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4*to*, The superior cannot insert in Captain Johnstone's charter any proviso, that the lands shall revert to him upon the failure of the heirs male of the body of the former vassal; because such clause would be inconsistent with the right of the vassal to sell the lands: A purchase of lands which was to continue only during the subsistence of the heirs male of another family, would be no purchase at all. If a change of the vassal is at all admitted, the limitations which were personal to the vassal and his family, must, when that change happens, fly off.

'THE LORDS found, That the suspenders were obliged to grant a charter to the charger, and his heirs and assignees whatsoever; and therefore repelled the reasons of suspension.'

Reporter, *Lord Colston.* Act. *Ferguson.* Alt. *Sir Da. Dalrymple.*

W. J. *Fol. Dic. v.* 3. *p.* 218. *Fac. Col. No* 194. *p.* 347.

1762. *December* 9.

GEORGE-JAMES DUKE OF HAMILTON and his TUTORS, and DUNBAR EARL OF SELKIRK *against* ARCHIBALD DOUGLAS of Douglas, Esq; and his TUTORS.

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A party became bound in his son's contract of marriage, to infeft him and the heirs-male of his body in certain lands; and failing heirs-male, the lands so provided to return to the granter and his heirs-male and of tailzie. The son was prohibited from selling, &c. without consent of his father. Found, that neither the clause of return nor the prohibitory clause disabled the heirs of the granter from gratuitously altering the succession appointed by the contract.

WILLIAM Earl of Angus, in the marriage contract of his eldest son William Lord Douglas with his first wife, daughter of Lord Paisley, settled the estate and earldom of Angus upon Lord Douglas, and the heirs male of his body; whom failing, on the Earl's younger sons, successively, and the heirs male of their bodies; whom failing, the other heirs male of the Earl's body; whom failing, the Earl's heirs male whatsoever, bearing the sirname of Douglas, and the arms of Angus; upon which contract, charter and infeftment followed, *anno* 1602.

William Lord Douglas, who, upon the death of his father, became Earl of Angus, obtained in 1633, the dignity of Marquis of Douglas, to him and his heirs male. Of the foresaid marriage he had issue one son, Archibald Lord Douglas, and three daughters.

After the death of Lord Paisley's daughter, Marquis William intermarried with Lady Mary Gordon, daughter of the Marquis of Huntly, by whom he had issue three sons. Of these, William, the eldest, having married the heiress of the family of Hamilton, was created Duke of Hamilton, and the present Duke of Hamilton is the lineal descendent of that marriage. The two younger branches are extinct.

In 1630, Archibald Lord Douglas, Marquis William's eldest son, was married to Lady Ann Stewart, sister of the Duke of Lenox; and in the contract of marriage with her, the Marquis, then Earl of Angus, upon a narrative that the sum of L. 48,000 Scots had been paid to him, as the said Lady's portion, 'became bound to infeft and seise, by charter and sasine, *titulo oneroso*, in due

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'and competent form, the said Archibald Lord Douglas, and the heirs male 'lawfully gotten and to be gotten of his own body; which failing, to return 'to the said noble Earl of Angus his father, and his heirs male and of tailzie, 'contained in his infeftment of the earldom of Angus, and their assigns what-'somever, under the reservations and other provisions, and restrictions after-'mentioned, allenarly, and no otherwise, in all and hail the earldom of An-'gus, &c.' The Earl reserves his liferent, and a power of burdening, to the extent of 100,000 merks: Then follows a clause, in these words: 'Providing, 'in like manner, that it shall not be leisome to the said Archibald Lord Dou-'glas, or his foresaids, to sell, annailzie, wadset, dispone, dilapidate, nor put 'away, any part of the lands and others above provided, and appointed to be 'provided to him in manner above expressed, nor to contract any debt, nor to 'do any other deed whereby the same may be evicted, by apprising, or any 'other manner of way, from him or his foresaids, in hail or in part, without 'the special advice or consent of the said noble Earl William, Earl of Angus, 'during his lifetime, first had and obtained thereto, in writ.'

Upon this contract proper titles were made up in the person of Lord Douglas, by charter under the great seal, and infeftment. The prohibitory clause last recited was not inserted in the charter nor in the sasine.

Of this marriage between Archibald Lord Douglas and Lady Ann Stewart, there was issue one son, James, afterwards Marquis of Douglas.

Lady Ann having predeceased, Archibald Lord Douglas was married a second time, to a daughter of the Earl of Wemyss, and, in his marriage contract with her, settled a part of the estate, viz. the baronies of Bothwell and Wandell, upon the heirs-male of the marriage, under a condition of return to the family upon failure of such heirs.

Of this marriage he had a son, afterwards created Earl of Forfar; and, in 1665, Archibald Lord Douglas, then Earl of Angus died, after having contracted large debts, his father, the Marquis, being still alive.

Upon the death of Marquis William in 1668, his grandson, Marquis James, made up titles to the estate by service, as heir male therein to the deceased Archibald Earl of Angus, his father, under the marriage contract 1630, with the charter and infeftment following thereon; and the retour bears, 'That Archi-'bald Earl of Angus died last vest and seized in the estate, under the reserva-'tions, provisions, and restrictions, contained in the contract of marriage 1630;' and particular notice is taken of the prohibitory clause above recited. The sasine following upon the retour also narrates the conditions in the contract of marriage 1630, and bears, that sasine was given to the said James Marquis of Douglas, 'under the reservations, provisions and restrictions, above written.'

Marquis James, in implement of his father's last contract of marriage, disponed the lands of Bothwell and Wandell to his brother consanguinean, Archibald Earl of Forfar, and the heirs-male of his body; whom failing to return to

No 40. himself, his heirs-male, and successors; and, upon that disposition, charter and infeftment followed.

Marquis James was twice married; *1st*, to a daughter of the Earl of Mar, by whom he had issue one son, who died unmarried, before his father; *2d*, To Lady Mary Ker, daughter of the Earl of Lothian, by whom he had one son, Archibald, afterwards Duke of Douglas; and a daughter, Lady Jean Douglas.

In each of the contracts executed on account of these marriages, the Marquis bound himself to make resignation of his estate, 'in favour of himself and 'and the heirs-male of the marriage; whom failing, the other heirs-male of his 'own body; whom failing, Archibald Earl of Forfar, and the heirs-male of his 'body; whom failing, William Duke of Hamilton, and any son of his body, 'not succeeding to the estate and dukedom of Hamilton, whom he should 'name by a writ under his hand; and, failing any such nomination, to the se-'cond, third, fourth, fifth, sixth, and remanent sons of the said William Duke 'of Hamilton, the one of them after the other, *successive*, and the heirs-male 'of their bodies, always not succeding to the estate of Hamilton; whom fail-'ing, the Marquis's nearest heirs and assignees whatsoever;' *proviso*, that it should be lawful to the Marquis himself to alter the foresaid tailzie, and to provide the whole estate otherways, as he should think fit, without consent of any of the heirs of tailzie.

John Viscount of Dundee having been forfeited for high-treason, his estate of Dudhope was, in 1694, granted by the Crown to the Marquis of Douglas and the heirs-male of his body; whom failing, to the other heirs of tailzie, to whom the dignity of marquisate and the estate of Douglas were provided; whom failing, to the Marquis's heirs and assignees whatsoever.

Marquis James, having contracted large debts, executed a deed in September 1697, whereby, for the regard he had to the weal and standing of his family, and for the love and favour he bore to Archibald Lord Angus, his only son, he disponed to the said Archibald Lord Angus, and the heirs-male to be procreated of his body; whom failing, to the other heirs-male to be procreated of the Marquis himself; 'which failing, to and in favour of such heirs of tailzie as 'we shall nominate and appoint to succeed to us in the order, and with such 'conditions and provisions as we shall think fit to appoint by any writ under 'our hand, at any time in our lifetime; which writ, hail heads, tenor and con-'tents thereof is holden as herein expressed, and is to be holden as expressed 'in the instruments of resignation, charters, and sasines, to follow hereupon; 'and failing of any such nomination by us, to our heirs-male whatsoever; 'which also failing, to our heirs and assignees whatsoever; all and hail, the 'earldom, lands, lordships, baronies, and regalities, underwritten;' namely, the earldom of Angus, and all other lands and heritable estate belonging to him within Scotland, except the estate of John Viscount of Dundee, gifted to him by his Majesty, as above.

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A charter under the great seal, and infeftment, followed upon this deed, in 1698, whereby the Marquis was divested of the fee, reserving only a power of making a further substitution of heirs, failing his son, and the heirs-male of his body, under such conditions and limitations as he should think proper.

In 1699, he executed various contradictory deeds, one of them dated 9th March that year, whereby, although already denuded, he bound and obliged himself to make due and lawful resignation of his estate and honours in favour of, and for new infeftment to be 'granted to, Archibald Lord Angus, our eldest 'lawful son, and the heirs male of his body; which failing, to the heirs-male 'lawfully begotten, or to be begotten, of his own body; which failing, to 'Archibald Earl of Forfar our brother-german, and the heirs-male of his body; 'which failing, to Lord Basil Hamilton, son to the desceased Duke of Hamilton, 'and the heirs-male of his body; which also failing, to the other younger sons 'of the Duke of Hamilton, in the order of their birth.' By a clause in this deed, the Marquis bound himself and his heirs, as follows: 'The which bond, 'and right of tailzie and provision, above-written, we bind and oblige us, and 'our foresaids, never to revoke, alter, innovate, annul, change, nor infringe, 'neither in hail nor in part, neither by last will and testament, nor by any de-'claration in writ under our hand, nor no otherways whatsoever; wherein, if 'we fail, we do hereby acknowledge and declare, any and all such writs to be 'in themselves, *ipso facto*, null and of no force, effect nor avail, from the be-'ginning, and in all time thereafter.'

Upon the 11th of the same month of March 1699, the Marquis, upon the narrative of his reserved power by the disposition 1697, executed a deed of nomination of heirs, whereby, for the care he had 'for the weal and standing of his 'family, and for certain other good causes and grave and weighty considerations 'him moving, he nominated and appointed, that, failing of heirs-male of his '(the Marquis's) body, the eldest heir-female of the body of Lord Angus, and 'the heirs whatsomever of the body of the said eldest heir-female; which failing, 'the eldest heir female of the Marquis's own body; which failing, our heirs-'male whatsoever; which failing our heirs and assignees whatsoever,' &c.

The Marquis upon the 15th June that year, executed another deed, approving of the deed 9th March. And again, upon the 28th October 1699, he executed a new nomination, in the same terms with that of the 11th March, and recalling all deeds inconsistent therewith. The estate of Dudhope is comprehended in this last deed.

Marquis James died in 1702, and was succeeded by his only son Archibald, then under age, who, in 1703, was created Duke of Douglas. The Duke already stood vested in the family estate, under his father's settlement 1697, upon which charter and sasine had followed in 1698; and his tutors also completed his title to the Dudhope estate, by a service, as heir-male in special to his father; upon which he was infeft in 1702.

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In 1707, the Duke's tutors resigned the whole estate, including Dudhope, and obtained a new charter from the Crown in favour of their pupil, 'Et hæredibus masculis de ejus corpore procreand. Quibus deficien. hæredibus suis taliae jus haben. succedendi in ejus statu de Douglas et Angus, secundum cartam dict. Duci concess. sub magno sigillo, de data 24to die mensis Julii, anno 1698, et facultatem inibi content. cum et sub conditionibus, provisionibus, et clausulis irritantibus content. *in nominatione* supra dict. facultate sequen. hæreditarie et irredimabiliter,' &c. Upon this charter, sasine was taken, 10th May 1707; and the same was soon after ratified in parliament, and made the title upon which the Duke possessed during his life.

The instrument of sasine consisted of a number of pages wrote book-ways, but the last page only signed by the witnesses; and, in 1758, the person who then did business for the Duke, being apprehensive that the sasine 1707 might not be good, took infeftment of new upon the same charter.

Upon the death of Lord Forfar, son of the first Lord Forfar, without issue, in 1716, the Duke of Douglas was served heir-male in special to him in the baronies of Bothwell and Wandell, which had been granted as above to the first Earl of Forfar, and the heirs-male of his body, with a clause of return; and, in 1717, a question having arisen with Lockhart of Lee, to whom Lord Forfar had disponed those lands, without any valuable consideration, it was adjudged by the Court of Session, and in the last resort, that, by the clause of return, Lord Forfar was barred from conveying this estate gratuitously to the prejudice of the Duke's right.

In 1716, 1718, and 1726, the Duke made settlements of his estate in favour of himself and the heirs-male of his body; whom failing, the heirs-female of his body; whom failing, Lady Jane Douglas his sister, and the heirs-male of her body; whom also failing, the heirs-female of her body; whom failing, the Duke of Queensberry, &c. And, in the year 1718, he executed a particular settlement of the estate of Dudhope upon the same series of heirs.

In 1744, the Duke being disobliged at his sister Lady Jane, executed a revocation of these settlements, in the following words: 'I Archibald Duke of Douglas, for certain most just causes me moving, and to the end that, on failure of myself, and the heirs male or female of my body, my lands and estate, and heritable offices and jurisdictions within Scotland, may descend to, and continue with the heirs of the ancient rights and investitures of the same, by these presents revoke and recall all and whatsoever deeds and settlements, either by disposition, procuratory of resignation, bond of entail, or otherways, made and granted by me, of my lands and estate, heritable offices and jurisdictions, in whole or in part, preceding this date, declaring hereby all such deeds and settlements so made by me to be void and null, as if I had never granted the same; reserving nevertheless full power to me, to make new settlements of my estate in such manner as I at any time hereafter shall think fit. And I dispense with the not delivery hereof to those having interest

'therein.' He also, in 1752, executed three different revocations of all deeds formerly made in favour of his sister. No 40.

In 1754, Lady Jane being dead, he executed a new settlement of his whole estate, as well what he had succeeded to, as what he had since acquired, (which last was considerable) in favour of himself and the heirs-male of his body; whom failing, the heirs-male descended of the body of William Duke of Hamilton his grand-uncle, having right to inherit the title and honours of Marquis of Douglas and Earl of Angus; whom failing, the heirs-female of his body; whom failing, his nearest heirs-male whatsoever; whom failing, his nearest heirs whatsoever, and their assignees, reserving full power to alter and revoke: And, by a deed in 1757, he so far altered, as to put the heirs-female of his own body next to the heirs-male of his body, and prior to the family of Hamilton; and to declare, that the last substitution of the nearest heirs whatsoever should be exclusive of the issue of his deceased sister. He also reserved power to alter and innovate at any time in his life.

The Duke having in 1758 intermarried with Margaret now Duchess of Douglas, entered into a post-nuptial contract of marriage with her, of date 6th August 1759, in which he settled his estate upon the heirs-male of the marriage; whom failing, his heirs-male of any subsequent marriage; whom failing, the heirs female of the marriage, the eldest succeeding without division; whom failing, such heirs as he had named, or should name in the settlements of his estate, made or to be made by him; and, failing thereof, his own nearest heirs and assignees whatsoever.

In January 1760, the Duke revoked, and cancelled the deeds which he had executed in favour of the family of Hamilton; and upon the 11th July 1761, within ten days of his death, he executed a new settlement, in form of a strict entail, in which he granted procuratory for resigning his whole estate in favour of himself, and the heirs whatsoever of his body; whom failing, the heirs whatsoever of the deceased James Marquis of Douglas his father; whom failing, Lord Douglas Hamilton second son of the deceased James Duke of Hamilton; whom failing, certain other substitutes therein named.

And, by another deed of the same date, the Duke having no heirs of his body, nor prospect of any, made an appointment of tutors and curators to Archibald Stewart, a minor, son of his sister Lady Jane, by her husband Sir John Stewart of Grandtully, upon the narrative, that, by the said entail, in the event of his death without heirs of his body, Archibald Stewart was the person who would succeed him.

The Duke died upon the 21st of the said month of July; and Archibald Stewart, now Douglas, soon after took out a brieve from the Chancery, upon which he was served and retoured heir of tailzie and provision in general, under the foresaid deed 11th July 1761, and took possession of the estate. But the Duke of Hamilton having laid claim as heir male and of tailzie under former settlements to the earldom of Angus, the lordship of Dudhope or Dundee,

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and baronies of Bothwell and Wandell; and the Earl of Selkirk having also claimed the two former of these estates, as heir under the deeds executed by Marquis James, upon the 9th March, and 15th June 1699, a competition ensued, in which the following points occurred:

1mo, The Duke of Hamilton *contended*, That by the clause of return and prohibitory clause in the contract of marriage 1630, the heirs-male of Archibald Earl of Angus' body were disabled from gratuitously preventing the return stipulated in that contract to Marquis William, and his heirs male, and from altering the order of succession thereby established. Succession to land estates may, by the law of Scotland, be settled in three different ways: 1. By simple destination; 2. Under prohibitions to alter; 3. Under irritant and resolutive clauses. The last kind had not received the sanction of the law, and was hardly known in 1630. Prohibitions were the strongest guards which the noblest families in those days had to their settlements.

Prohibitions may be either expressed or implied; instances of the latter are tailzies for onerous causes, tailzies mutual, and tailzies containing clause of return to the maker and his heirs. In none of these can the settlement be disappointed by gratuitous deeds. In the case of a clause of return, the granter gives his estate under that condition; the condition therefore is onerous, and may be said to be purchased at the price of the whole estate.

The effect of these clauses of return has been acknowledged by our lawyers, and has received the sanction of practice and of decisions; Sir George M'Kenzie's Treatise of tailzies, page 458; Dirleton, *voce* Return of Lands to the King, and *voce* Limitation of Fees; M'Dowal, vol. 1. page 592, and 595; Mr Erskine, page 370, Waddel against Waddel, January 16th 1739, *voce* Minor.

Neither does it make any difference, that William Marquis of Douglas was only settling his estate on the heir *alioqui successurus*. Lord Douglas had no title to the estate during his father's life. The Marquis could have burdened the estate to any extent, and, when he disponed it to his son free during his own life, the son could not take it but *sub forma doni*.

The prohibitory clause, though it respects only the power of selling, gives additional force to the clause of return; for the Marquis would not have prohibited the heirs to sell, if he had not understood that he had restrained them from altering the order of succession, which was of much more importance to his family, and more agreeable to his views. Neither was this prohibitory clause superfluous, supposing the clause of return should have full effect; for they respect different things, viz. alienations of the property, and alterations of the order of succession. The whole circumstances show, that the purpose and intent of these limitations was to secure the estate to the heirs of the investitures and honours, so far, at least, as to disable Lord Douglas and his heirs from disappointing the order of succession. See the case of Shaw of Greenock, 15th July 1715, *voce* Tailzie.

Answered for Archibald Douglas; Being the heir of line of the Douglas family, he has favour on his side; and the presumption of law is for him, agreeable to the opinion of Lord Stair, Title Heirs, § 35, and Sir Thomas Craig, lib. 2. dieg. 16. § 12. The clause of return, in this case, is merely a substitution. The words, 'which failing, to return,' have no charm in them. The effect would have been the same, had the words been 'which failing, to the granter 'and his heirs.' And accordingly, in the charter following on the contract, the words are, 'Quibus deficien. praefato prædelecto, &c.' The person in whose favour a return is stipulated takes the estate by a service, as heir to the person last infeft, is subject to his debts and deeds, and is, in every respect, a substitute. No 40.

Such returns, therefore, receive their effect, not from any particular form of words used in the deed, but from the nature of the deed in which they occur; and an evident distinction is pointed out, in reason and in law, between one species of deed and another. When a man freely and gratuitously alienates his estate, or any part of it, to a stranger, from himself and his proper heirs, as all donations are to be strictly interpreted, he is not understood to grant more than he has thought proper to give in express words; and when, in such a deed, he stipulates a return of the estate to himself, in any particular event, though conceived in the form of a simple substitution, he thereby gives away his estate *sub modo;* and it becomes an implied condition in the grant, that the granter, or his heirs, shall not disappoint the return to the granter, or his heirs, when the same opens to them in the course of succession; in the same way as in the case of mutual tailzies or tailzies for onerous causes, though they contain no express prohibitory clause, it is implied in the transaction itself, that the succession cannot be disappointed by any gratuitous deed. But for the same reason, and upon the same principles, where a man, under a previous obligation, for an onerous cause, to dispone his estate, does, in implement of that obligation, grant a disposition, containing a clause of return to himself, in a certain event, such clause can have no stronger effect than a substitution in a simple destination of succession, and which will be defeasible by the disponee, or by any of the substitutes, at pleasure. In the former case, the return is the *modus* or condition of the grant; and the will of the granter must be the rule. But, in the latter case, the conditions inserted in the disposition are the act of the disponee. He could have regulated the destination as he thought proper. It was a matter of favour in him to give the disponer any place in the settlement; and, therefore, he cannot be understood to have laid either himself or his heirs under any fetter.

As, therefore, it is evident, that clauses of return do not receive their force or efficacy from any form of words, but must receive their construction from the nature of the deed, and the intention with which they were put in, the question is, Whether, in a settlement of a man's succession upon his heirs who are to represent him, such clause can imply any thing more than a naked substitution? When a person gives away an estate from himself and his proper heir,

No 40. though to a younger son, it is an alienation. The younger son is, in the eye of law, a stranger; and a substitution in favour of the granter himself and his heir is understood to be a condition of the grant, implying a prohibition on the donee and his heirs to do no deed to defeat it. But, when he settles his estate upon his own proper heirs, this is no alienation. A man's heir is, in the sense of the law, *eadem persona* with himself; he possesses the estate, not upon singular titles, but as the representative of the deceased; and, even though the settlement takes place in the granter's life, this is only *præceptio hereditatis.* In the the case of lands holding ward, such a disposition, though without consent of the superior, did not infer recognition.

As such deed therefore is not understood an alienation, but a settlement of the estate upon the proper heir who, independent of the deed, would be entitled to take and hold it, the meaning of the grant will fall to be most benignly interpreted; nor will any fetters be brought upon him but such as are clearly expressed. The distinction here pointed out is clearly established by the decisions, Duke of Douglas *contra* Lockhart of Lee, No 31. p. 4343.; Marquis of Clidsdale *contra* Earl of Dundonald, No 3. p. 1262.; the case of Kerr of Chatto, (*See* APPENDIX.) Some of the authorities appealed to on the other side do not prove the point for which they are adduced; others respect bonds of provision to daughters, which are plainly of the nature of donations, and where the return must be understood as a condition of the gift.

The prohibitory clause does not enter at all into the question, as it limits only the power of selling and contracting debt, and was likewise at an end by Marquis William's death. *See* Ayton against Monypenny, 31st July 1756, *voce* PRESCRIPTION.

II. *Point, Prescription.*——The next question was, Whether, supposing the clauses in the contract 1630 amounted to an express prohibition to alter the order of succession, the same were not now cut off and at an end, both by the negative and positive prescription?

Pleaded for Mr Douglas; The prescription in this case is founded in the express words, both of the acts introducing the negative prescription, and in the act 1717, concerning the positive prescription. The Duke of Douglas was infeft in the estate of Angus as far back as 1698, upon a charter under the Great Seal, proceeding upon the disposition 1697, containing no prohibition or clause of return, or other limitation whatever. In like manner, the charter of infeftment 1707, referring to a nomination of Marquis James, in favour of a different series of heirs, contains no limitation or clause of return in favour of the collateral heirs-male. Upon these titles, the Duke possessed his estate, without molestation or challenge from the family of Hamilton, or any other heirs-male who would have been entitled to the succession upon the marriage-contract 1630. Such titles and possession, undisturbed for a half a century, were sufficient to secure the Duke's rights under those infeftments, as an unlimited fee by prescription, and to work off the fetters of any former tailzies or limitations.

This is now an established point by decisions; case of Auchlunkart, 31st December 1695, *voce* PRESCRIPTION; case of Mackerston, 10th July 1739, IBIDEM.; Douglas of Kirkness, 3d February 1753, No 38. p. 4350.; and Ayton against Monypenny, *voce* PRESCRIPTION. No 40.

Answered for the Duke of Hamilton; The nominations procured from Marquis James in 1699 were latent and unfairly obtained; and none of them being expressly referred to in the charter 1707, the infeftment still must be considered as standing on the same series of heirs appointed by the contract 1630. It is true, the same clauses are not repeated in the charter and infeftment 1698, and subsequent charter and infeftment 1707: But the heirs of the contract 1630 had no call or occasion to challenge this, so long as no act or deed was done to intercept their right of succession in those events in which the return was to operate in their favour. And, though it should be admitted, that one or other of the nominations was referred to in the charter 1707, and made a part of it, yet the positive prescription could never begin to run in favour of such deeds, nor the negative prescription against the titles of the heirs-male to challenge them, till, by some ouvert act, it was published and known that such deeds had been granted. Further, the Duke, by these nominations, was laid under harder fetters, and more absurd ones than the reasonable clause of return to the heirs of his honours and dignity; so that all the right he acquired by this prescription was, being tied down to one set of heirs in place of another; consequently there could be here no *adjectio dominii*, which is the definition of prescription.

Replied for Mr Douglas; There can be no doubt that the charter 1707 does refer to one of the nominations, and it is immaterial which of them, in the present argument. Neither would it have been material, though none of them had been referred to; for, though the Duke had possessed upon titles, by which the estate stood devised to the precise same series of heirs as by the contract 1630, the prescription would still have run, as he possessed upon an unlimited title, bearing no reference to the supposed limitations in the contract 1630. Supposing an estate fettered with an entail in favour of a certain series of heirs, and that any of the heirs of entail should devise the estate to the same series of heirs, but without any limitations; if the estate is possessed upon this unlimited title without challenge for 40 years, there can be no doubt that such an entail will effectually be at an end. The holder of the estate will have acquired a fee simple by the positive prescription, and the *jus crediti* of the substitute heirs will be cut off by the negative prescription.

It is a mistake to say, that the heirs-male had no ground of complaint, as long as the estate was possessed upon titles in favours of heirs-male. There was a great difference between possessing upon a title which could not be altered, and an unlimited one defeasible at pleasure. It is also a mistake in point of fact, that conditions were imposed upon the Duke by these nominations; for the Marquis had reserved no power to lay the Duke under fetters; and, though he had imposed any such fetters or conditions, this would not have va-

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ried the case, as still it remains true, that the limitations in the contract 1730 are at an end, the Duke having got clear of them, whatever other burdens he may have been subject to.

III. *Point, Objection to Sasine.*——The next question was, Whether any objection lay to the sasine 1707, upon account of its being wrote book-ways, and the witnesses not having signed each page, as directed by the act 1686? The Duke of Hamilton *insisted*, That this was a nullity, and consequently that no prescription could be founded on said charter and sasine.

Answered; The statute on which this objection is founded seems to have been altered by the act 15th Parliament 1696; and accordingly the objection has been repelled by the Court of Session as often as it has occurred. See Dictionary, *voce* WRIT; and case of Sutherland *contra* Dunbar, in 1736, *voce* PROCESS; and late case of Miss Hamilton of Rosehall *contra* Hamilton of Dalziel. *See* APPENDIX.

Upon a search, it has been found, that in practice since the year 1696, the bulk of the sasines in Scotland are only signed by the witnesses on the last page, agreeable to the provision of the statute 1696; and it further appears from the record, that the statute 1686 hath almost entirely gone into disuse; for that not only the bulk of the sasines in Scotland are only signed by the witnesses on the last page, but that the other proviso of the statute, viz. that the attestation of the notary must condescend upon the number of the leaves the sasine consists of, has been very little attended to in practice. See act of sederunt 17th July 1741.

IV. *Point, Revocation* 1744.——The Duke of Hamilton next *insisted*, That the revocation 1744, which remained uncancelled and subsisting at the Duke of Douglas's death, and which proceeds on this narrative, 'To the end that, failing of heirs of his own body, his lands and estate, heritable offices and jurisdictions, may descend and continue with the heirs of the ancient rights and investitures of the same,' ought to be constructed as a deed of settlement of the Duke's succession, or at least as an indication of his will with respect to the person entitled to take his succession under the penult branch of the contract of marriage 1759, viz. the heirs whom the Duke had named, or should name, &c. When a faculty is reserved of appointing heirs, no *verba solennia* are necessary for exercising that faculty. It is enough if the person's will be signified by any authentic deed. Many instances occur, where effect has been given to imperfect deeds, the defunct's meaning being sufficiently clear; 31st January 1667, Henderson, *voce* TESTAMENT; Sir John Kennedy of Kulain *contra* Hugh Arbuthnot, No 22. p. 1681.; 11th December 1751, Simpson *contra* Barclay. *See* APPENDIX.

Answered for Mr Douglas; In the *first* place, supposing this writing could be constructed as a deed of settlement, it does not appear upon what grounds it could be a settlement in favour of the Duke of Hamilton. From the tenor of the deed itself, it appears, that the ancient rights and investitures are put in op-

position to the deeds of settlement which the Duke had executed himself. He only revokes all deeds and settlements made by himself, declaring the same to be null and void, as if he had never granted the same; which is saying in plain words, That his succession was to go in the same way as if he himself had never executed any deed. In which view, it is plain, that, if this revocation is to be constructed a deed of settlement, the persons entitled to claim under it are the heirs of the charter and sasine 1698, and subsequent nomination 1699, and charter 1707; consequently the respondent would, in the event that has happened, be the heir called under this deed. What further shows this, is, that the reservation bears the Duke's intention to make way for his succession's devolving first upon the heirs male and female of his own body; which could only be on the deeds executed by his father, after revoking those made by himself. No 40.

But, 2*dly*, This revocation can with no propriety be metamorphosed into a deed of settlement. The tenor of it shows, that it was only calculated to pave the way for a new settlement by a revocation of the old ones. And he accordingly, in the 1754, executed a formal and solemn settlement upon the Duke of Hamilton and his heirs-male, which, according to the construction now attempted, would have been superfluous. Besides, it is incongruous to suppose, that a deed executed in the 1744 was the exercise of a faculty reserved in the 1759. None of the decisions referred to will apply. In all of these cases, the deeds contained an express nomination of an heir; it was on that ground they were sustained, and the objections merely in point of form were over-ruled.

3*dly*, Even supposing the revocation 1744 were to be considered as a settlement of succession in favour of the heir-male, it would not avail the Duke of Hamilton; because it expressly reserves to the Duke of Douglas a power to make new settlements of his estate, at any time thereafter he should think fit. And no person, claiming under a deed containing a reservation, can object to the exercise of that reservation, even on death-bed; besides, the deed 1744 remained in the Duke's custody, and under his power till his death; so that he could dispose of it in any shape he pleased, or, which is the same thing, alter it by a new deed to the last moment of his life; so that the deed 11th July 1761 must at any rate prevail over it.

V. *Point, Construction of heirs whatsoever, and competency of proof to explain this termination.*——The last point pleaded by the Duke of Hamilton was, That, laying aside the deed 1761, as executed on death-bed, and if the succession was to be regulated by the immediate preceding deed, viz. the contract of marriage 1759, the person entitled to take the succession under the last substitution of heirs and assignees whatsoever in said contract, was the heir of the former settlements and investitures, which his Grace intended to be the heir-male; and, in aid of this construction, a condescendence of facts was given in for him, tending to show, that the Duke of Douglas had no intention under this termination of his settlement in the contract of marriage to call his heir of line; that the person in view must have been the heir of the ancient investitures, and

No 40. of the honours and dignities of the family. And of this condescence a proof by witnesses was craved.

It was *argued* for the Duke of Hamilton upon this head, That the term 'heirs 'whatsoever,' has no fixed invariable signification in the law, but is a general and pliable term, which must be explained according to circumstances. For the most part, this term is understood to denote the heir of line, or heir general; but, from circumstances, it may also be descriptive of particular heirs. Its signification depends upon the intention of the user, and points out those heirs who, from the circumstances of the case, appear to have been designed to be called to the succession. The reason why the heirs of line are generally meant by the expression 'heirs whatsover,' is, that heirs of line are always presumed, unless a contrary intention appears; so that still intention is the rule. Sometimes these words denote all kinds of heirs. Thus, where one obliges himself and his heirs whatsoever, he obliges all his representatives in their order; and, under this general description, the creditor will be well founded in his action, not only against the heir of line, but against the heir of provision, and against his executor. In like manner, where a right is taken to one and his heirs whatsoever, the interpretation varies according to circumstances. *In feudo novo*, it signifies heirs of conquest; *in feudo antiquo*, heirs of line; and in moveables, the heir *in mobilibus*, or executor. In an heritable bond with a clause of infeftment, these words carry the subject to the heir of line; but, if the creditor has charged his debtor with charge of horning, heirs whatsoever become executors. In bonds of corroboration, wherein principal sums and annualrents are accumulated, and both principal sums and annualrents are taken payable to heirs and assignees whatsoever, it has been found, that these words signify both the heir of line and the heir of conquest, and, as to the anualrents, the executors; and thereby the same words in the same deed carry different parts of the estate to different heirs. See the cases of Marquis of Clidesdale against Earl of Dundonald, January 1727, No 3. p. 1262; Duke of Hamilton against Earl of Selkirk, 8th Jan. 1740, *voce* HERITABLE AND MOVEABLE; Scott against Scott, Jan. 1665, *voce* PRESUMPTION; Skene, 31st July 1725, *voce* PRESUMPTION; Hay against Crawfurd, 16th Nov. 1698, *voce* SUCCESSION; Farquharson against Farquharsons, No 43. p. 2290; M'Dowal against M'Dowal, Feb. 1727, *voce* PROVISION TO HEIRS AND CHILDREN; Stair, *voce* HEIRS, § 12; M'Dowal, v. 2. p. 330, § 27; Erkine, p. 368, § 20.

That the Duke of Douglas had no intention to call his heir of line, but all along meant to favour the heir of his honours and ancient investitures, appears from the whole tenor of his settlements, and from the circumstances of his family; and the same can be put beyond doubt, if a proof is allowed of the condescendence. This will not be taking away written evidence by witnesses. The purpose of the proof is to discover from circumstances the sense and intention of a phrase of doubtful signification. It is not to destroy or take away the deed, but to explain it. Parole evidence was allowed by the Roman law in such cases;

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L. 69. ff. de legat. 3.; and, by our law, nothing is more common, than to allow a proof by witnesses, of facts and circumstances inferring payment, or any other matter which could not have been the subject of a direct proof by witnesses; 3d February 1697, Drummond, observed by Fountainhall, *voce* PROOF. There are likewise two cases, similar to the present, in which parole-evidence was admitted, viz. The case of Weir of Weygateshaw, 7th February 1745, collected by Falconer, *voce* PRESUMPTION; and the case of Aberdeen, 13th December 1757, *voce* IMPLIED WILL.

Answered for Mr Douglas; The words, 'nearest heirs whatsoever,' are technical words, well known in law, and which have received a fixed and determined signification, denoting the heir of line, or heir general; and though, in some cases, *ex præsumpta voluntate*, arising from the face of the deeds themselves, 'heirs whatsoever' have received a different construction; yet it is clear, that, in a settlement of heritable succession, they can only be constructed to mean the heir of line. When a man, after having called the several persons whom he means to prefer to his succession, closes the whole with a termination to heirs whatsoever, in order to prevent the estate from falling to the Crown, which, as the law once stood, would have been the case upon the failure of the heirs specially called, in sound reason, he can only be understood to have meant his heirs of blood, who naturally are entitled to the succession, and in whose favour the will of the testator is always presumed, if the contrary is not expressed.

In collateral subsidiary deeds, one deed may be explained by the other, and the expression, 'heirs whatsoever' may admit of different significations; but this is not the case in general settlements. Where a person executes a settlement of his estate, pointing out the different heirs whom he chuses to succeed him, the heirs of the former investitures can have no claim unless they are again specially called; for, by the execution of a new settlement, all former ones are at an end; and, as the heirs called by former investitures must have been under his eye, so the presumption is, that, if he had chosen to prefer any of them to his heir of line, he would have done so in express words: Accordingly, the method pointed out by our lawyers for breaking tailzies or particular destinations, is, by the owner's resigning the lands of new in favour of himself and his heirs whatsoever; Craig, lib. 2. dieg. 16. § 21.; Balfour, tit. TAILZIE, c. 6.; Hope's Major Practics, tit. TAILZIE, § 3. And the decisions of the Court have been agreeable to these principles; Gilmour 1665, Calderwood against Pringle, No 5. p. 3036; case of Brodie of Pitgavenie, 1749, *See* APPENDIX; Hamilton of Dalziel against Miss Hamilton, 1757, *See* APPENDIX. The cases and authorities mentioned on the other side do all relate to purchases of collateral rights, or *ubi non agebatur* to make a settlement of succession.

In the present case, the termination of heirs and assignees whatsoever, is the same with what occurs in all the settlements of the family: All those for whom there is a predilection, are, in the first place, called, and, in the last place, heirs and assignees whatsoever, are allowed to take the succession, which, in the na-

No 40. tural course of things, ought to fall to them. Neither is there occasion to suppose, that the maker of the settlement had any particular person in view by this substitution: The probability is, that he had no particular person in view, nor, indeed, can he be supposed to have known who those heirs of law would be, at the distance, perhaps, of many generations; but, in general, his intention was, that the succession should go in the legal and natural course.

The proof offered by the Duke of Hamilton is altogether incompetent. It would be of the most dangerous consequence to allow witnesses to explain away the legal import of settlements. It is an established principle in the law of Scotland, that writing is essential to the transmission of land property, and of every real right, even of the smallest value. A man's will, concerning his land property, cannot be proved by witnesses; and, for the same reason, if he has made a settlement according to the legal form, in writing, his succession must be regulated by the writings, nor can witnesses be adduced to give it a construction different from what arises upon the face of the deed itself.

Where a deed is unintelligible, it will be set aside, and all effect will be denied it. A deed to which no proper meaning can be affixed, must be held as no deed at all; but, where a deed is conceived in apt and proper terms, as every man is presumed to know the legal import and meaning of words used by him in his own settlements, it must be constructed accordingly. If the legal import of words is to be departed from, there is no knowing where to stop: It would throw every thing into the greatest uncertainty; and to allow witnesses to prove that the testator's intention was different from what is expressed, would plainly be allowing a settlement to be constituted by parole-evidence, contrary to one of the fundamental principles of law. It would even be giving a stronger effect to the testimony of witnesses, than if nuncupative settlements were allowed; for, though such settlements were good, which was the case among the Romans, still no man is obliged to trust the transmission of his property to the lubricity of witnesses. He may, if he pleases, make a deed, and so put it out of the power of witnesses to defeat his intentions; but if, after a man has made his will in writing, witnesses shall be allowed to explain that will, and to give it a construction different from the natural meaning of words, no man can be sure that his will is to have effect. This would, in reality, be putting it in the power of witnesses, first to destroy the will of the defunct, and then to substitute another in its place.

The decision in the case of Weygateshaw was not approved of by the lawyers of the time, and has not since been followed; and, rather than risk a decision in the last resort, the matter was compromised. The circumstances, too, were different from the present. The Court was sufficiently clear upon the construction of the disposition itself; nor was the proof allowed to overturn or explain the settlement, but in further support of it, in order to remove some scruples that had been raised with respect to the question, whether it had been revoked or not by the defunct. In the case of Aberdeen, the writings were likewise clear,

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and the proof was granted, in the *first* place, to support one of the branches of the declarator, viz. That Provost Aberdeen was in *leige poustie ;* and, *2dly*, To prove that instructions had been given by him for making the disposition in the form in which it was conceived. The case put, of payment of a bond being proved by facts and circumstances, does not at all apply. This is not explaining a writing, or putting upon it a construction different from the natural import of it: The nature of the writing is, that it is extinguishable upon payment, and it is only proving from circumstances that the obligation was implemented ; writing is not necessary to the extinction of the obligation; payment, if instructed, will extinguish it, and payment may be otherwise instructed than by writing: It may be instructed by circumstances sufficient to convince the mind of the judge.

Several of the above points also occurred in the question between the Earl of Selkirk and Mr Douglas, and the same arguments were used. A separate plea was further insisted in by the Earl, upon the deed of nomination 9th March 1699, and the following propositions were maintained by him.

1. That the deed of nomination 9th March 1699, in virtue of which the Earl of Selkirk is now entitled to succeed, as in right of his father Lord Basil Hamilton, the substitute to Lord Forfar, was a proper and habile exercise of the Marquis's reserved faculty, by the disposition 1697.

2. This nomination was rational, and just in itself, agreeable to the plan of succession which the Marquis had adopted, and was his own voluntary act and deed, without any undue influence practised upon him.

3. It was delivered by the Marquis to his brother the Earl of Forfar, upon the 31st of July 1699, and thereby became a compleated deed before the after-nomination of 28th October was obtained from the Marquis.

4. It never was altered by any fair and voluntary deed of the Marquis's, the after-deeds of the 11th March and 28th October 1699 having been impetrated from him by fraud and circumvention.

5. The nomination 9th March 1699, being the only true and legal nomination of the Marquis of Douglas, in virtue of the faculty reserved in the deed 1697, must be held as ingrossed in the charter and infeftment 1698, and in the charter 1707, referring to that faculty ; and, consequently, the Earl of Selkirk is the next heir of tailzie and provision under that investiture.

6. Supposing no circumstances of fraud appeared against the nomination 11th March 1699, and after-deed confirming it, the same are void in law, having been granted *a non habente potestatem ;* for the faculty reserved to the Marquis, of appointing further heirs of tailzie, was exhausted and at an end by his appointment or nomination of the 9th March, delivered to his brother upon the 31st July thereafter; and which deed he declares to be unalterable, renouncing all power of altering, changing, or infringing the same for ever.

On the other hand, it was *contended* for Mr Douglas, 1. That the disposition and settlement executed by the Marquis, of date 9th March 1699, by which

No 40. he called Lord Forfar, and certain younger sons of the family of Hamilton, in exclusion of his own daughther and lineal descendents, was obtained by undue and fraudulent means.

2. That, though this deed had been fair and unexceptionable as to the means, yet it was effectually revoked and altered by the proper exercise of the Marquis's reserved power, and by the nomination of heirs which he executed on the 11th of the same month, and ratified on the 28th October thereafter.

3. If the deed 9th March shall be held as an irrevocable settlement, or as a nomination of heirs, which the Marquis had no power, by any subsequent deed, to change or alter; yet his son, the late Duke, neither was nor could be thereby subjected to any limitation, or debarred from altering the order of succession; as the Marquis had reserved no power to lay his son, the fiar, under any limitation.

4. The nomination 11th March, in favour of the Marquis's female issue, and, failing such issue, his brother Lord Forfar, and other substitutes, is liable to no just challenge of fraud, but was fairly obtained, by the advice of noble and honourable persons.

5. Though this deed had been originally liable to challenge, and the opposite deed fair and unexceptionable, yet the nomination 11th March is now confirmed and established by the positive prescription; and the opposite deed is cut off by the negative prescription: The deed of the 11th March having been in the view of the Duke's tutors, and referred to under the general words of the charter and infeftment 1707; so that it is the nomination of the investiture, and became a part of the Duke's title of possession during his life.

The only point of law occurring in the above debate, was that which was maintained by the Earl of Selkirk, under his last proposition: 'That the Marquis's reserved faculty of nominating heirs was exhausted and at an end by 'the deed of 9th March, which by its conception, was unalterable, and was 'compleated by delivery.' And on this head the Earl *pleaded*, That a man might limit not only his heirs, but himself, in the exercise of his property, and might put it out of his own power to alter any deed of settlement executed by him. In support of which argument, reference was made to the authority of Sir Thomas Hope, title Tailzies; Sir George M'Kenzie, title Tailzies; and to the following decisions, 28th January 1668, Binny, No 3. p. 4304; 3d February 1674, Drummond, No 5. p. 4306; 27th January 1687, Lord John Hamilton *contra* Earl of Callender, observed by Lord Fountainhall and Harcarse, *voce* TAILZIE; 15th July 1715, Shaw of Greenock, IBIDEM.

Answered for Mr Douglas; The deed 9th March, though conceived in the form of a disposition, can be supported under no other character than as a nomination of heirs, which was the only power reserved to the Marquis; and as this nomination was made without any onerous cause, it was of the nature of a testamentary deed, which requires no delivery, and is revokable, whether delivered or not; nor can any person tie himself up in favour of his own heir from

altering his will at pleasure. Many authorities to this purpose are to be found in the civil law; and, from the following decisions, it appears, that the same doctrine has been understood to obtain in ours; Dalrymple, 8th December 1714, Lord Lindores against Stewart, *voce* JUS QUÆSITUM TERTIO; 23d June 1713, Scott of Raeburn against Haychester, *voce* TAILZIE. No 40.

N. B. As the above point of law was waved by the Court, it does not seem necessary to be more full upon it. The judgement pronounced upon the whole (9th December 1762) was as follows:

'Find, That neither the clause of return or substitution, nor the prohibitory clause in the contract of marriage 1630, disabled Marquis James from gratuitously altering the order of succession appointed by the said contract: Also find, that the Duke of Hamilton's claim, founded on the said clause of return, and prohibitory clause, is cut off by the negative prescription, and also by the positive prescription upon the title of the charter and infeftment *anno* 1698, and possession thereon: Find the deed of nomination the 11th March *anno* 1699, ratified by the subsequent deed dated the 28th of October 1699, is the nomination referred to in the charter *anno* 1707; and that the Earl of Selkirk's claim, founded on the deed executed by the Marquis on the 9th of March 1699, and the deed the 15th day of June following, relating thereto, is lost by the negative prescription. Repell the objection to the sasine *anno* 1707, and find, That the charter and sasine *anno* 1707, and possession of the late Duke following thereon, entitles Archibald Douglas to the benefit of the positive prescription, against the conditions and restrictions contained in the contract of marriage *anno* 1630, and in the deed dated the 9th of March 1699: Find, that the deed of revocation *anno* 1744 was no legal or proper settlement of the lands and estate belonging to the late Duke of Douglas: Find, that, from the legal import of the clause, 'heirs and assignees whatever,' in the late Duke of Douglas his contract of marriage, dated in the year 1759, Archibald Douglas, as heir of line, is called to succeed to the said Duke in his whole estate, including the baronies of Bothwell and Wandell: And find, that the parole-evidence offered by the Duke of Hamilton and Earl of Selkirk, to the effect of giving a different meaning to the said clause, is not competent: And also find, that it is not competent to the Duke of Hamilton or Earl of Selkirk to object death-bed to the late Duke's disposition of the 11th July 1761, as they are not called to the succession by the last feudal investitures *anno* 1707, nor by the contract of marriage *anno* 1759; therefore repell the reasons of reduction proponed for the Duke of Hamilton and Earl of Selkirk, and assoilzie Archibald Douglas from the reductions and declarators carried on by them; and decern: And find, That the brieves issued forth by the chancery at the instance of the Duke of Hamilton and Earl of Selkirk, for serving them heirs in special to the late Duke of Douglas, cannot proceed; and remit to the macers to dismiss the same accordingly.'

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The Duke of Hamilton and Lord Selkirk gave in separate reclaiming petitions against this interlocutor; and Lord Selkirk's petition, with answers for Mr Douglas, having been advised upon the 19th July 1769, the COURT found, 'That the deed of nomination of the 11th March 1699, ratified by the subsequent deed dated the 28th of October 1699, is the nomination referred to in the charter 1707; and that the Earl of Selkirk's claim, founded on the deed executed by the Marquis on the 9th of March 1699, and the deed of the 15th of June following relative thereto, is lost by the negative prescription: Found, that the charter and sasine *anno* 1707, and possession of the late Duke following thereon, entitles Archibald Douglas to the benefit of the positive prescription against the conditions and restrictions contained in the deed dated the 9th of March 1699: Found, that, from the legal import of the clause, heirs and assignees whatsomever, in the late Duke of Douglas his contract of marriage, dated in the year 1759, Archibald Douglas, as heir of line, is called to succeed to the said Duke in that part of his estate claimed by the Earl of Selkirk; and that the parole evidence offered by the Earl of Selkirk, to the effect of giving a different meaning to the said clause, is not competent; And also found, that it is not competent to the Earl of Selkirk to object death-bed to the late Duke his disposition of the 11th of July 1761, as he is not called to the succession by the last feudal investiture *anno* 1707, nor by the contract of marriage *anno* 1759; therefore the LORDS adhered to their former interlocutor, in so far as concerned the Earl of Selkirk, and refused the desire of his petition.'

The petition for the Duke of Hamilton, with answers for Mr Douglas, remain unadvised, the brieve taken out by the Duke having fallen by his death, which was understood to put an end to that branch of the cause. *See* PRESCRIPTION. PROOF. WRIT.

For the Duke of Hamilton, *Lockhart, Sir John Stewart, John Campbell*, jun. *Walter Stewart, William Johnston, Nairn, Sir Adam Ferguson.*

For Earl of Selkirk, Advocate, *Sir David Dalrymple, P. Murray, Wight, Crosbie.*

For Mr Douglas, *Hamilton-Gordon, Burnet, Montgomery, Garden, M'Queen, Rae, Ilay Campbell, Al. Murray, R. Sinclair, John Pringle, Henry Dundass.*

I. C. *Fol. Dic. v. 3. p. 218. Fac. Col. No 101. p. 223.*