1783.

DUNDASES v. DUNDAS.

LORD MANSFIELD said:

"My Lords,

"The agreement with Monro was a device to elude the meaning of the statute 28 Geo. II.; and therefore I move your Lordships to reverse the judgment below." It was therefore

"Ordered and adjudged that the interlocutor complained of be reversed. And it is declared, that the respondents, by selling beer and ale, upon the express condition of his selling the whole in the town of Glasgow, and making discounts and allowances, is a manifest evasion of the act of the 28 Geo. II., and ought to be considered as selling within the town of Glasgow by the respondents themselves."

For Appellants, *Henry Dundas, Ilay Campbell.*
For Respondents, *L. Kenyon, Thomas Erskine.*

---

(M. 15,585.)

LAURENCE, WILLIAM, CHARLES, MARGARET, CHARLOTTE, THOMAS, FRANCES - LAURA, GEORGE and ROBERT DUNDASES, Children of the marriage betwixt Sir THOMAS DUNDAS of Kerse, Bart. and Lady CHARLOTTE FITZWILLIAM, his Wife, - - } *Appellants;*

SIR THOMAS DUNDAS of Kerse, Bart. *Respondent.*

House of Lords, 21*st May* 1783.

REVOCATION—ENTAIL.—An entailer had reserved to himself power to alter and revoke the entail executed by him. He thereafter executed a will conveying the fee of his whole real estate in England and Scotland, according to the English form, and revoking all "former and other wills." Held that this latter deed was not effectual as a revocation of the entail.

1764. Sir Laurence Dundas, on the occasion of his son Thomas' (now Sir Thomas) marriage with Lady Charlotte Fitzwilliam, became bound to execute a conveyance of his whole lands and estates in Scotland, to himself in liferent, and in trust *quoad* the fee, for behoof of the first, second, third, and other sons of the said marriage, and their respective issue male. By this marriage contract power was reserved to destinate the line of succession, and to impose such condi-

tions and limitations upon the issue male as he might think proper. In pursuance of these reserved powers Sir Laurence, in 1768, executed an entail, by making resignation in favour and for new infeftment of the same to be made and "granted "to the said Thomas Dundas, my son, in liferent for his life- May 25, 1768. "rent use only, during all the days of his natural life, after "my death, and to his heirs male lawfully procreated or to be "procreated of his body, in fee, whom failing, to the heirs "female procreated of my said son's body," &c. The prohibitions against selling and contracting debt were qualified by powers in favour of his son Thomas to grant liferent infeftments to widows, and to grant leases not exceeding nineteen years, and to provide his younger children with provisions not exceeding £25,000 Sterling, and also power to Sir Laurence himself "to revoke this present tailzie." This entail was duly recorded.

Thereafter, and in February 1779, by a last will, he gave Feb. 1779. and devised and bequeathed to his son Thomas Dundas all my real estate in England, Ireland, and Scotland, as also in the island of Dominica in the West Indies, and elsewhere, not included in the settlement made on his marriage, and all my personal property of every nature or kind soever, to hold to him, his heirs, executors, &c. charged with an annuity of £2400, to his wife, and legacies to his servants. There was this clause in this will: "I do hereby revoke all former "and other wills by me heretofore made, and do constitute "and appoint my dear son my sole executor." The testing clause ran thus: "In witness whereof I have hereto set my "hand and seal this 14th day of February 1779." (signed) "Laurence Dundas." "Sealed, published, and declared by "the said testator, as and for his last will and testament, in "the presence of us, who in his presence, and in the pre-"sence of each other, have subscribed our names as wit-"nesses." (Signed) "A. Drummond, Crawford, Cha. Sayer." This deed was prepared and executed in London according to the English form.

On Sir Laurence Dundas's death, the questions were, 1. Sept. 21, 1781. Whether the clause of revocation therein was good to recal the entail; and, 2. Whether the deed was good of itself to carry heritage in Scotland, it not being tested according to statutes.

The Court of Session pronounced this interlocutor: "Find Feb. 25, 1783. "that the deed of entail libelled on is effectually revoked "by the deed executed by Sir Laurence Dundas upon the

1783.

DUNDASES
*v.*
DUNDAS.
Mar. 11, 1783.

"14th Feb. 1779." And on reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellants.*—The latter will or deed 14th February 1779 being not holograph of the granter Sir Laurence Dundas, and not being tested, in terms of the statutes, as wanting the name and designation of the writer, and designation of the witnesses, is null and void, and of no effect to revoke an entail conveying heritage, executed with all the statutory requisites. It is no answer to this to say, that the testament is not founded on as a conveyance, but only as an effectual revocation, because the law of Scotland acknowledges no such distinction, as all deeds affecting heritage must be executed in a formal manner: But, separately, Sir Laurence, by the latter deed or will, did not intend to revoke the entail, but the sole object of that deed was to burden the heir with the annuity and legacies; for had he intended it so to revoke the entail, the word entail would have been mentioned, and the general terms, "all former and other wills," cannot have the effect of revoking a deed of entail by construction or implication.

*Pleaded for the Respondent.*—Although Sir Laurence had undoubted right to alter or revoke the entail at pleasure, yet the question is, Whether the last will of 1779 was intended to be, and was in point of law, a revocation of that deed. It is clear that the later deed was a departure from the entail or destination, in so far as it gave his son, the respondent, a fee simple of the whole estates in England and Scotland, except the lands settled by the marriage articles; and the plain meaning of revoking "all former and other wills," just meant, that in pursuance of the powers reserved to himself, he now altered the previous settlement, and thus revoked the entail. Its effect in law is equally beyond dispute, because the reservation of a power to do any act, is a mere declaration of will, which may be executed by any authentic deed. And as the will here questioned was properly authenticated according to the law of England, where it was executed, it ought to be held good as a contrary declaration of will to the effect of revoking a former deed, though conveying heritage. Though not good as a deed conveying heritage in Scotland, yet, being properly authenticated, it was good as a revocation.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained

of be *reversed*, so far as it finds that the entail libelled on is effectually revoked by the deed executed by Sir Laurence Dundas upon the 14th Feb. 1779, and that the case be remitted back to the Court of Session in Scotland to carry this judgment into execution.

For Appellants, *Jo. M'Laren, Robert Blair, Alex. Abercromby.*

For Respondent, *Henry Dundas, Ilay Campbell, Alex. Wight.*

---

The Rev. Mr. William Milligan, Minister of Kirkden, - - - } *Appellant;*

Sir John Wedderburn and Others, Heritors of the Parish of Kirkden, - } *Respondents.*

House of Lords, 8*th July* 1784.

Stipend—Augmentation—*Res Judicata*—Appellate Jurisdiction of the House of Lords.—Held, though a stipend had been augmented since the Union, that there was no law which barred the minister from insisting for a further augmentation. Also, that the House of Lords had an appellate jurisdiction in reviewing the judgments of the Lords of Session, as Commissioners of Teinds in such questions.

The appellant, as the settled minister of Kirkden, brought an action of augmentation, modification and locality of stipend, before the Lords of Session, as Commissioners of Teinds, against the heritors of the parish. The last modification and locality was obtained by a decree of Court on 18th July 1716, by which the stipend was fixed at £47. 4s. $5\frac{4}{12}$d., including communion elements. The summons then proceeded to cite the several acts passed for the provision of competent stipends to the ministers, stating that the above sum was by no means adequate to the weight of the charge, nor could it be considered so, from the great increase in the price of all necessaries of life for the last sixty years. The respondents confined themselves to a preliminary defence, to the effect that the stipend of this parish having been augmented by a decree in the year 1716, they were entitled to found on that decree as a *res judicata* in bar of this action, because of the rule of the Court, confirmed by uniform practice, of not granting any new augmentation, where the stipend had been augmented since the Union.