LORD CHANCELLOR.—My Lords, As I am to propose to your Lordships to affirm the interlocutor appealed from, I shall not detain you by any observation. I have no doubt that the Court of Session have come to a sound conclusion. As the Court, though unanimous, gave leave to appeal, I shall not propose costs. Feb. 23, 1831.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellant's Authorities.—Forbes, Dec. 3, 1701 (7,812); 2 Stair, 3, 70; Chisholm, June 17, 1801; (No. 1. Appendix, Salmon-fishing;) Kintore, May 31, 1826; (4 Shaw and Dunlop, 641, and July 11, 1828; *ante* 3, 261;) Magistrates of Dumbarton, Jan. 16, 1813. (F. C.)

Respondent's Authorities.—Statutes, 1488, c. 16; 1563, c. 68; 2 Ersk. 3, 31.

PALMER—A. M'RAE,—Solicitors.

No. 8.

WILLIAM BRACK, Appellant.—*Robertson—Sandford.*

GEORGE JOHNSTON, ADAM HOGG, and Others, Respondents.—*Lord Advocate (Jeffrey)—D. M'Neil.*

Writ—Foreign—Trust.—Held (affirming the judgment of the Court of Session), that a trust-disposition of heritage duly tested, containing a direction to the trustee to convey to any person to be nominated by the truster, together with a testament executed according to the forms of Jamaica, where the truster resided, but not of Scotland, bequeathing his heritage to a particular person, constituted an effectual right in favour of that person, exclusive of the heir-at-law.

DANIEL VIRTUE, a native of Scotland, and proprietor of an heritable estate there, resided in Jamaica, where he possessed considerable property. On the 30th of April 1822 he executed a trust disposition in Jamaica, which was duly tested according to the rules of the law of Scotland. After narrating that he had confidence in the trustee therein named for executing the trust reposed in him, he "did by these presents dispone, assign, "convey, and make over, to and in favour of George Johnston, "farmer in Yetholm Mains in the county of Roxburgh, North "Britain, and his heirs and assignees, as trustee for the uses and "purposes after mentioned, all and whole, &c., with all right, "title, and interest, I, my predecessors and authors, heirs and "successors, had, have, or may have to the said subjects; but "declaring always that these presents are granted by me, and "accepted of by the said George Johnston, in trust for the ends

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2D DIVISION.
Lord Medwyn.

Feb. 25, 1831. " and purposes following; viz.—In the first place, he shall ac-
" count to me for the rents and profits thereof during my life;
" and in the second place, at my death, he shall assign and dis-
" pone the whole premises to such person or persons as I shall
" specify and name in my will, or by any separate writing or
" letter to that effect; and it shall be sufficient to my said
" trustee to dispone the same accordingly, although such writing
" or letter hath not the legal solemnities of a deed; in the
" which lands and others above disponed I bind and oblige me,
" my heirs and successors, duly and validly to infeft and seise
" my said trust-disponee and foresaids; to be held," &c. This was followed by a procuratory of resignation and a precept of sasine, in the usual terms; but there was no clause dispensing with delivery. The granter retained the deed in his own possession, and on his death it was found in his repositories. He had two nephews, William Brack and Adam Hogg. On the 14th of April 1823 he executed in Jamaica a latter will and testament, setting forth that he did " make this my latter will
" and testament, hereby revoking all other wills by me formerly
" made." It was executed according to the forms of the law of Jamaica, and not according to those of the law of Scotland. After providing certain legacies, and bequeathing an annuity of £30 to the appellant, he disposed of the residue in these terms:—
" Item, I give and bequeath to my nephew, Adam Hogg, the re-
" sidue and remainder of my property, real, personal, and mixed,
" consisting of lands, houses, &c. in Berwickshire, Great Britain,
" and of Roxburgh Castle, with the slaves, stock, &c. in this
" island, he paying therefrom, should my monies be insuffi-
" cient, the legacies of my reputed sons John Virtue and
" William Brack, and make good all the other legacies, and
" pay my just debts, if any." No reference was made to the trust-deed. He nominated the trustee and certain other persons to be his executors. After surviving about ten months, he died on the 16th of December 1823.

These deeds were transmitted to the trustee, who took infeftment in the property situated in Scotland, and executed a disposition in favour of Hogg, who made up titles, and was infeft. William Brack, who was the heir-at-law, expede a general service in that character to the deceased, and then brought an action of reduction and declarator, concluding to have the trust-deed, the testament, and the subsequent

title set aside on these grounds:—" 1. The aforesaid alleged " gratuitous disposition, executed by the said Daniel Virtue " in favour of the said George Johnstone, was neither a " completed deed, nor was it delivered by the said Daniel " Virtue, but remained in his custody, and was at his abso- " lute disposal and under his controul, till the day of his death, " which happened upon the 16th day of December 1823, and " is otherwise null and void. 2. The said gratuitous and unde- " livered trust-disposition granted by the said Daniel Virtue " was, besides, completely revoked and set aside by the foresaid " testamentary deed, executed by the said Daniel Virtue upon " the 14th of February 1823 years, by which he expressly revoked " all the other wills which he had previously made. 3. The " foresaid testamentary deed, executed by the said Daniel Virtue " upon the said 14th day of February 1823, is, in so far as it " gives and bequeaths to the said Adam Hogg the testator's herit- " able property in Great Britain and in Jamaica, null and void; " and it is destitute of all the solemnities and requisites which " by law are necessary for the conveyance of heritable property; " and, in particular, it is neither holograph of the granter, nor " does it express either the place of signing or the name and " designation of the writer, or the names and designations of " the witnesses present on the occasion when it was alleged to " have been subscribed."

In defence it was maintained that the trust-disposition was a good and effectual divestiture by the granter, in favour of the trustee, of the heritable property; and that as he had directed the premises to be conveyed to such person or persons as he should specify in his will, the testament, which was a formal and probative deed according to the law of the place where it was made, was sufficient as a direction to the trustee to convey to Hogg.

The Lord Ordinary pronounced this interlocutor:—" Finds, " that on the death of the late Daniel Virtue of Vere in Jamaica, " which took place on 16th December 1823, there were found in " his repositiories two deeds; the first, a trust-deed dated 30th " April 1822, executed in Jamaica, but, according to the law of " Scotland, disponing, with procuratory and precept, certain " heritable subjects in Scotland, in favour of the defender " George Johnstone, for uses and purposes, and these are de- " clared to be, first, ' to account to him for the rents during his

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" life, and, secondly, at his death, to dispone them to such person " as I shall specify and name in my will, or by any separate " writing or letter, although it shall not have the solemnities " of a deed;' the second, a will executed on 14th February " 1823, according to the forms of the law of Jamaica, but not " tested according to the law of Scotland, which has this clause: " —' Item, I give and bequeath unto my nephew, Adam Hogg, " Jamaica, the residue and remainder of my property, real, " personal, and mixed, consisting of lands, houses, &c. in " Berwickshire in Great Britain:' Finds, that the trust-deed " contains no clause dispensing with delivery, which indeed " would have been inconsistent with the first and prominent " object of the deed; and that the will makes no reference to it " as a subsisting deed, or one which was then operative, or which " it was to render operative, by declaring its uses and purposes: " Finds it admitted, ' that the trust-deed was not delivered to " the trustee in the lifetime of the truster, but that it remained " in his custody and under his controul till the day of his " death:' Finds, that the trust-deed can have no effect, not " having been a delivered deed, nor the delivery dispensed with " by the maker of it; and therefore that it is unnecessary to " consider whether, if it had been an effectual conveyance of the " heritable property into the person of the trustee, the will, being " a deed not tested according to the law of Scotland, would have " been held to be a sufficient deed of instructions to the trustee " to make over the heritable property in Scotland to the defender " Hogg: Finds, that the will is quite inoperative of itself to con- " vey the said heritable property to the defender, as it does not " contain disponing words; and therefore sustains the reasons of " reduction, at the instance of the pursuer, the heir-at-law; and " reduces, decerns, and declares in terms of the reductive con- " clusions of the libel: Finds no expenses due." His lordship at the same time issued the subjoined note.* To this judgment he afterwards adhered, and accompanied his interlocutor with the note below. †

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* " The ground upon which the heir-at-law has been preferred being dif- " ferent from those pleaded in the elaborate memorial for him, the Lord Ordinary is " willing, if the parties incline, to review the interlocutor, in a representation, " which, by section second of the Act of Sederunt passed this day, he is empowered " to authorize."

† " The Lord Ordinary still entertains the opinion that the trust-deed required

The respondents having reclaimed, the Court, on advising cases, pronounced this interlocutor on the 23d of November 1827 :— Feb. 25, 1831.

" Alter the interlocutor of the Lord Ordinary, submitted to " review : Find the trust-deed in this case effectual, although " it contained no clause dispensing with the delivery, and was " not delivered during the life of the granter : Find the will " afterwards executed by him likewise effectual as a declaration " of his intention and instruction to his trustee, relative to the " disposal of his heritable property in Scotland after his death : " Therefore sustain the defences, assoilzie the defender from the " conclusions of the action, and decern." *

Brack appealed.

Appellant.—1. The established rule is, that heritage cannot be conveyed, either directly or indirectly, unless the peculiar forms of the law of Scotland be observed. The testament is not executed according to these forms, and it is not pretended that per se it can affect the right of the appellant as heir-at-law. It is true that the trust-disposition is executed agreeably to the Scottish forms; and if it had been a complete deed, and had

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" delivery to make it effectual, as it was obviously intended to be delivered imme- " diately, since it authorizes the trustee to uplift the rents in the truster's life- " time, and calls upon him to account for them to him. Its never having been deli- " vered implies a change of purpose, or that the purpose was not fully resolved on ; " and there is nothing to indicate that the second purpose of the deed was finally " resolved to be carried into effect when the other was not. In his latter will the " testator has not once alluded to it ; and as it was not transmitted to this country at " first along with the will, it would appear that the testator and his executor had not " regarded the trust-deed as influencing his succession. If the trust-deed were to be " held effectual without delivery, and if it were necessary to form an opinion on the " pleas still argued so anxiously by the pursuer, the Lord Ordinary does not think he " could concur in opinion with the pursuer, that the trust-deed was revoked by the will, " or that the will would not have been a sufficient declaration of the purposes of the " trust, on the ground that it did not bear express reference to it, assimilating this to " the exercise of a reserved faculty to burden ; but he would have been inclined to hold " that the will, not being tested according to the law of Scotland, was not sufficient " to have the effect of conveying Scotch heritage from its legal destination. This is " a point of great difficulty, and may be considered, perhaps, as not thoroughly " settled ; but the Lord Ordinary remembers well the very decided opinion of Lord " President Blair, delivered in the unreported † case of Lang and Whitelaw, 16th No- " vember 1809. The Lord Ordinary avoided the decision of this difficult question " by holding the trust-deed ineffectual from want of delivery."

* 6 Shaw and Dunlop, No. 81.

† Vide post.

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been delivered, or had dispensed with delivery, it might have had the effect to exclude the appellant. But it was not a delivered deed, and at all events it specified no disponee; and therefore, even if it were to be held as a subsisting deed, it would constitute a trust for behoof of the appellant. Indeed, effect cannot be given to the testament without violating the law of death-bed; for, as a testament is held to be made at the last moment of the testator's life, it would necessarily follow that heritage might be effectually transmitted when a party is in articulo mortis.

2. But assuming the trust-deed to be of a mortis causa nature, it was revoked by the subsequent testament; for, although the testament may be ineffectual to transmit heritage, it is quite sufficient as a deed of revocation. This was found in the cases of Crawford, Batley, and Mudie, relative to death-bed deeds, which, although null as transmissions of property, were held good as revocations of previous deeds.

3. Supposing that the trust-disposition were unobjectionable, still the reserved power contained in it was not duly exercised. To accomplish this effectually, it was necessary, both that special reference should be made to the trust-deed, and that the deed by which the faculty was exercised should be executed agreeably to the forms of the law of Scotland. It is said that the reverse was found in the case of Willoch; but it does not appear from the report, nor from the papers, that the deed by which the faculty was exercised was not executed agreeably to these forms. Indeed, an opinion to the reverse was delivered by Lord President Blair in the case of Lang and Whitelaw.*

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* A report of this case will be found, 2 Shaw, App. Cases, p. 13. The following notes of Lord President Blair's opinion, taken by the late Solicitor General Wedderburn, were laid before the House of Lords: "The case depends on the validity and "effect given to a foreign will. The questions have arisen, Whether such will is "effectual, as a revocation of a deed previously executed? and, Whether the clause "of revocation amounts to a revocation of the Scotch settlement?"

"The preliminary question is, Whether the deed of revocation is valid, as affecting "Scotch heritage? and the first inquiry is, Whether the point is shut by former "decisions? But I can see no series rerum judicatarum sufficient to settle it.

"In the case of Barclay the point was not argued, because the deed was supposed to have been holograph.

"In the case of Sir Thomas Dundas the point was argued and decided in this "Court, but it was not taken up when that decision was reversed. It was then laid "down that the lex domicilii applied to moveables only.

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Respondents.—1. As the trust-disposition contained a reservation of the granter's liferent, or of his right to the rents during his life, (which was equivalent to such a reservation,) and was clearly mortis causa, it did not require delivery, nor any clause dispensing with delivery. Accordingly, the appellant himself

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" Considering the point to be open, or at least this the only judgment upon it, I " will hold it still liable to decision.

" There are two views, Whether the deed of revocation was executed in Scotland " or abroad?

" In this case none of the solemnities have been observed, which are enacted not to " fetter, but to secure the act of the proprietor.

" The first Act of Parliament relates to deeds importing heritable title. It is said " that this does not constitute a title to the lands. Neither, indeed, does any settle- " ment; but it affects the titles to it, and the succession to it.

" Let it be supposed that two deeds are executed; that the first is not destroyed, " and that the last is revoked. The first revives; and this truly affects heritage. There " are two classes required to be tested? 1st, Those affecting heritage, which I consider " a revocation to do; and, 2dly, Deeds of importance, which a revocation certainly " is. Nor is this any restraint—It preserves and secures the will of the proprietor. " Is there less temptation and more difficulty to forge revocations? There is more of " the first and less of the second undoubtedly. True, a deed may be revoked without " writing—it may be destroyed, by which the deed ceases to exist, unless it be revived " by proving the tenor, and a casus amissionis different from the act of the proprietor " and granter.

" In the books of law, is there one word to make a distinction between deeds of " revocation and other deeds? No exception but in favour of privileged deeds, holo- " graph, or in re mercatoria. A person must revoke with the same solemnities of test- " ing as in granting. Therefore hold that a deed of revocation is in the same situa- " tion with all other important deeds.

" Is there any difference by the deed being executed in Jamaica? The only distinc- " tion here is, that foreign deeds can only affect or convey moveables. But in what- " ever touches the land or immoveable property, the law of Scotland must exclusively " govern. Nothing can be more clearly determined than this. Even an heritable " bond must be so conveyed. The hardship in requiring solemnities in revocations " is less than in requiring them in settlements; for the granter may revoke by de- " stroying. Even if the clause of reservation in the settlement was, that he should " be allowed to revoke without the solemnities of the law of Scotland, it would be " null, for the law can listen to no intention, but what is conveyed in an authentic " form.

" Supposing, however, the Jamaica will is to be recognised, I am clear that the " expressions in the will are sufficient to reach the Scotch settlement.

" It is contended that the deed cannot be a revocation unless it be a settlement. " I think in general it may. At least this is the legal presumption. But this pre- " sumption is removed by the terms of the will, which shew that the revocation was " wholly in favour of the widow, and not against her. I rather think that the revo- " cation cannot be held to touch the liferent.

" The Court repelled the objections to the validity of the revocation, but found " that it cannot touch the legacy and liferent to the widow."

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abandoned this plea when the case was debated before the Lord Ordinary; but his Lordship gave his judgment upon it as a view which had occurred to himself. The Court, however, were unanimously of opinion that this was erroneous; and although the appellant has revived the plea, there is no authority in support of it. Assuming, therefore, that the deed did not require delivery, it had the effect to divest the granter of the feudal right, so that the requisites of the law of Scotland were satisfied. That right was vested in the trustee, subject to directions, and he was bound to give obedience to authentic directions received from the truster; but it is not disputed that the testament is authentic and probative according to the law of the place where it was executed, and consequently the trustee was bound to carry these directions into execution. The case of Willoch is a conclusive authority upon this point; as is also that of Lang, as decided by the Court; and the same decision has recently been pronounced by the Court of Session in the case of Bellenden Kerr. In regard to the plea of death-bed, it is irrelevant and inapplicable, because it is not libelled as a reason of reduction; and it is admitted that in point of fact the testator survived the execution of the testament for ten months.

2. It is impossible to construe the ordinary clause of revocation of all former wills into a revocation of the trust-disposition. That deed was meant to subsist to the effect of enabling the granter to exercise his will by any document, whether probative or improbative; and his plain meaning was, that all wills which he had made inconsistent with the one in question should be recalled.

3. By the trust-deed the trustee was directed to convey the property thereby disponed "to such person or persons as I shall "specify and name in my will, or by any separate writing or "letter to that effect." By the testament he nominated the respondent Hogg as his disponee; and although it was not tested according to the Scottish forms, yet it is not necessary that a deed of nomination be so, provided it be probative according to the law of the place where it was executed. Neither is it necessary that it should make special reference to the trust-deed.

LORD LYNDHURST.—As far as regards the trust-deed, I think it did not require delivery to render it valid: first, because the granter

himself had an interest; and secondly, because, as far as related to the deed, it was a deed mortis causa. On these grounds I am disposed to recommend your Lordships to affirm the opinion of the Court below. I further think that, as far as relates to the will, it was intended by the party to be an execution of the power contained in the first deed. It is impossible to consider the nature of the transaction itself, as mentioned in the first deed, and the description of the property, and not to come to the conclusion that the party intended to execute that. The question that remains then is, Whether the mode of execution was sufficient? If the mode of execution was sufficient, then there is an end of the question. I can hardly distinguish this case from the case of Willoch. It was considered at that time a question of very little doubt. Under such circumstances, I move your Lordships that this judgment be affirmed, but without costs. Feb. 25, 1831.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

Appellant's Authorities.—3 Ersk. 2, 43; Crawford, Feb. 3, 1801 (No. 3, Appendix, Deathbed); Batley, Feb. 2, 1815 (F. C.); Mudie, March 1, 1824 (2 Shaw's App. Ca. 9); Scott, March 2, 1820 (F. C.); Roxburghe, Dec. 13, 1816 (F. C. App. May 25, 1820); Bell on Testing Deeds, 110; 3 Ersk. 2, 22; Logan, Feb. 27, 1823 (2 Shaw and Dunlop, 253); Colville, Dec. 16, 1664 (15,927); Brand, Dec. 4, 1735 (15,941); Davidson, Dec. 20, 1797; (5,597, No. 1, App. Her. and Mov.)

Respondents' Authorities.—Willoch, Dec. 14, 1769 (5,539); 3 Ersk. 2, 44; Lang, Nov. 16, 1809; Bellenden Kerr, Feb. 24, 1829; (7 Shaw and Dun. 454.)

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,—Solicitors.

ARCHIBALD THOMAS FREDERICK FRASER, Appellant. No. 9.

THOMAS ALEXANDER FRASER, Respondent.

Entail.—Held (affirming the judgment of the Court of Session), that an heir under a strict entail is not liable to implement an obligation granted by a preceding heir in a lease, to pay for the value of meliorations at its expiration.

LORD LOVAT was attainted of treason, 1746, and his estates annexed to the Crown. They were restored in 1774 to his eldest son, Lieutenant-General Simon Fraser, who, on the 16th Feb. 25, 1831.

1ST DIVISION. Lord Newton.