THE HON. JOHN DOUGLASS, an Infant, by his Guardians, *Appellant;*
THE EARL OF MORTON, ... *Respondent.*

1773.

DOUGLASS *v.* EARL OF MORTON.

House of Lords, 20th January 1773.

DEED INFORMAL—EXECUTION BY NOTARIES—PRIOR OBLIGATION—DEATH-BED.—By an antenuptial contract of marriage, the father became bound to provide his son John with a provision of £14000. In implement of this obligation, he had resolved to convey an heritable bond he held over an estate for £9000 *pro tanto* of this provision. The deed was all prepared and ready for execution, when he suddenly took ill of a disorder which deprived him of writing. He, however, resolved to have it executed by notaries, but only one could be got in London. Held, in a reduction to set aside this deed, as in prejudice of the heir at law, that the deed was ineffectual, as wanting the usual solemnities to convey heritage in Scotland.

The respondent was the eldest son of the late Earl of Morton by his first marriage. The appellant was his son by a second marriage.

In contemplation of this last marriage with Miss Heathcote, the parties entered into ante-nuptial contract of marriage, whereby the appellant's mother brought him a fortune of £12000, and the Earl, in consideration of the marriage, and of £12000, thereby bound and obliged himself to secure to the children of the marriage the sum of £26000 out of his estates in Scotland. If a son and a daughter, the event which happened, he bound himself to pay £14000 to the son, and £12000 to the daughter, at the first term of Whitsunday or Martinmas that should happen after his death, and after their attaining majority.

At this time, the Earl was seized and possessed of considerable estates in Scotland without entail, and a mortgage or wadset over the earldom of Orkney for £30,000, which was afterwards sold, and the money paid.

Of this date, he made a will, which recites the marriage settlement above mentioned, and, among other things, provided and directed that the £26000 above provided, should be divided among his two children of the second marriage, viz. £12000 to his daughter, and "£14000 to John Douglas, (the appellant) his son, and "that after his countess' death, the house in Brook Street, worth "£6000, should be sold and divided between his said son and daugh-"ter." Aug. 2, 1766.

Of this date, he executed another deed, settling the £30,000 on the respondent, by directing certain trustees, therein named, to purchase lands in Scotland with the said £30,000, and to take the conveyances of the same to the respondent, and the heirs male of his body. Of the same date, he executed an entail of his lands and lordship of Aberdour, as well as of two other estates in Scotland. Oct. 16, 1767.

At this date, his personal estate was chiefly in England, and by a provision in the above deed, he declared that any subsequent purchase or purchases of land in Scotland, with that personal estate, should

1773.

DOUGLASS
v.
EARL OF
MORTON.

go to satisfy *pro tanto* the above provision of £30,000. He purchased two parcels of land for £1417. 10s.

July 1768. In July 1768, the Earl, in order to increase his income, by a higher rate of interest, laid out part of his personal estate in the purchase of an heritable bond, on the estate of Pringle of Clifton for £9000, bearing interest at 4½ per cent. It was the intention of the Earl to convey this bond to the appellant in payment *pro tanto* of his provision.

In preparing the deed of assignment, his agent wrote him from
Aug. 1, 1768. Edinburgh to London, "If your Lordship continues your resolution "of conveying *this debt* to Mr. John, in part of the provision *pro* "*tanto* in your contract of marriage, the form of the deed to that "purpose shall be sent."

Aug. 19, —— In answer, the Earl wrote, "I still continue my resolution of con- "veying the £9000 due upon the estate of Clifton, to my son John, "in implement *pro tanto* of the provision made for him in my con- "tract of marriage."

Aug. 25, —— His agent wrote, "Your Lordship is now infeft in Clifton's debt, "and I shall send you a form of the conveyance to Mr. John in a "post or two."

Aug. 31, —— The Earl answered, "I find I am now infeft in Clifton's debt, "and shall expect the form of a conveyance of it to my son John."

Sept. 13, —— The agent sent the Earl "the form of a conveyance of Clifton's "heritable debt to Mr. John, his heirs and assignees." He also asked to whom he wished the bond to go, failing John, and his Lordship wrote particular directions as to this; and his agent being from town, the letter was not anwsered until the beginning of October. The deed was then engrossed in London, and prepared for the Earl's execution. The Earl, however, before it was signed, was seized with a fatal illness on the 11th October, and the disorder increasing, the next day, 12th October, he sent his secretary to procure a notary, he being unable to write, in order to have the deed signed. Two notaries were necessary, but the secretary could only get one, and the deed was accordingly executed in that form, the notary declaring, "I, Kenneth Mackenzie, do subscribe these pre- "sents for him, as no other notary admitted by the Court of Session "could be found."

The Earl died next morning, and the question here was, Whether the above deed, as so executed, was sufficient, by the law of Scotland, to carry the heritable bond. This was raised in a declarator brought by the appellant, and an action of reduction to set aside that conveyance, brought by the respondent; which two actions being conjoined, the Lord Ordinary ordered memorials to report the case to the Lords.

The respondent contended, 1. That the deed, 12th October 1768, being the conveyance of an heritable estate in Scotland, and not signed by the granter himself, but by a notary, only for him, is absolutely void and null, under the statute 1579. 2. That it was

also null and void, having been executed on deathbed, in prejudice of him, the heir at law.

The Lord Ordinary having ordered the letters above quoted to be adduced, the appellant answered, 1. That the Earl had done all he could to comply with the act 1579, in obtaining two notaries to execute his deed, but that being impossible, he complied with it as far as possible: That the Court of Session, in various cases, in cases of necessity, had sustained deeds so executed: That in transactions *inter rusticos* deeds, informal by the statute, were sustained; and clergymen have been allowed to act as notaries in the execution of last wills. That this indulgence has, in particular, been applied where the defect in form of the deed has proceeded from its execution in a foreign country. It being also founded on prior obligation, the strict rigour of the statutory rules has been dispensed with in such cases where there is no reason to suspect fraud. But, 2. At all events, this is clear law, that such a deed, executed in implement of a prior obligation contained in an ante-nuptial contract, is not chalengeable on deathbed.

Sinclair *v.* Merry, 1656; Erskine *v.* Ramsay, 1664. Dict. of Dec.

Vide Jack *v.* Jack. Dic. vol. ii. p. 536.

Sutter *v.* Cramnond, Ibid. June 19, 1771.

The Lords pronounced this interlocutor; "Conjoin the process of "reduction at the instance of the Earl of Morton *v.* Mr. John Doug- "lass and his Guardians, with process of declarator at their instance "against the Earl; and as to the declarator, they sustain the defen- "ces, assoilzie the Earl, and decern; and as to the reduction, they "sustain the reasons of reduction, reduce, decern, and declare ac- "cordingly."

Against this interlocutor the present appeal was brought.

Pleaded for the Appellant.—The objection to the conveyance of the heritable bond to the appellant ought not to prevail in this case, because the want of a second notary was matter of necessity, from the impossibility of procuring more than one: That the law makes allowance for such circumstances, and in general dispenses with the omission of matters merely of form, rendered impossible by the situation in which the deed was executed, and particularly when executed out of Scotland. The law also allows of such deeds, if executed according to the law of the country in which they were so executed, and one notary being sufficient in England, it ought to be held good here: That the objection of deathbed ought not to be allowed to operate against a deed, which, though finally executed in that situation, had been determined, directed, and prepared, while the party was in perfect health: And the deed being executed in implement of the obligation contained in his father's marriage contract, was, by the law of Scotland, perfectly good, nothwithstanding imperfections in form. And the various instruments executed by the Earl to regulate his whole succession ought to be considered as one general settlement, so as to support the conveyance of the £9000 heritable bond to him, though executed in the form in which it was executed.

1774.

THE GOVERNORS OF HERIOT'S HOSPITAL, &c. *v.* FERGUSON.

Pleaded for the Respondent.—The deed founded on is intrinsically null and void, and can make no faith, being defective in the essential and indispensable requisites established by the statute 1579, which requires "that all writings, importing heritable title, shall be "signed by the parties, if they can write, otherwise by two famous "notaries before four famous witnesses." But the deed in question is signed only by one notary. Though our law will always give faith and effect to contracts and obligations, respecting personal estate made in conformity to the laws of other countries, yet that rule cannot hold in reference to the conveyance of heritable estate. 2. The deed, besides, is reducible, as having been executed on the head of deathbed, because, by the law of Scotland, no deed executed on deathbed can be allowed to hurt or prejudice the heir. 3. Besides, the £9000 heritable bond in question cannot be imputed in part payment of the trust money. And the correspondence which passed between the late Earl and his agent, in regard to conveying the bond to the appellant, cannot influence the question. In dispositions of real rights in prejudice of the heir, the intention of the disponer can only be gathered from the deed of conveyance; any other evidence is inadmissible. Besides, all that appears from the correspondence is, that the Earl had in contemplation to settle this heritable bond on the appellant, but came to no final resolution about it till the last moments of his life, when he was in extreme agony, and debarred from conveying heritable estate. 4. The circumstances of favour founded upon the supposed intention of the late Earl cannot be regarded, when the execution of that intention is totally incompatible with the rules of law.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For the Appellant, *E. Thurlow, Al. Forrester, J. Dunning, Thos. Lockhart.*

For the Respondent, *Ja. Montgomery, Alex. Wedderburn, Henry Dundas.*

(Mar. 12817.)

THE GOVERNORS OF HERIOT'S HOSPITAL, . . *Appellants;*
WALTER FERGUSON, Writer, Edinburgh, . . *Respondent.*

House of Lords, 2d March 1774.

SUPERIOR AND VASSAL.—Held, that the limitations expressed in a feu right are not to be extended beyond the express words.

The appellants, as superiors of the ground in the New Town of Edinburgh, feued to John Clelland, in 1734, five acres of their lands near to the Register Office. The feu right contained this clause, "That it shall not be leisom to the said John Clelland and his for-