Against this interlocutor the appellant reclaimed to the Court; and the Court, after remitting again to the Messrs Laing and Burn, to give in a report on special points specified, finally adhered to the Lord Ordinary's interlocutor reclaimed against, with expenses. And a further petition was also refused.

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LOCKHART v. ROSS, &c.

Mar. 3, 1810.

Mar. 10, 1810.

Against these interlocutors the present appeal was brought to the House of Lords.

But the House of Lords, after hearing counsel,

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed, with £170 costs.

For Appellant, *William Adam, Ja. Abercromby.*

For Respondents, *Sir Saml. Romilly, Thos. W. Baird.*

NOTE.—Unreported in the Court of Session.

Sir ALEXANDER MACDONALD LOCKHART of Lee and Carnwath, Bart., - - *Appellant.*

Sir CHARLES Ross of Balnagowan, Bart., and HENRY JARDINE, Esq., Executors and Legatees of Charles Lockhart Wishart, Count Lockhart, deceased, and ROBERT LOCKHART, Esq., - - - - } *Respondents.*

House of Lords, 1st July 1814.

TESTAMENT—CONDITIONAL INSTITUTION OR SUBSTITUTION—MOVEABLES—HERITABLE DESTINATIONE.—A party conveyed to his son, and his heirs, executors, and assignees, his whole heritable and moveable estate, including his whole "jewels, silver-plate, "pictures, marbles, alabasters, &c., and all kinds of household "furniture, and in general all goods and gear belonging to him "at the time of his death." Of same date he executed a deed, expressing his will and intention to be, that, in the event of his dying without leaving heirs-male of his body, the furniture, silver-plate, and pictures in his mansion-houses of Dryden and Carnwath, should go to the heir of entail succeeding to these estates of Dryden and Carnwath, and assigned and disponed the

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"nine feet. The letter from the feuars, addressed to Mr Jameson, "intimates their desire, that the level of the first floor might be four "feet above the level of the ground, on which it is presumed Mr "Jameson acquiesced; and the difference betwixt that which was "there proposed and the height of the first floor as now erected, is "only three inches, according to Messrs Laing and Burn's report."

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same to these collateral heirs-male accordingly. His son survived him, and executed a deed bequeathing otherwise this moveable estate. Held that this was a conditional institution, and not a substitution, and that the son, on succeeding, was entitled to dispose of the property as absolute proprietor, in any way he might think proper.

James, Count Lockhart, was possessed of the estates of Carnwath and Dryden, held under strict entail.

He held other estates in fee-simple, and possessed considerable personal estate, as well as the furniture, pictures, library, &c., in his family mansion-houses of Dryden and Carnwath.

Jan. 9, 1782. He made, of this date, his will, by two separate instruments, which were stated to have been written out and framed by the same person, executed on the same day, and attested by the same witnesses.

By one of these instruments he assigned and disponed, "to "and in favour of Charles Lockhart, his only son, and *his* "*heirs, executors, and assignees*, all and whatsoever debts and "sums of money, heritable and moveable," &c. "As also "jewels, *silver-plate, pictures*, marbles, alabaster, china ware, "bed and table linen of all kinds, *household* furniture, out-"sight and inside plenishing, corns, cattle, horse, &c., and in "general all and sundry goods, gear, and effects, of whatever "kind, quality, or denomination, which should pertain and "belong to him at the time of his death;" subject to the payment of his debts and any legacies he might leave by a writ under his hands.

The other instrument set forth that, considering "that I "have for several years past expended considerable sums of "money in furnishing my house of Dryden; and it being my "will and intention, *in the event of my said estate going to a* "*collateral heir through the failure of issue-male of my body*, "that not only the furniture in the house of Dryden, but also "the furniture in my house at Carnwath, should remain "therein, and fall and belong to the same series of heirs ap-"pointed to succeed to my said entailed estates, do therefore, "*in the event of the failure of issue-male of my body*, assign "and dispone to and in favour of Charles Macdonald Lock-"hart, Esq. of Largie, my brother-german, and the heirs-male "of his body, whom failing, to the other heirs and members of "entail mentioned in the foresaid deed of entail, according to "the order of substitution therein specified, all and every move-"able article whatever which shall be in my houses of Dryden "and Carnwath, particularly the household furniture, plate,

"and pictures, of whatever kind, quality, or denomination, "that shall be in the said houses at the time of my death."

James, Count Lockhart, the testator, died in 1790, without altering these instruments. He was survived by his son, Charles, named in the first instrument, who, in virtue of that deed, confirmed to, and took possession of the moveable estate so conveyed.

On 21st June 1802, Charles, now Count Lockhart, made a will, conveying his whole property, real and personal, to the Earl of Moray and the respondents, Sir Charles Ross (his brother-in-law) and Mr Jardine (his confidential law-agent), in trust for payment of his debts, making special bequests of all his wines in his cellars at Dryden to Lord Moray; all his plate and family pictures to the respondent, Robert Lockhart, Esq.; a set of Dresden china to Mr Jardine; and the residue of his personal estate to Sir Charles Ross—naming them as executors of his will.

He died in about forty days after the execution of this deed; and the appellant conceiving that he had right to succeed to the whole furniture, silver-plate, pictures, &c., in the mansion-houses of Dryden and Carnwath, assigned by the deed second above recited, brought an action of reduction to set aside the conveyance made by Charles, Count Lockhart, the son, before his death.

The reasons of reduction were—1st, That by the instrument second above narrated, connected with the other settlements, there was created a substitution of the appellant as heir of entail, failing the heirs-male of the general's body, implying a prohibition of gratuitous alienation to the prejudice of the substitutes. 2dly, The trust-deed or will by Count Charles in favour of the respondents was executed by him when on deathbed, and therefore flowed *a non habente potestatem*—the subject being *heritable destinatione.* And 3dly, With regard to the silver-plate, family pictures, household furniture, books, and china at Dryden, which are excepted from the dispositive clause in the said trust-disposition, and bequeathed to Mr Lockhart, Sir Charles Ross, and Mr Jardine, the trust-deed contains no disposition, but they are merely bequeathed as legacies, which is not sufficient to convey moveables made heritable *destinatione.*

The defence stated to this action was, that by the conception of the instrument on which the appellant founded, there was only a conveyance of the furniture, &c., therein mentioned, to the collateral heirs of entail, in the event of his surviving

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his son, or dying without issue-male of his body; but that the son having survived his father, the instrument fell to the ground, leaving the son to take as absolute proprietor. The conveyance, therefore, to the appellant was conditional, and only to take place on an event which never happened. Substitutions in moveables have no place in the law of Scotland; and the estate conveyed here was moveable, in so far as the appellant professed an interest in it.

Mar. 2, 1809. The Lord Ordinary (Hermand) pronounced this interlocutor:—"Finds that by disposition and settlement, 9th "January 1782, General James Lockhart Wishart, con- "veyed to his son, Charles Lockhart Wishart, his jewels, "plate, chinaware, and the whole other moveables of whatever "description, under which deed, if never revoked, the said "Charles Lockhart Wishart became unlimited proprietor of "the said moveables; finds that on the same day, and, per- "haps, at the same moment at which the said James Lock- "hart Wishart had disponed his whole moveables to the said "Charles Lockhart Wishart, his executors or assignees, he "executed another deed nowise inconsistent with it, and "which the pursuer states as making part of one and the "same deed, by which, in order to provide for the event "that, by the predecease of his son, the former deed should "not have effect, he declares his intention, that 'in the event "'of my estate going to a collateral heir, through the failure "'of issue male of my body,' the furniture in the house of "Dryden, stated by the pursuer (appellant) as of great value, "and that in the house of Carnwath, of which less has been "said, should belong to the heirs of entail, and 'in the event "'of failure of issue male of my body,' dispones to Charles "Macdonald Lockhart, his brother, and the other heirs of "entail in their order, every moveable article whatsoever, "which should be in the houses of Dryden and Carnwath, "with some exceptions unnecessary to be here particularized, "substituting the said Charles Macdonald Lockhart and the "other heirs of tailzie, 'in the event of my dying without "'issue male of my own body.' Finds that Charles Lock- "hart Wishart expede a confirmation under the general dis- "position and settlement, whereby the moveables thereby "disponed were completely vested in his person; finds that the "said disposition and settlement was not revoked or altered "by the other deed executed *unico contextu* with it; and that "Charles Lockhart Wishart having survived his father for "years, was entitled to dispose of the moveables as he thought

" fit, subject to no challenge, or if to any, not at the instance " of the pursuer (appellant), a collateral heir of entail; finds " that, as to that part of the moveables which may be con- " sidered as heirship moveables, descendable to the heirs of " line, the pursuer, as heir of entail, has no title to pursue; " finds, that having no interest, so far as the Lord Ordinary " has been able to judge, in the disposal by General James " Lockhart Wishart of the moveables, confessedly belonging " to him, and which moveables he conveyed to his son, to " whom, or to his other nearest of kin, they would, indepen- " dent of such disposal, have belonged, the pursuer has no " title to enquire into the validity of the conveyance of these " moveables by Charles Lockhart Wishart; sustains the " defences, assoilzies the defenders and decerns."

On representation, the Lord Ordinary adhered. And, on reclaiming petition, the Court adhered, and afterwards found the appellant liable in expenses.

July 11, 1809. Nov. 14, 1809. Dec. 7 and 23, 1809.

Against these interlocutors, the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The first question for your Lordships' decision in this cause is, whether, by the just construction of the testamentary instrument left by James Count Lockhart, in favour of his brother, and his other collateral heirs of entail, the operation of it was confined to the event of his son's dying before him, or of his own death, without leaving male descendants, or whether it was to operate, in the case, which actually occurred, of his dying, leaving male issue, and that issue afterwards failing?

How it came about that Count James made his will in two parts, or on two separate pieces of paper, can only be conjectured. It might be owing to the writer's thinking the testator's meaning could be more distinctly expressed in that way; or the Count might wish to have it in his power to destroy the one if his mind changed, while he preferred the other; but it seems perfectly clear, that both instruments must be taken into consideration together as parts of the same will, and forming one whole, and therefore, that it was wrong in Count Charles (allowing his motives to have been pure), to suppress or keep back one of the parts, while he brought forward the other.

The respondents represent the two instruments as totally distinct, and intended to meet different events; the one to give to Count Charles, if he survived the testator, the whole of the testator's moveable property absolutely; the other to give to the

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heirs of entail the furniture, in case the testator had no male descendants living at his death. But in the first place it is very difficult to conceive that the testator, when declaring his will and intention to be, that, in the event of his estates going to a collateral heir, the furniture in his mansion houses should go with the inheritance or entailed estates, without saying by what occurrence that event should take place, whether by his own death without male descendants, or by the after failure of such descendants, should, at the very same moment, declare that he had no such will or intention, if his son should happen to survive him a single day; for to that length the respondents' argument goes.

After the testator gives and dispones (in the dispositive clause) to his collateral heirs (his brother, &c.,) *in the event of the failure of issue male of his body*, he is made to surrogate, and substitute his said disponees in his full right and place in the premises *in the event of his dying without issue male of his body*. But the phrases are in truth synonymous, or if there be any difference, the last must yield to the first; and the dispositive clause must govern. 2d. If, therefore, the deed in favour of the collateral heirs created a substitution, it is plain that it could not be defeated by a deathbed deed, the right being made heritable *destinatione;* for, supposing that Count Charles had died intestate, the appellant must have made up his title by service, and not by confirmation; and, for the same reason, the right could not be carried either by a deathbed deed, or by a testament. The general rule is, that heritage cannot be conveyed either by the one or the other, and it applies to subjects though in their nature moveable, if they pass by service, and are made heritable *destinatione.*

Pleaded for the Respondents, Sir Charles Ross and Robert Lockhart.—1st. Though substitutions, in moveable subjects, are not altogether unknown to the law of Scotland, the presumption of that law is clearly against them; and it is the settled rule of our practice, that they are never to be presumed *in dubio*, or to be admitted without the most express words to that effect. This is reported as the result and summary of the latest case which appears in any collection, *Vide* Brown *v.* Coventry, 2d June 1792, (Fac. Coll. vol. 10, p. 447; Mor. 14,683 et Bell 310), and appears under this title or marginal argument in the Faculty Collection. "Substitution "of heirs *may* take place in moveables, but not to be admitted "without express words." See that case accordingly and in other cases, Lutfit *v.* Johnstone, 4th February 1642, (Mor

14,847); Lamerton *v.* Plendergaist, 16th July 1679, (Mor. p. 14,848); Hamilton *v.* Wilson, 8th December 1687, (Mor. 14,850); Dickson *v.* Stevenson, 23d February 1697, (Mor. 14,851); Stevenson *v.* Barr, 24th June 1784, (Mor. 14,862); where a *destination* having been made in one and the same deed to an individual (without any mention of his *executors* or *assignees*), whom failing to certain other persons, it was decided that this imported only a conditional institution of the persons last named, and that they had no right or claim whatever to the subject, if the party to whom it was first given only survived, and took it up. 2d. But in the present case, not only is there every presumption, from the relationship of the parties, that Count James Lockhart meant to give his son as absolute and complete a property in the moveables in question as he himself had, and to create a substitution only in the event of his never surviving to take up that property, but this intention seems to be evidenced in the strongest manner, by the circumstance of his making this absolute, and unlimited conveyance of them by a *separate and distinct deed* from that in which the conditional institution and substitution is contained. It is very true, that in seeking to expiscate intention, it may be very proper to take both deeds into consideration together, and to endeavour to construe them into one rational and consistent settlement, but it is a circumstance of *fact* very material to the discovery of this intention, that the alleged substitution of Charles Macdonald Lockhart, and the collateral heirs of entail to the granter's own issue male as institutes, is contained in a separate deed. 3d. Besides, the whole question is set at rest, by the express words of the deed, which gives to these collateral heirs-male, the moveable property in the mansion houses of Dryden and Carnwath only "in the "event of my dying without issue male of my own body."

Pleaded for the other Respondent, Mr Jardine.—Mr Jardine gave in a separate case specially directed to rebut some insinuations as to the manner in which the deed was framed and executed by him. In the summons of reduction there was no allegation of fraud or undue advantage having been taken, and the insinuation made was satisfactorily refuted, but this part of the case had no bearing on the point of law decided, and therefore is not given.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are, hereby affirmed.

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WRIGHT
v.
PATERSON.

For the Appellant, *Sir Samuel Romilly, John Clerk, W. Macdonald.*

For the Respondents, *Sir Charles Ross, Robert Lockhart, Thos. W. Baird, F. Jeffrey.*

NOTE.—Unreported in the Court of Session.

[13 Fac. Coll. p. 54–6.]

ADAM WRIGHT, Esq., late of Glasgow, now of Edinburgh, ... *Appellant.*

DUGALD PATERSON, Merchant in Glasgow, . *Respondent.*

House of Lords, 4th July 1814.

GUARANTEE—CAUTIONARY OBLIGATION—LEX MERCATORIA—STATUTORY SOLEMNITIES.—A letter of guarantee was granted, having reference to past as well as future contractions. In an action against the cautioner, Held that this was not a cautionary obligation, requiring to be attested in terms of the statutes, but a letter of guarantee *in re mercatoria*, and therefore constituted a valid obligation. Affirmed in the House of Lords.

The appellant granted to the respondent a letter of guarantee for Messrs Simpson and Co., manufacturers in Glasgow, in the following terms:—

"*Glasgow, July* 13, 1806.

"MR D. PATERSON,

"Sir,—I hereby bind myself to see you paid for whatever purchases of cotton yarns, &c., Messrs Joseph Simpson and Co. has made, or may make, from you, for twelve months to come from this date.—I am, yours,

(Signed) "ADAM WRIGHT."

The respondent had delivered cotton yarns to Joseph Simpson and Co. per account, to the amount of £621, 7s. 4d. £229, 17s. 5d. of these yarns had been delivered *prior to the date of the letter*, and the rest after its date.

Simpson and Co. having become bankrupt, and an action having been raised, against the cautioner, for payment of the whole amount of £621, 7s. 4d., the defence stated was, that all obligations of this nature require to be attested by witnesses, and the name of the writer mentioned in the instrument in terms of the statutes thereanent. In reply, it was pleaded