed to the ſame effect, or to prove the tenor of the original ſettlement. She accordingly brought an action for proving the tenor of the deed, which ſhe alleged was cancelled by accident, and in her libel ſet forth the words thereof at length. To this action the appellant pleaded, that it was not competent to prove

the

the tenor of a deed without firſt proving and particulariſing the *caſus amiſſionis*; that Dame Helenor muſt be preſumed to have been the deſtroyer of the Deed, becauſe it bore not to have been delivered, and muſt be preſumed to have remained in her cuſtody, in order to its being ratified if ſhe thought fit; and that it never was ratified by her. With regard to the propoſal to renew the deed, Sir John ſtated, that the original being cancelled, the grant of the annuity was alſo cancelled; and that by the cancelled deed as ſet forth in the libel Sir John the father had concurred in ſeveral grants and proviſions in favour of his ſon, which could not be reſtored by Dame Helenor's act or deed.

The Court on the 19th of July 1711, "Found that Dame "Helenor having the diſpoſition cancelled in her hands, and "never ratifying the ſame judicially, preſumed in law that it was "cancelled by herſelf, and therefore that the obligements on Sir "John by the bond are diſſolved." Againſt this interlocutor, Dame Helenor next day entered her proteſt for *remeid* of law; but preſented no appeal to the Houſe of Lords.

Sir John afterwards offered to refer it to the oath of his mother's counſel, whether they had not ſeen the cancelled deed in her cuſtody; but having declined to depone, the Court on the 25th of July 1711, "In reſpect that in the debate Dame Hele-"nor's having the cancelled diſpoſition in her cuſtody was not "refuſed, and that her advocates refuſed to appear to give their "oaths of calumny becauſe of the appeal interpoſed, aſſoilzied "the ſaid Sir John Schaw (*a*)."

Dame Helenor proſecuted her appeal no further; but on the 6th of September 1711, ſhe executed five ſeveral deeds for a ſettlement of her eſtate and effects, while ſhe had in view the endeavouring to obtain a reverſal of the decree of the Court of Seſſion. Three of theſe deeds were executed to take effect in the event of the decree being reverſed, and were of the following nature: Firſt, a diſpoſition of her ſhare of the eſtate of Carnock and Plain, to herſelf in life-rent, and to the appellant her ſon in fee, reſerving a power to charge the ſame with 50,000 merks Scots, and providing that the diſpoſition ſhould be void, if ſhe ſhould not be found entitled to the ſaid annuity of 8000 merks, or in caſe the appellant ſhould not pay her the ſame: Second, an aſſignation to the reſpondent of all the arrears of the ſaid annuity due and to become due, ſubject to a power of revocation: and third, a deed charging the ſaid eſtate with the payment of 49,000 merks to the reſpondent, purſuant to the reſervation for that purpoſe.

The two other deeds were executed to take effect in caſe ſhe ſhould be found to have no right to the annuity of 8000 merks, and were of the following nature: Firſt, a ſettlement by way of entail of the ſaid eſtate of Carnock and Plain to herſelf in life-rent, and to the reſpondent her daughter and the heirs of her body; whom failing, to ſuch perſons as Dame Helenor ſhould

(*a*) Theſe two interlocutors were the ſubject of the ſubſequent appeal, at Lady Houſton's inſtance, againſt Sir John Schaw, No. 128 of this collection, to which appeal the foregoing ſtatement of facts and precedents is an introduction.

appoint

appoint by any writing under her hand; whom failing, to her own heirs and aſſignees: and ſecond, an aſſignation to the reſpondent of the proviſions in the marriage-contract in Dame Helenor's favour, particularly the arrears of the life-rent of 2500 merks ſecured to her, upon her renouncing her jointure out of the eſtate of Eaſter Greenock.

All theſe deeds contained powers of revocation, and none of them were delivered or put upon record, but the whole were retained in Dame Helenor's own cuſtody. No alteration was made upon theſe ſettlements till about a month before Dame Helenor's death. On the 26th of February 1722, ſhe executed an aſſignation of all her perſonal eſtate in favour of the reſpondent, ſubject to the payment of ſuch debts and legacies as ſhe ſhould at any time give, with a power of revocation. On the 3d of March thereafter, ſhe executed a deed reciting the former ſettlement of the eſtates of Carnock and Plain in 1711, and that the ſame was ſubject to a power of revocation; therefore ſhe ſo far varied it, as to ſettle the ſame upon the deceaſe of the reſpondent, and failure of heirs of her body upon Mrs. Maria Schaw, daughter of the appellant, and the heirs of her body, with ſeveral other ſubſtitutions of heirs, the laſt of them being to her own heirs whatſoever; and ſhe directed, that this ſhould be conſidered as part of the former deed 1711. Of ſame date ſhe executed an aſſignation to the reſpondent of the arrears of the ſaid annuity of 2500 merks: and the reſpondent executed a back bond, obliging herſelf to apply all the money ſhe ſhould receive of this laſt-mentioned annuity in the purchaſe of lands to be ſettled in the ſame manner as the ſaid eſtate of Carnock and Plain was. On the 5th of March ſhe executed in favour of the appellant's grand-daughter Miſs Helenor Cathcart an aſſignment of ſeveral bonds to the amount of 2000 merks; and about the ſame time ſhe aſſigned to Mrs. Helenor Houghton, the reſpondent's daughter, a bond of 500*l.* ſterling. All theſe deeds executed by Dame Helenor contained powers of revocation, and clauſes diſpenſing with the delivery. She died on the 20th of ſaid month of March 1722; and it came to be a queſtion between the parties, which is the ſubject of the preſent appeal, whether Dame Helenor had not of a date ſubſequent to the ſettlements laſt mentioned, executed other deeds, conveying her eſtate, particularly the eſtate of Carnock and Plain, to the appellant.

Immediately after Dame Helenor's death, one of the baillies of Edinburgh, where ſhe died, came and ſealed up the preſſes, cabinets, and repoſitories, at the deſire of the appellant. But when theſe were opened, the only deed that was found was the aſſignation in favour of Miſs Helenor Cathcart, the appellant's grand-daughter, executed on the 5th of March 1722.

The appellant thereupon commenced an action of exhibition *ad deliberandum* before the Court of Seſſion, againſt the reſpondent; and the reſpondent produced all the deeds before mentioned conceived in her favour. The appellant afterwards brought an action of reduction and declarator againſt the reſpondent, to have all theſe deeds

deeds ſet aſide, on the ground, that the reſpondent had illegally and unwarrantably poſſeſſed herſelf of her mother's keys, and of her mother's ſtrong box, in which ſhe kept her deeds and writings; and that ſhe had carried away theſe deeds and writings out of the houſe two days before her mother's death; which, it ought to be preſumed, were done without her mother's conſent: and that the reſpondent having had it in her power to preſerve what might be for her intereſt, and to deſtroy what was not ſo, ſhe had rendered her mother's will uncertain, therefore all the deeds executed in her favour ought to be declared void; or, the ſame being ſubject to a power of revocation, it ought to be preſumed they were revoked; and the whole real and perſonal eſtate ought to be decerned to the appellant.

To this action the reſpondent ſtated as her defence, that what ſhe had done was by her mother's authority; that ſhe poſſeſſed herſelf of no deeds but which appeared to be properly belonging to her, and which, being in her cuſtody, muſt be preſumed in law to have been delivered to her; and that the mother had never altered or ſhewed any intention to alter any of theſe deeds. The Court, in July 1723, allowed both parties to prove their allegations, and many witneſſes were examined.

The import of the proof appears to have been (for it cannot be diſtinctly ſtated on either ſide) that three nights before the old lady's death, the reſpondent's lawyer and agent were brought by her into the houſe, and the ſeveral deeds then carried away: no direct authority from the mother herſelf was proved for this: female witneſſes about the perſon of the deceaſed ſwore that before her death, ſhe had declared that ſhe had ſettled all affairs between her children; that ſhe had forgiven the appellant of all her claims, and even given him a *gripe* of the eſtate of Carnock; ſhe mentioned too that ſhe had left legacies to the miſtreſs of Cathcart and to Colonel Cathcart, &c. and a donation to the poor of the pariſh, but none of thoſe appeared.

On the part of the reſpondent it was proved by the writers and witneſſes of the deeds which appeared, that they knew of no other deeds having been executed; and in a condeſcendence, given in by her, ſhe denied all the allegations of the appellant. The cauſe coming to be heard, the Court, on the 22d of June 1725, "Found, that it was not proven, that the reſpondent's "intromiſſion with her mother's ſtrong box and writings was un-"warrantable."

The appellant reclaimed, and after anſwers for the reſpondent, the Court, on the 20th of July 1725, "Found that the deeds in "favour of the reſpondent, and of Mrs. Helenor Cathcart, and "Mrs. Helenor Houſton, are preſumed to contain the laſt will "of the deceaſed concerning her ſucceſſion; and that no evi-"dence ariſes from the proof adduced by the appellant, that the "deeds in favour of the reſpondent were altered or revoked in "his favour; or that the deceaſed concealed or embezzled any "of the deceaſed's writings; and therefore aſſoilzied the re-"ſpondent from the reaſons of reduction inſiſted on."

The

The appeal was brought from "an interlocutory order of the "22d of June 1725, and an order or decree of the 20th of July "following, made by the Lords of Seſſion." Entered 25 Jan. 1725-6.

Heads of the Appellants' Argument.

Though evidence of the kind adduced by the appellant be not *per ſe* abſolute and concluſive, yet when the reſpondent, by her clandeſtine and unwarrantable intromiſſion, rendered the will of the deceaſed uncertain, conjectural evidence and preſumptions muſt ſupply the place of direct proof: nothing could be eaſier than for the reſpondent to prevail on the writer and witneſſes of the papers which muſt have been executed not to offer a diſcovery voluntarily.

The reſpondent inſiſted, that it was unnatural to ſuppoſe, that a ſettlement, the work of ſo many years, and in which it appears that the old lady had perſiſted till the 3d of March, 17 days before her death, ſhould have been altered in the remaining ſhort term of her life; at leaſt that it was not to be believed without direct evidence. But this general obſervation did not militate againſt the appellant; the laſt of the deeds in favour of the reſpondent was dated on the 3d of March before Dame Helenor's death, and the only one produced in the appellant's favour was dated on the 5th of March, two days later: as that alteration was made, in thoſe two days, the remaining period of the old lady's life left time enough for the other alterations.

Heads of the Reſpondent's Argument.

The ſeveral deeds in favour of the reſpondent were really and truly executed by her mother, at the reſpective times they bear date, and the latter of them, which confirmed the former one, executed ſo ſhort a time before the lady's death, that there can be no foundation for preſuming that any alteration was made.

By the law of Scotland, it is not neceſſary to prove the actual delivery of any deed; but if it be out of the poſſeſſion of the grantor, it is preſumed to have been lawfully delivered, unleſs it be proved, that the perſon poſſeſſed of ſuch deed came by it in an unwarrantable manner.

No proof was made of giving inſtructions to revoke any of thoſe deeds, or to prepare others in favour of the appellant. Deeds ſolemnly executed, cannot, without ſhaking the ſecurities of all property, be ſet aſide on pretence of ſuch ſlender evidence of words ſpoken, at beſt ambiguous in themſelves, or upon pretended preſumptions, without any real foundation on facts.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutory order and decree therein complained of be affirmed.* Judgment, 2 April, 1726.

For Appellant, *Dun. Forbes. C. Talbot.*
For Reſpondents, *C. Wearg. Ro. Dundas. Will. Hamilton.*