his interposition—the extent of his interposition as counsel in that business, never can bring him within the authority of such cases as Mackenzie; which was quoted at the Bar; and therefore there is not the slightest reflection of that sort upon him.

Feb. 25. 1824.

My Lords, another object was to reduce this lease, for Alexander, the tenant, is a party in the cause. If, however, the sale to Sir James Montgomery is a good sale, then there is an end of all right to reduce the lease on the part of those who were claiming to do so. But, my Lords, independent of that, there is another question, which is this, if Sir James Montgomery bought, subject to the lease, query, Whether any body can affect that lease, if Sir James Montgomery bought subject to the lease?

My Lords, on all these grounds it does appear to me, and I took the liberty of interrupting your Lordships at this time of the evening, as I was the only law Lord present at the time the cause was heard, and I take the liberty of stating it to be my humble opinion, that your Lordships ought to affirm the decision.

Appellant's Authorities.—1. Ersk. 1. 5. 3.; Laurie, July 27. 1814. (2. Dow, 556.)

SPOTTISWOODE and ROBERTSON—J. RICHARDSON,—Solicitors.

(Ap. Ca. No. 2.)

No. 2.

Mrs MUDIE, and Trustees of the late JOHN AITKEN, Appellants.
Clerk—Greenshields—Jeffrey—Jameson.

Mrs MOIR, and Others, Respondents.—*Cranstoun—T. H. Miller.*

Deathbed—Revocation—Approbate and Reprobate.—A party having executed a mortis causa disposition of his heritable property in liege poustie, excluding one of his heiresses portioners, with a power of revocation; and having executed a second disposition on deathbed in favour of the same parties, but making alterations affecting interests provided for in the first deed, and having revoked that first deed. Held, (affirming the judgment of the Court of Session), 1. That the heiress portioner was entitled to found on the revocation, as recalling the first deed; and, 2. That she was at the same time entitled to object to the disposition of the property, as executed on deathbed.

March 1. 1824.

2D DIVISION.
Lord Pitmilly.

THE late Reverend John Aitken, minister of the parish of St Vigeans, and proprietor of the estate of North-Tarry, in the county of Forfar, had three nieces,—the respondent, Cornelia Isabella Aitken, wife of William Moir of Newgrange; the appellant, Jane Aitken, wife of James Mudie of Pitmuis; and Catherine Aitken, wife of James Ford of Finhaven,—these ladies being sisters, and co-heiresses portioners of Mr Aitken.

March 1. 1824.

On the 25th October 1805, Mr Aitken (who was then eighty years of age) executed a disposition and deed of settlement in favour of his three nieces, by which he conveyed to them his whole property, real and moveable, with the exception of a small piece of ground which he conveyed for behoof of his successors in the office of clergyman of St Vigeans, 'but reserving 'full power and faculty at any time in my life, or even on death-'bed, to revoke, alter, innovate, or cancel these presents, in whole 'or in part, as I may think proper.'

On the 26th of May 1813, (at which time Mr Aitken was eighty-nine years of age), he executed a new disposition and deed of settlement, by which he disponed his estate to Mrs Mudie, and Mrs Ford, thereby excluding the respondent Mrs Moir, to whom he provided an annuity of L.120, and to her children L.1000, to be held in trust by Mr Mudie and Mr Ford for their behoof, and with both of which sums he burdened his disponees. In this deed he also excepted the above small piece of ground, and reserved to himself 'full power and faculty, at any 'time in my life, or even on deathbed, to revoke, alter, innovate, 'or annul these presents, in whole or in part, as I shall think 'proper, or to burden and affect the subjects heritably conveyed, 'as I may incline; dispensing with the delivery hereof, and de-'claring the same, or any alteration I may make, shall have the 'full effect of a delivered evident, whether found in my custody, 'or in the keeping of any other person, at the time of my death, 'any law or practice to the contrary notwithstanding.'

Towards the end of the year 1815, Mr Ford having become bankrupt, and his estates having been sequestrated, the agent who had prepared the previous deeds of settlement suggested to Mr Aitken, that as Mr Ford's creditors might possibly claim the share of the property belonging to Mrs Ford, he should execute a new deed, so as to prevent this being accomplished. Accordingly, on the 26th of April 1816, (at which time he was ninety-two years old), he executed a new deed of settlement, by which, while he disponed to Mrs Mudie as in the preceding deed, he conveyed the share of Mrs Ford to Mr Mudie and Mr Rattray, writer to the signet, as trustees for her behoof, excluding the jus mariti of her husband. The provisions to Mrs Moir and her children were also repeated, but in reference to them Mr Rattray was substituted as a trustee in place of Mr Ford.

There was also introduced at the usual place this clause:—'And further, I hereby revoke and alter all former dispositions, 'assignations or settlements, or latter wills or testaments, exe-

'cuted by me; reserving always to me my liferent right and 'use of the whole subjects, heritable and moveable, above dis- 'poned, and full power and faculty, at any time in my life, even 'on deathbed, to revoke, alter, innovate, or annul these presents, 'in whole or in part, as I shall think proper, or to burden and 'affect the subjects hereby conveyed as I may incline, by a co- 'dicil, or any other writing expressive of my intention.'

March 1. 1824.

This deed was different from that of 1813 in these respects:— In the 1*st* place, It substituted trustees in place of Mrs Ford. 2*d*, It excluded her husband's jus mariti. 3*d*, It recalled his nomination as a trustee, and appointed Mr Rattray in his room. 4*th*, It declared Mrs Mudie and the trustees of Mrs Ford liable each for one-half only of the annuity and legacies, whereas, by the former one, these ladies were made liable conjunctly and severally. And, 5*th*, There was no exception of the piece of ground in favour of the clergyman of St Vigeans. At the time of executing this deed Mr Aitken was upon deathbed, and he died within six days after the date of it.

Soon after this event, Mrs Moir, with concurrence of her husband, brought an action of reduction, on the head of deathbed, of the deed 1816, in so far as Mr Aitken had executed powers of disponing, but founding on it as containing an effectual revocation of the deed in 1813.

In defence, it was maintained by Mrs Mudie and the trustees, that as the two deeds were substantially the same, and were in favour of the same disponees, and as the latter had been made merely to prevent Mr Ford's creditors from attaching the share of his wife, the deed of 1813 must be held as a valid and subsisting deed.

The Lord Ordinary having repelled the defences, and decerned in terms of the libel, and Mrs Mudie and the trustees having reclaimed, the Court ordered a hearing in presence, on advising which, their Lordships being equally divided, Lord Cringletie was called in; and his Lordship having concurred in the interlocutor of the Lord Ordinary, the Court, on the 2d of March 1820, adhered to that judgment.*

---

* See Fac. Coll. 2d March 1820, Moir against Mudie, where the following is reported to have been the opinions of the Judges:—

'*Lords Glenlee* and *Bannatyne* thought that a general revocation in a deathbed deed 'had some flexibility, so as to allow it to be adapted to what was evidently the intention 'of the granter. They thought that the case of Coutts was properly decided by the 'House of Lords, as it was apparent that the granter of the deathbed deed intended that

March 1. 1824.

Mrs Mudie and the trustees then appealed, and pleaded,—

1. That as the deed had been executed merely for the purpose of carrying into effect the previous deed of 1813, it was to be considered as immediately connected with that deed; that therefore it did not fall within the rule relative to deeds executed on deathbed, which applied only to such deeds as were executed for the first time, and not for the purpose of guarding against an objection or danger arising out of the terms of the previous existing deed; and that accordingly the principle on which the law of deathbed rested was, that where a deed, conveying away property, was executed at that time, it was presumed that it was executed by the granter, rather ex fervore animi quam ex mentis deliberatione, whereas here it was proved to have been executed to support the previously existing deed.

2. That supposing the deed were liable to reduction, still the respondent had no legal interest to challenge it; because, if it were set aside, the previous one of 1813 must come into operation. And,

3. That, in regard to the clause of revocation, the respondent was not entitled both to approbate and reprobate the deed; but that, at all events, such a clause was to be construed according to what was the manifest intention of the maker of the deed: that, if so, then the extent of its operation was to be governed by ascertaining what was the intention of the granter,

---

'the person favoured by the liege poustie deed should in no event succeed. They thought 'that, although the fact of the two deeds being in favour of the same person was not 'conclusive, it was a circumstance of great weight in the quæstio voluntatis; and that, 'while a liege poustie deed in favour of a different person must be taken out of the way 'in order to make room for the person favoured in the deathbed deed; on the other 'hand, where the deathbed deed was in favour of the same person as the liege poustie 'deed, and merely conferred additional benefits upon him, the latter must be considered 'as still subsisting in favour of such person, and only altered to a particular effect, 'unless it was expressly revoked in toto.

'The *Lord Justice-Clerk* and *Lord Craigie* thought, that the heir's right of challenge 'being universal, and not being barred unless annihilated by a valid deed in liege poustie 'subsisting at the death of the ancestor, and the clause of revocation in this case being 'universal, unqualified, and unambiguous, his challenge was admitted. And they 'thought that it made no difference in such a case, that the disponees were the same. 'They thought that the case of Coutts was properly decided by the House of Peers.

'The Court being equally divided, *Lord Cringletie*, Ordinary in the Outer-House, 'was called upon to give his opinion. His Lordship thought that there was little doubt 'of the granter's intention, but that the Court could only look to the execution of intention; that the revocation of the liege poustie deed was general and unqualified; and 'that, when the language employed by a party was clear, the Court could not alter the 'deed which he had executed, merely on a conjecture of his intention.

and therefore a greater or less effect should be given to it, or it should be altogether suspended, according to the circumstances of the case: that in the present one it was manifest, that the deed was intended to be purely remedial, and was calculated for no other purpose than to give effect to that of 1813. They therefore maintained, that it was impossible to construe the clause of revocation so as to import that Mr Aitken intended, that if the deed of 1816 should not receive effect, that that of 1813 should be regarded as recalled. This doctrine, they alleged, was not contradicted by the case of Coutts *v.* Crawford; because, there, the disponee in the deed which was challenged was different from the person in whose favour the pre-existing deed had been granted; so that it could not be argued that it was the intention of the grantee, that if the last of the deeds were set aside, the prior one should revive: whereas, in the present case, the disponees in both deeds were the same, and consequently there could be no doubt as to the intention of the granter; and it had been decided in the case of Whitelaw, that, in such circumstances, the revocation of the prior deed was not to be presumed.*

---

* The case of Whitelaw, 16th November 1809, is not reported; but as it was greatly relied on by the appellants, and contains an opinion of President Blair, their statement of it is given:—

'Thomas Whitelaw, in 1803, executed a Scotch trust-deed. The trustees inter alia 'were bound to pay L. 1000 to his widow, over and above her matrimonial provision; 'or, if she preferred it, to give her an heritable property, being a house in Glasgow; 'and also " to invest and secure the whole full remainder and residue of my fortune, 'means, and estate, (he had an heritable estate), for the liferent use of my spouse, 'Agnes Lang." After executing some other deeds, not necessary to be mentioned here, 'he went to Jamaica, and on deathbed made an English deed, in which he thus speaks 'of the Scottish deed now mentioned: " Whereas in the said will I appointed my said 'managers and executors to pay certain legacies and annuities; now, for certain 'weighty reasons, I totally revoke that will, and appoint of new my said wife my sole 'executrix and universal heir to the above narrated property," together with what " I have 'or may recover in Jamaica." Besides this specific revocation, he added another in 'the following terms: " I do hereby revoke, annul, and declare absolutely void and of 'no effect, the said last will and testament, and disposition of my estate and effects, 'to all intents and purposes."

'In these circumstances the widow brought an action, in which she insisted that she 'was entitled to the full amount of the provisions settled upon her. Mr Whitelaw's 'sisters, on the other hand, who were his heirs-at-law, brought an action, in which 'they insisted, 1*st*, That the previous settlement was extinguished by the revocation; '2*dly*, That the deed containing the revocation was ineffectual against them, not merely 'because it was in the English form, but because it had been executed on deathbed. 'Lord Armadale, the Ordinary, pronounced the following judgment: " Finds, That the

March. 1. 1824.

To this, it was answered by the respondent,—

1. That it is an established rule of the law of Scotland, that the proprietor of an estate is utterly disabled from exercising dispositive power while upon deathbed; and as Mr Aitken was

---

'trust-disposition and settlement by Thomas Whitelaw, of date the 9th of December '1803, and supplementary deed of same date, were effectually revoked by the deed exe-'cuted by the said Thomas Whitelaw in Jamaica in October 1805; but finds, That the 'said deed executed in October 1805 was ineffectual, as a deed on deathbed, and as a 'deed in testamentary form, to convey an heritable estate in Scotland; and therefore sus-'tains the reasons of reduction in the action insisted on by Elizabeth and Jean White-'law, the heirs-at-law of Thomas Whitelaw; and to that extent also assoilzies the said 'heirs-at-law from the counter-action at the instance of Agnes Lang, the widow of Tho-'mas Whitelaw." It appears from this, *1st*, That deathbed was pleaded and decided; '*2dly*, and principally, That it was found that the last deed, though on deathbed, and 'in an English form, "effectually revoked" the previous settlement.

'This interlocutor having been petitioned against, a hearing in presence took place. 'The Court was clear, and indeed had voted, that the revocation was valid; but the 'view of the matter which occurred was this: Let the second deed be held, as it must 'be held to be ineffectual; it is no matter whether this be done on the head of death-'bed, or from defect of form, or from both; but let it be held as null; still we are of 'opinion, that it is good as a revocation. Now, in the ordinary case, there can be 'no doubt, that a revocation invalidates the deed revoked, though an intended new set-'tlement should fail; because in the ordinary case, when a settlement is revoked, this is 'done from a change of disposition towards the persons who are favoured. But the 'peculiarity here is, that there is no room for supposing such a change of intention; 'for the deed revoking is rather more in favour of the original disponee than the 'deed revoked. In order to have a full discussion, memorials were ordered.

'These memorials were occupied almost exclusively on this new aspect of the question. 'The light in which the matter appeared to the Court is fully disclosed in the notes, which 'were taken down at the moment by the reporter, from the speech of the late Lord Pre-'sident Blair, as follows:—" Thomas Whitelaw, proprietor of certain heritable subjects 'in the neighbourhood of Glasgow, and likewise of an estate in Jamaica, executed a 'disposition in the Scotch form, conveying his heritable properties therein described, 'and likewise all his other lands and moveables, to certain trustees, for payment of his 'debts, and other purposes; after which the deed proceeds,—" I appoint my trustee '" to vest and secure the whole free residue and remainder of my fortune, means, '" and estate, for the liferent use of my said spouse, Agnes Lang."

'" Of the same date he executed a last will and testament in the English form, for 'the purpose of recovering the effects in Jamaica, and vesting them in terms of the 'disposition. He afterwards executed a will in Jamaica in the English form, revoking 'the former deed and disposition, and appointing of new his said wife to be sole exe-'cutrix and universal heiress to the above narrated property.

'" He again executed another will, in English form, revoking all former wills. In 'this last will he declares all the residue and remainder of any estate, real, personal, or 'mixed, whatsoever, or wheresoever the same may be situated, I give, devise, and 'bequeath unto my said dear wife, Agnes Lang, to hold the same.

'" An action had been brought at the instance of Agnes Lang, the widow, concluding 'to have it found and declared, *1st*, That the testamentary deeds executed in Jamaica, 'in the English form, are effectual to convey the heritage situated in Scotland; or, '*2dly*, That she shall at least be found entitled to what is provided to her by the dis-

confessedly upon deathbed, the deed 1816 was ineffectual, so as to bar the right of the respondent as one of his heirs-portioners at law. And, March 1. 1824.

2. That as the deed 1813 expressly reserved a power to alter,

---

'position and relative will of 9th December 1803. The Lord Ordinary has found 'that the settlements of 9th December 1803 were effectually revoked by the testamen-'tary deed executed in Jamaica; and that these deeds being executed on deathbed, 'and in a testamentary form, are not effectual to convey heritage situated in Scotland, 'and therefore has preferred the heir-at-law.

'" The merits of this case involve several questions of law, and depend materially on 'the validity and effect of the will executed by Mr Whitelaw in Jamaica, October 1805."

'After various remarks on the other part of the case, his Lordship proceeded:—

'" We must therefore come ultimately to the doctrine already considered, that, by the 'law of Scotland, deeds of revocation are exempted from the statutory solemnities; and 'I do not think this doctrine well founded.

'" On the supposition, however, that the objections to the validity of the English will, 'considered as a revocation of the settlement of the Scotch estate, were to be overruled, 'two questions still remain:—The first relates to the construction of the deed, and 'whether the words of the revocation extend to the trust-deed in 1803? And, *2dly*, 'What is the legal effect of such legal revocation?

'" As to the first of these questions, I have little doubt a revocation requires no parti-'cular form of words, and it is only necessary that the will of the party be expressed 'with sufficient clearness to be understood; and the words used in this case will clearly 'shew that Mr Whitelaw had in view the revocation of the trust-deed: *2dly*, As to the 'effect of the revocation, however, the question seems to me to be attended with more 'difficulty. A long argument has been maintained for Mrs Whitelaw to shew, that if 'the English will is not to have complete effect as a settlement, it cannot be sustained 'as a revocation. But this is very doubtful. A party may be desirous to revoke for-'mer deeds although new settlements should not stand. This is rather the legal pre-'sumption, and is recognized in the case of deathbed. The revocation may be sepa-'rated from the rest of the settlement in which it is contained, and many instances have 'occurred in which a deed has been effectual as to one part of it, and ineffectual as to 'the rest.

'" But the peculiarity in the present case which removes the legal presumption is, 'that, to a certain extent, the deed revoking and the deed revoked are in favour of the 'same person. The first deed gives the widow the liferent, and the second deed gives 'her the fee; and if the deed of revocation, while it deprives her of the liferent pro-'vided in the deed revoked, is at the same time ineffectual in the provision of the fee, 'she would thus be deprived of all those provisions which it was undoubtedly her 'husband's intention to confer upon her. It is impossible that a deed giving the fee 'can be construed to take away from her the liferent. This would be to allow one 'clause of a deed to defeat the express will declared in the same deed. If the first 'deed had been in favour of a different person, then there might have been some room 'for presumption that he meant at all events to recall that deed. But in this case 'there is no room for this presumption. The revocation is in fact a deed in favour 'of the widow. The express will of the testator is, that his widow shall at least enjoy 'the subjects during her life."

'This principle was adopted by the Court, and the following interlocutor was pro-'nounced:—" The Lords having advised the mutual memorials for the parties, and 'whole cause, they alter the interlocutor of the Lord Ordinary; repel the objections to 'the revocation contained in the deed executed in Jamaica in October 1805, in so far

March 1. 1824. even upon deathbed, and as that power had been exercised by the deed of 1816, that of 1813 was effectually set aside: in support of which it was maintained, that where a liege poustie deed reserves a faculty to revoke and alter, it may be exercised in lecto, in which case the revocation is equally effectual, whether it be expressed in a separate instrument by itself, or whether it form a clause of the dispositive deed or settlement objected to; so that the interest of the respondent could not be affected by the deed of 1813.

3. That approbate and reprobate is not a relevant objection against the heir alioqui successurus, who is entitled to found on the revocation as annulling the liege poustie deed, and at the same time to reduce the deathbed disposition as a deed granted to his prejudice: that the wishes or intention of the deceased to prefer a stranger disponee to his heir, (in which situation the appellants stood in relation to the respondent's share), could neither support the deathbed deed directly, nor through the medium of the liege poustie deed, provided this last deed has been revoked expressly and unconditionally as a conveyance or disposition transmitting or affecting the property; a proposition which was established in the case of Coutts *v.* Crawford: And farther, that the identity either of interest or disponees under the liege poustie and deathbed deeds, however clearly indicative of the predilection and intentions of the deceased, was a consideration of no relevancy in a question with the heir,—the liege poustie deed having been revoked, and the deathbed deed being subject to reduction: But that in the present case there was no identity of the two deeds, because that of 1816 was in many respects different from that of 1813.

The House of Lords 'ordered and adjudged that the appeal 'be dismissed, and the interlocutors complained of affirmed.'

'as the same are founded upon the want of statutory solemnities; but find that the said 'deed is not an effectual revocation of the trust-disposition and settlement executed in '1803, in so far as Agnes Lang has interest therein. Therefore, assoilzie her from the 'conclusions of the action of reduction at the instance of the Miss Whitelaws, and 'decree. And in the action of declarator at the instance of the said Agnes Lang, find 'and declare, that the trust-deed and settlement 1803 is a valid and effectual deed, so 'far as she can claim interest or provision thereby, and decern."

It is proper, however, to notice, that in a foot-note to the case of Barclay *v.* Small, 2d February 1815, F. C. it is stated, that the case of Whitelaw was not reported, because it was laid down by the Lord President, 'that the judgment went entirely 'upon specialties, and was not to be held as an authority.'

March 1. 1824.

LORD CHANCELLOR.—Your Lordships have, within the last few days, heard a case in which the question to be decided is, Whether a will which was made by a gentleman of the name of Aitken, but which did not bear date sixty days before his death, was a valid disposition? or, on the other hand, whether it was an invalid disposition? it being contended, that though it might not be good as a disposition, it was good as a revocation of a former will.

My Lords, the nature of the case certainly is such, that one cannot help feeling it a case of considerable hardship on the appellant, Mrs Mudie; but after the greatest attention which I have felt it my duty to give to this case, in consideration of that circumstance, and also in consideration of the Division of the Court of Session, by whom this case was decided, having been divided in their opinion, it does appear to me, I own, to be impossible to advise your Lordships to reverse the judgment which has been given. There is this peculiarity in the law of Scotland, that though a deed is bad as a deathbed deed, it may be good for one purpose, that is to say, that the heir-at-law can insist that it is a good deed, provided the effect of it be to revoke a former settlement, though in itself it would be bad. In this case, it has been strongly contended at the Bar, that it ought not to operate as a revocation, although there are express words of revocation in it; and that it ought not to operate as a revocation, because there had been a former deed, and that it was an affirmance of that former deed. Now, in truth, in respect of that, there is hardly a single interest which is given in the former deed, which is not somehow, in its nature and quality, altered by this. It does, therefore, appear to me, that whatever might be the law,—in respect of which I beg I may be understood to give no opinion whatever, if the dispositions had been exactly the same,—I give no opinion whatever upon the principles which might or might not apply to such a case,—they do not apply to this case; and therefore, however much I may regret the hardship of the case, it appears to me your Lordships can give no other judgment but that of affirmance of this judgment.

Appellant's Authorities.—(1.)—2. Reg. Maj. c. 18. § 7, 8, 9.; 1. Craig, 12. 36.; 1. Stair, 4. 27.; 3. Mack. 8.; 3. Ersk. 8. 95.; Kames's Eluc. p. 162.—(2.)—3. Ersk. 8. 97.; Kames's Pr. of Eq. 1. 1. 4.; Whitelaw, Nov. 18. 1809, (not rep. but see Note, ante, p. 13.); Kerr, Jan. 25. 1677, (3249.); Hamilton, April 18. 1724, (Robertson's App. Ca. 674.); Irving, Nov. 1738, (3180.); Crawfurd, June 16. 1749, (16,121.); Rowand, Nov. 22. 1775, (11,371.); Telford, June 24. and July 8. 1806, (not rep.); Muir, June 1. 1813, (F. C. remitted).

Respondent's Authorities.—(1.)—3. Ersk. 8. 98.; Livingston, Jan. 23. 1708, (3273.); Cunningham, June 10. 1748, (16,119. affirmed, April 12. 1749.);* 3. Ersk.

* It is stated in the appellant's case, 'That in the case of Donaldson v. Mackenzie, '20th July 1776, Lord President Dundas and Lord Covington (the latter of whom was 'one of the counsel in Cunningham's case) said from the Bench, that they knew the

March 1. 1824.

Prin. 4. 9.; Campbell, Jan. 17. 1749, (6121.); Findlay, July 29. 1779, (3188.); Crawford, Nov. 17. 1795, as rev. March 14. 1806, (No. 3. App. Deathbed); Batley, Feb. 2. 1813, (F. C.)

J. Chalmer—J. Campbell,—Solicitors.

(Ap. Ca. No. 4. and 5.)

No. 3.

James, Duke of Roxburghe, Appellant.—*Solicitor-General Wetherell—Mackenzie.*

A. Swinton, W. S. Respondent.—*Warren—Adam.*

Judicial Factor—Bona Fides.—A judicial factor having been appointed on an estate pending a competition, and the widow of the last proprietor having worked quarries in her locality lands, and enjoyed the proceeds, and having been found not liable to repeat these proceeds, as having consumed them bona fide; and another party having, under a title ex facie good, drawn part of the rents of the estate, and been also found a bona fide possessor; and the judicial factor having been authorized to appoint sub-factors; and having paid a reasonable salary to a sub-factor; and (under the above exceptions) having uplifted the rents and feu-duties of the estate.—Held, 1. (affirming the judgment of the Court of Session), That he was not liable to account for the proceeds of the quarry and the rents, nor for the sum given as salary to the sub-factor. But, 2. (reversing the judgment), That he was bound to account for all the interest received by him on the rents and profits uplifted by him.

March 2. 1824.

1st Division.

On the death of William, Duke of Roxburghe, a competition having arisen for his estates, the Court of Session, on the 17th December 1805, pending the discussion, found, 'that the Duchess-'Dowager of Roxburghe is in hoc statu entitled to the possession

---

'history of the case very well. Before it came to be heard at the bar of the House of 'Lords, the parties understood that Lord Hardwicke, then Chancellor, thought that the 'interlocutor of the Court of Session was ill-founded, in consequence of which under-'standing, the matter was compromised by payment of a large sum of money. When 'the counsel were called to the bar, the cause was not argued, but it was stated that 'the matter was made up, and both parties concurred in wishing the decree to be affirm-'ed; upon which Lord Hardwicke observed, "that the respondent had done wisely in 'not risking a judgment;" and then the interlocutor was of course affirmed. In the 'case of Crawfordland, Lord Justice-Clerk Braxfield said, that when the case of Cunning-'ham "went to the House of Peers, it was understood that the Lord Chancellor held it 'to be a bad decision, and the matter was transacted, and a great sum of money paid 'to the disponee. I have always been of the opinion of the Lord Chancellor, that had 'it been brought to trial in the House of Peers, it must have been reversed; and it has 'ever since here been held as an erroneous decision." Lord Eskgrove said, "The case 'of Cunningham v. Whiteford always appeared to me a very extraordinary one; and 'to the decision which was pronounced by this Court I could have paid no regard."' The respondent, however, stated that this rested upon no sufficient authority.