

1777. July 3.

YOUNG *against* SCOTTS.

IN a reduction *ex capite lecti*, Young against Scotts, Lord Covington, Ordinary, "found it proven, That John Young was, in the construction of law, upon death-bed, and had contracted the disease of which he died before executing the disposition under challenge, and that he died within 60 days after executing said disposition; but found it also proved, that, as formerly in use to do, he went several times to the public flesh-market, in market time of day, freely and unsupported, either going or coming therefrom; and that, when in said flesh-market, he bought skins, or bought and priced butcher-meat, and thereby was, in the construction of law, so far convalesced as to validate and secure the deed from any challenge on the head of death-bed." These acts of convalescence happening at different times, each act was proved by one witness only, and therefore it was maintained that the proof of them was insufficient. But, upon petition and answers, the Lords adhered, (3d July 1777.)

REVOCATION ON DEATH-BED.

SIR James Cuninghame executed a disposition of his estate in favour of his brother David, his heir-at-law, and charged him with certain provisions to other friends, reserving a power to alter. Accordingly Sir James, (10th June 1748,) made a new disposition in favour of his brother, with additional burdens. In a reduction of this last disposition, *ex capite lecti*, at the instance of David, the Lords found him free of both;—of the first, as expressly revoked by the second; of the second, on the head of death-bed. But, says Lord Bankton, (Vol. II, p. 306,) this would not have been found, had there not been an express clause in the second disposition, revoking the first. An implied revocation would not have been sufficient, unless the deed whereby it was inferred had been found to subsist.

Accordingly, another case occurred to this purpose.

1775. November 22. ABRAM ROWEN *against* ROBERT ALEXANDER.

JAMES ROWAN, in 1768, disposed an heritable debt on the estate of Westsheilds, to John and Robert Rowans, his nephews, by a younger brother, Hugh, reserving a power to alter, even on death-bed.

When on death-bed, *anno* 1768, he disposed the same debt to another nephew, Robert Alexander, by a sister; but this deed contained no revocation

of the former. Abraham Rowan, the son of James's elder brother, and heir of conquest, brought a reduction of these deeds, and contended, that he had right to this debt, because the first disposition was revoked by the last; and the last was reducible at his instance, *ex capite lecti*. The defence chiefly insisted on was, that the first deed was not expressly revoked by the last; and therefore, although the last deed should be taken out of the way, the first would still subsist; "and so the Lords found, (22d November 1775;) they held a virtual revocation of the first not sufficient, and assoilyied the defenders." And the decision was well founded; for, if a death-bed deed contains both a disposition and revocation, there may be some reason for maintaining, that, though the disposition be set aside, the revocation may subsist; because they are distinct; *et utile per inutile non vitiatur*; but, when the death-bed deed contains no revocation, and is cut down on the head of death-bed, it cannot be maintained, with plausibility, that it ought to subsist as a revocation.

DECLINATOR.

1776. July 26. WILLIAM DALGAIKNS *against* ———.

WILLIAM Dalgairns, tacksman of the Mills of Kiethick, belonging to the Lord Privy Seal, pursued several of the neighbouring tenants for abstracted multures. The process came, by suspension of a sentence of the Sheriff of Perth, before Lord Stonefield, who declined himself on account of his connexion with the Privy Seal, proprietor of the mill. The Privy Seal was no party called to the process. The Lords, 26th July 1776, repelled the declinator as not a legal one.

Being related to either of the parties, as an uncle, by affinity, is no declinator. Repelled in the case of *Lord Coalston* as uncle to *Mrs Caddell*. In the case of *Lord Gardenstone*, in the process *Irvine of Drum* against *Earl of Aberdeen*, June 1776: Irvine had married his niece. And in the case of *Lord Covington*, in the process *Moray of Abercairney* against *M'Namara*, 27th July 1776.

1774. December 2. DOUGLAS, HERON, and COMPANY *against* EARL of GALLOWAY.

A CAUSE, at the instance of Douglas, Heron, and Company against the Earl of Galloway, having come in course before Lord Hailes, Ordinary in the Outer-house; his Lordship, not adverting that Sir Adam Ferguson, his brother-in-law, was a known member of that Company, assoilyied the defender, found expenses due, and decerned, (23d July 1774.) A representation being given in, the