1775. *November* 18. ROBERT DICK *against* His CREDITORS.

CESSIO BONORUM.

Case where the Court refused to dispense with the habit.

[*Fac. Coll., VII.* 135; *Dictionary*, 11,791.]

PRESIDENT. The facility of the Court in granting *cessios* has been of too great prejudice to the mercantile world. I doubt how far a smuggler is entitled to the benefit of the *cessio*. That benefit is only granted to the unfortunate. A man who cheats the revenue, and is detected, cannot be called *unfortunate*: he is an unsuccessful cheat. At no rate whatever can we dispense with the habit.

HAILES. We have already gone far in granting the benefits of the *cessio* to smugglers. We can go no farther unless we dispense with a most express statute.

On the 18th November 1775, "In respect that the bankruptcy has arisen from illicit practices and contraband trade, not from innocent misfortunes, the Lords refused to dispense with the habit."

Act. G. Fergusson. *Alt.* J. Boswell.

1775. *November* 22. ABRAHAM ROWAN *against* ROBERT ALEXANDER.

DEATHBED—PRESUMPTION.

A general settlement of one's estate dispensing with the delivery, and containing power to revoke, not held to be annulled by a posterior partial settlement in favour of others, executed on deathbed, which contained no direct revocation of the former, nor the second reducible as on deathbed in a question between the heir-at-law and the disponees in both deeds.

[*Faculty Collection, VII.* 139; *Dict.*, 11,371.]

PRESIDENT. The case of the succession of Sir James Cunningham was determined finally here; but there was a great difference of opinion. On appeal the respondent was advised to compromise matters. The lawyers came to the bar, and declared that they were agreed in the affirming the judgment. There was a compromise, and a sum paid. Lord Hardwicke said that the respondent was well advised. This case is not so narrow as that of *Cunningham*; for *there* the former deed was actually cancelled, at least that copy of it which was in the power of the disponer.

MONBODDO. After a settlement once made, though *revocable*, the person called is the *heir*, and, if he consents, the revocation is good. But here there is not a total, only a partial revocation. The testator plainly meant that the former deed should subsist in part.

COALSTON. This precise question has never received any precise judgment of the Court. Decisions ought to be more fully stated. When a man grants a deed to take effect, after death, the settlement is revocable. Suppose that he destroys the deed, and, *ex intervallo*, makes a settlement on strangers on deathbed, this is reducible. The same is the case if he revokes on the back of the settlement. Suppose a deed revoked, and, in that deed revoking, a new deed granted to a stranger, it is difficult to distinguish between an express and a virtual revocation.

PRESIDENT. Here there is no *mutatio voluntatis*, as in the cases put. There is no revocation of the former deed. If the second deed is set aside, I think the former one must be the rule, and that no *mutatio voluntatis* must be presumed.

KAIMES. A man makes a settlement of his whole estate, alters his mind, but upon deathbed. The two deeds are inconsistent. The latter deed is good as far as it goes. There is an implied revocation *ad hunc effectum*. If that is the case, there is no room for the heir of line to interpose.

AUCHINLECK. I do not like any attempt to disappoint the law of deathbed. A man grants his estate to A, *in liege poustie*, with a power of revocation; on deathbed he grants his estate to B, a stranger: this deed may be lying by him: thereby the law of deathbed will be eluded; for the heir of line cannot complain. The settlement to A excludes him, supposing the settlement to B not to have any effect. This is an impossible case; for it just comes to this,—A man means to settle his estate on B, a stranger: with this view he settles it on A, *in liege poustie*, with a power of revocation, and on B on *deathbed*. No man will make such a settlement. He will not give such a chance to A when he does not mean to favour. If he means to favour a stranger he will do it directly, and not postpone his settlement to a moment when he may make the second will good by recalling the first.

COVINGTON. I doubt whether heirs under the first deed are heirs of provision. A settlement in a man's cabinet does not make his disponees to be heirs of provision. There was an implied revocation in the deed itself. The question is, *quo intuitu* was the second deed executed? My opinion is that the revocation, being only to the effect of bringing in other heirs, must be effectual as to that.

JUSTICE-CLERK. The law of deathbed was intended to secure every sort of heir. It cannot apply to the persons named in the first deed, for their very right was under the implied or the express power of revocation in the granter. The question is, What title has the heir-at-law to challenge the deathbed deed? How are they injured? If the alteration had not been made, the subject would have gone according to the former deed. If a man leave heirship-moveables by a deathbed deed, after having made a settlement on strangers, Can the heir come in and object to the settlement of heirship-moveables? This last query does not advance us much in the argument, for it only puts *heirship-moveables*

instead of *lands,* and is in effect putting the case which has happened, and asking a question on it, instead of giving a solution.

On the 3d August 1775, " the Lords sustained the defence, altering Lord Auchinleck's interlocutor.

Act. A. Rolland. *Alt.* Ilay Campbell.

Diss. Auchinleck.—*Non liquet,* Stonefield, Justice-Clerk.

1775. *November* 22.—MONBODDO. The deed 1768 is not in prejudice of the heir, for he was excluded by the deed 1763. If there had been first a revocation, and then, at some interval, another deed, the case would have been different; for, after the revocation, the granter would have been intestate, and the heir would have had an interest which a second deed on death-bed would have impaired. As to the case of *Cunningham,* it was carried by the President's casting vote against the judgment of Lord Elchies, and was at length ended by a compromise on the appeal.

KAIMES. It is a general rule in law, that a man cannot be received to plead against a deed when he has no interest: but then the question still occurs, Whether there is here a deed standing against the heir? Had Rowan first of all put the former deed in the fire or expressly revoked it, there would have been room for the heirs complaining; for then the new deed would have been to his prejudice, and have deprived him of the right *ab intestato* which he got by the cancellation. Had Rowan been asked what he meant by the second deed, and whether he meant, in any event, to let in the heir?—I am persuaded that he would have answered in the negative.

ALEMORE. When a revocation is executed, it must have its effect; but I cannot admit of a virtual revocation. This comes to be a *quæstio voluntatis:* it appears to have been the will of the testator not to let in the heir.

COALSTON. It is difficult to distinguish between this and other cases where the heir has been found to have a right. I am very uncertain, and, therefore, if the Court in general should be of opinion against the heir, I shall acquiesce.

KENNET. I have great respect for the law of death-bed, but I do not think that it applies here.

JUSTICE-CLERK. The heir has very artfully endeavoured to make the last deed consist of two parts,—a revocation and a new settlement; but it was one single act. The judgment formerly pronounced does not impinge on the law of death-bed, which gives relief to heirs of all denominations *if lesed.* I hope we shall never be deprived of the law of death-bed: the only thing that can deprive us of it is, if we extend it to cases which the law did not mean it to reach.

On the 22d November 1775, " The Lords assoilyie;" adhering to their interlocutor of 3d August 1775; which altered Lord Auchinleck's interlocutor.

Act. R. M'Queen. *Alt.* Ilay Campbell.