March 17. 1824.

Appellant's Authorities.—1597, ch. 232.; Heinec. Instit. l. 2. t. 1. § 323.; 1. Craig, 15. 11.; Lithgow, Jan. 15. 1697, (9637.); 2. Ersk. 1. 8.; Spence, Dec. 1. 1808, (F. C.); Connel on Parishes, 167. 179.

Respondent's Authorities.—1. Craig, 15. 2.; 2. Bank. 8. 184.; 1. Bank. 3. 12.; 2. Ersk. 1. 8.

SPOTTISWOODE and ROBERTSON—J. CAMPBELL,—Solicitors.

(Ap. Ca. No. 19.)

No. 15.

PETER and JOHN HUTTON, Appellants.—*Sol.-Gen. Wetherell—Walker.*

DAVID GIBSON, Respondent.—*Murray.*

Process—Amendment of Libel.—Held, (affirming the judgment of the Court of Session), That it is competent, before great avizandum is made with an action of reduction on the head of forgery, to amend the libel, by adding deathbed as an additional reason.

March 23. 1824.

2D DIVISION.
Lord Cringletie.

DAVID GIBSON, the heir of conquest of the late Peter Gibson, merchant in Edinburgh, who died on the 3d of September 1803, leaving, as was alleged, two deeds of settlement,—the one dated on the 2d of September, being the day preceding his death, and the other on the 3d of June 1802,—brought an action of reduction improbation of them, on the ground that they were false and forged. To that action he called the appellants, Peter and John Hutton, as defenders, who had the chief interest under the deeds, and by whom he alleged the forgery had been committed. The action having come before Lord Reston, a warrant was granted for transmitting the principal deeds from the record, which was accordingly done without objection. Immediately thereafter Gibson proposed to make an amendment of the libel, by adding the following reason of reduction:—

'The said pretended deed of settlement, dated the 2d day of 'September 1803, and recorded in the books of Council and 'Session the 7th day of the said month and year, even if it were 'a genuine deed, truly signed, and regularly executed by the 'said Peter Gibson, is liable to the objection of deathbed, as it 'is said to bear date the day before the said Peter Gibson's 'death, or on one or other of the days of the said month of September and year foresaid in which he died, or of the month 'preceding, or at any rate within sixty days of his death, while

'he was labouring under the disease of which he died, and there-'fore is reducible ex capite lecti.'

On the death of Lord Reston, the case was remitted to Lord Cringletie, and the appellants then objected to the amendment being received, on the ground,—

1. That the amendment was inconsistent with the other reasons, seeing that it assumed that the deed of 2d September was genuine, and was subscribed by the granter; whereas the reason on which the action had been originally brought, was a denial of its having been subscribed by him, and an averment that it was forged; and it was therefore incompetent to admit such an amendment.

2. That as exceptio falsi est omnium ultima, no other plea could, after falsehood, be insisted in, which had the effect to set aside the writing founded on.

3. That prior to the institution of this action, Gibson had raised another, concluding for reduction of the deed also on deathbed, and which was still in dependence; so that the proposed amendment was just an indirect attempt to raise a second action of precisely the same nature. And,

4. That Gibson had homologated the deeds brought under challenge.

To these pleas it was answered by Gibson,—That as it was undoubted that he could have brought an action libelling alternatively on forgery or deathbed, there was nothing incompetent in amending the libel to that effect; and that the plea of homologation was too late, and ought to have been stated before the deeds were produced.

The Lord Ordinary admitted the amendment, and made great avizandum with the reasons of reduction as amended; and thereafter refused a representation by the Huttons, not only on its merits, but as incompetent, in respect 'that, by having made great 'avizandum with the writings produced and reasons of reduction, 'he is exauctorated;' and at the same time issued this note:—'The Lord Ordinary cannot discover any fair interest which the 'representer can have to the amendment of the libel; for even 'supposing it to be incompetent, there is nothing to prevent the 'pursuer from raising a separate action; and the only benefit 'which the representer can draw from that, is the pleasure, if 'it be one, of putting himself and the pursuer to additional 'expense.'

A second representation was refused by his Lordship, who again expressed his opinion in the following note:—'On the

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'question of the power of admitting the amendment, the Lord 'Ordinary is completely satisfied that it may be and is correctly 'done. If the representers will look at the Act of Sederunt, '1st January 1726, they will there see, that in reductions and 'improbations, after great avizandum has been made, and after 'the cause has been remitted to an Ordinary, the pursuer has 'six days to put in additional reasons of reduction; and a 'fortiori may be produced an additional reason before the action 'is carried into the Court by great avizandum. With respect 'to the two reasons of reduction being destructive of each other, 'that is another question, and comprehends the inquiry, whether 'exceptio falsi sit omnium ultima; as to which the representers 'may look at 22d February 1676, the Laird of Innes *v.* Gor-'don; and 8th July 1697, Forrester *v.* Rowal. But at any 'rate, if the pursuer be bound to betake himself to the one 'or the other of his reasons of reduction, that is open to the 'representers to insist on it, when the cause shall be remitted 'by the Court to an Ordinary. As to the pursuer having 'barred his right of challenge by homologating the deed chal-'lenged, the representers ought to have pleaded that in limine 'before Lord Reston, when his Lordship, 15th January 1818, 'granted warrant to the Lord Clerk Register for producing 'the deeds called for, and when they were lodged in pro-'cess. By the interlocutor pronounced by the Lord Ordi-'nary making great avizandum, he considers himself exaucto-'rated; and were he not, he certainly would not listen to the 'prayer of this representation, which is confined entirely to 'desiring the action to be dismissed, on the ground of the 'amendment being incompetent. He is clearly of opinion that 'an amendment is competent. If the Court remit the cause to 'the Lord Ordinary, they may probably do so under a reserva-'tion of all objections to the title of the pursuers.'

The appellants having reclaimed, the Court, on the 17th of January 1821, adhered.*

The appellants then entered an appeal on the same grounds which they had urged in the Court of Session, but the House of Lords 'ordered and adjudged, that the appeal be dismissed, and 'the interlocutors complained of affirmed, with L.100 costs.'

J. BUTT—J. RICHARDSON,—Solicitors.

(Ap. Ca. No. 20.)

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* Not reported.