HUGH COGAN, Appellant.—*Wetherell—Mill* No. 45.

GEORGE LYON AND OTHERS, (CUMMING'S Trustees,) Respondents.—*Spankie—Robertson.*

Title to Pursue—Death-bed—Process.—A party called as heir to A under a deed executed by B, having libelled his title to reduce a death-bed deed executed by A as heir of provision of B, held, (affirming the judgment of the Court of Session,) 1. That he had no title in that character to reduce A's deed; and, 2. That the defender was not barred from stating the objection, although he had joined issue on the merits, and a proof had been taken.

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2D DIVISION.
Lord Pitmilly.

BY a deed of settlement, executed by Robert Hunter on the 28th of September, 1811, he disponed his property in favour of Ann Cumming, his wife, in case she should survive him, and failing her disponing and conveying the subjects, he destined them to Ann M'Indoe and others, in whose right the appellant now claimed. Ann Cumming survived her husband, and was infeft. Within sixty days of her death, she executed a disposition of the property in favour of the respondents as trustees. On her death, Ann M'Indoe and the others, called as heirs of provision under the husband's deed of settlement, brought, in 1813, an action of reduction of the trust disposition executed by Ann Cumming, on the head of death-bed. In the summons they set forth their title as 'apparent heirs of the deceased Robert 'Hunter.' The Lord Ordinary having appointed the respondents to satisfy the production, they lodged a representation, stating that the pursuers had no title, as heirs apparent of Robert Hunter, to call for production of a deed executed by Ann Cumming, or to have it set aside. The pursuers then gave in an amendment, by which they made their title to run in these terms (the words in Italics being introduced), 'appa-'rent heirs *of provision* of the deceased Robert Hunter, some-'time candlemaker in Glasgow, *conform to deed of settlement exe-'cuted by the said Robert Hunter, of date the 28th of September,* '1811, *whereby he gave, granted,*' &c. and they then recited the substance of the deed. This amendment was admitted by the Lord Ordinary, and the respondents ordained to satisfy the production, which they did, but their representation was not disposed of. In February, 1814, great avizandum was made, and a remit granted to discuss the reasons. The Lord Ordinary, before answer, appointed the pursuers to lodge a condescendence, and on advising it with answers, he also, before

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Cogan (as in right of the other pursuers, now dead) appealed.

Appellant.—It is undoubted that the original pursuers, as heirs of provision of Ann Cumming, had a good title to challenge her deed. It is true that, per incuriam, they were described in the summons as heirs of provision of Robert Hunter; but their true character was at the same time set forth by a recital of the deed under which they had right as heirs of provision. The respondents satisfied the production, and joined issue on the merits after the title had been so amended, without making any objection, and therefore they are barred from now doing so. Such an objection is a dilatory plea, which is passed from by entering on the merits. At all events, the action ought not to have been dismissed, but the Court ought to have received a supplementary summons, which was offered.

Respondents.—Although a title as heir of provision of Robert Hunter would have been sufficient to have given the pursuers right to challenge a deed executed by him, yet it could never enable them to set aside a deed granted by another party. The respondents are not barred from objecting to the title, because their representation was never refused, and the proof was allowed before answer. Besides, where the title on the face of the summons is insufficient to warrant the conclusion, it is not only competent to a party to state the objection at any time,

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* 5 Shaw and Dunlop, p. 92.

but it is the duty of the Court itself to dismiss such a summons. It is true, that where a party libels a title sufficient to warrant the conclusion, a defender may be barred, by joining issue on the merits, from objecting that the party truly has no such title. But here the objection is not of that nature. It is, that assuming the pursuers to have the title libelled, it cannot entitle them to set aside the deed challenged. In regard to the supplementary summons, although it might have been competent before the proof was taken, it is not so thereafter. Dec. 4, 1830.

LORD CHANCELLOR.—My Lords, by the law of Scotland, a death-bed deed is set aside, under certain restrictions, either at the instance of the heir of the maker of the deed, or the heir of provision to that person, I will not say of, but to that person. A death-bed deed, or at least one which was deemed to be reducible on that ground, having been granted by Ann Cumming, in the execution of a power which she had, under a settlement made by Robert Hunter, of giving the estate which was vested in her for life, after the termination of her estate for life, the present Appellants brought their action in the Court of Session, and stated themselves in the summons to be the 'heirs of the deceased Robert Hunter,' which, by amendment, stands now thus:—'The heirs of provision of the 'deceased Robert Hunter, according to, or conform (as it is called) to a 'deed' which vests the life estate in Ann Cumming, with certain powers of appointment to her, and in default of the execution of such powers, with remainder to those parties who state themselves, nevertheless, to be the heirs, not of Ann Cumming, but of Robert Hunter. The short question this appeal brings before the House is this,—and it is a question wholly of Scotch law pleading, and Scotch law practice—Whether or not the pursuer has a sufficient title to insist in an action for the reduction of a deed on death-bed, seeing that in his summons he states himself to be the heir of A, in which capacity he would have no right to pursue the reduction, but who, by amendment, has afterwards been permitted to state himself not truly and absolutely to be the heir of A, but the heir of A under a deed, which being set forth in the summons, shows him not to be the heir of provision of A, but the heir of provision to B; and it being admitted that in his capacity of heir of provision to B, he, if he were heir of provision, might have pursued this action of reduction to set B's death-bed deed aside? The simple question which this action brought before the Court, and on which alone the Court has adjudged, is, Whether this summons sets forth a sufficient title to pursue; or rather, Whether it does not, on the face of it, introduce such a title as excludes the party setting it forth from pursuing the reduction? That the decisions of the Court below should ever be held in a Court of Appeal to be impeccable, as it has been called by the learned counsel for the appellant who argued this case—that the judgment brought into question by the appeal should be held to be an overruling authority, and decisive in a Court of Appeal, is a

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proposition really too absurd, and indeed too self-contradictory to be for a moment entertained. But, my Lords, I certainly should feel disposed to pause, even where I did not myself see the best and soundest reasons for supporting the decision in the Court below, when, on a pure point of practice and the formality of pleading in that Court, I found the weight of six learned judges there in one voice deciding that the objection to the pursuer's title is fatal, and when of those six there is only one, who, after a considerable period given for deliberation and review of that opinion, comes round to an opposite view, and stands, therefore, in opposition, on this point, to the whole of his brethren. The principles which have been alluded to (rather than very clearly defined), on which the Scotch Courts hold this very great strictness, are those which must chiefly guide us, and furnish the rule enabling us to decide between the opinion adopted by Lord Alloway, and that of the five other learned Judges, whose authority I take, undoubtedly, to be eminent on such a question. I would refer your Lordships, also, to the principles which have been stated, and are, as far as they go, borne out by one or two of the cases, particularly the old case of the division of the land of Mount, and which I can by no means agree with the counsel for the appellant in thinking wholly inapplicable. It is relied on by Lord Glenlee as bearing mainly on the question; and it does not merely say that a person having a right of servitude—a right of pasturage—has no title to support an action for a partition of common; but the case is this, That it being found on the face of the libel that he had so set forth a servitude in himself, and nothing more, the Court set aside all the proceedings that had taken place, the libel, the condescendence, the answer, and the proof which had been made in the cause—all those proceedings were set aside at the eleventh hour, because the libel only set forth the servitude. Upon these grounds, I incline to the opinion of my Lord Glenlee; and, adverting to the extreme strictness which the rules of pleading require in setting forth a pursuer's title—taking into consideration the effect of the doctrine of death-bed, and that it is known to Scotch lawyers as (next to questions of conveyancing, in respect of entailed property under the Act of 1685) the one on which, perhaps, the greatest strictness, and the most technical nicety are required—taking this into account, and not laying out of my view the answer given to the difficulty by the learned counsel for the respondents, respecting the way in which this deed is inserted by amendment in the summons, so as to become, as it were, not an averment, or a portion of the averment of the pursuer's title, but rather a part of the evidence referred to by him in support of it, that title standing upon the face of the summons by plain distinct averment, (for there is an averment in this case that the pursuer pursues as the heir of Robert Hunter, and not as the heir of provision of Ann Cumming, the maker of the deed,)—taking these things into account, and considering, above all, the peculiar nature of this question, I shall only state, that, if I were now to advise your Lordships, I should humbly submit to you to affirm this judgment. Even had I not seen my way so clearly as I think I do, I should have been most slow to urge your

Lordships to reverse, upon such a point, a decision so come to; still more should I be slow to urge your Lordships to reverse, when I think I do see my way to a conclusion conformable to that at which the Court below arrived. I shall only further submit the reason why I would abstain, for the present, from urging you to affirm. Much of the weight due to the decision of the Court below must needs depend upon their having had a just, accurate, and correct view of all the facts before them when they pronounced that judgment; and I should have no doubt whatever of the deference due to that authority, if I saw distinctly, from the view taken by the Judges who gave their opinion,—the greatest number of them against the pursuer's title, in respect of the manner in which the summons set forth his claim,—that they had clearly and distinctly before them the amendment of the summons. There are one or two expressions used by the Judges which would lead me to suspect they had confounded the amendment of the summons with the supplementary summons, one of them distinctly speaking of the amendment as to be rejected in that stage of the cause. I think that can only have meant the supplementary summons, for the amended summons had been received. These matters seem to me to require that I should, before submitting to your Lordships the proposition for affirming this judgment, carefully examine the opinions of the Judges, and look to the forms and styles, as they are called, the mode in which the summons of reduction, under the head of death-bed, is usually framed in the Court of Session. I cannot help again expressing my deep regret, that this will lead to so unsatisfactory a result for both parties; for I am afraid the inevitable consequence of affirming this judgment will be, that it must go down to be argued again upon the merits, this being only a preliminary objection in point of form. My Lords, I have looked in the case of Harford v. Harvey,* and I find it by no means applies. It is not at all a precedent for authorizing this House to do so extraordinary a thing as to constitute itself a court of original jurisdiction in a case brought by appeal, for in that case the objection was to a part of the evidence; but there remained a sufficient part of the evidence, which was unexceptionable, to support the judgment to which the House came; and the Lord Chancellor, in moving the judgment of the House, expressly states, that the ground on which he proceeded was, there being evidence in the cause sufficient to support the judgment which he was about pronouncing, even if he rejected all the evidence which was objected to. My Lords, if both parties should, on further consideration, agree, as by consent, to save the additional expense and delay of having the cause sent back to the Court from which it came, after a judgment on the preliminary objection shall have been given, then, undoubtedly, there can be no objection to this House doing that which it would wish above all things to do—rectifying the defect in the cause as it now stands. It is gratifying to know, that, of these objections, we

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* 2 Bligh.

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shall hear nothing in cases since the late Jury Act; but in this case the Court proceeded according to the ordinary course of practice which had been adopted for ages, and did only what was sanctioned by that practice. It is a very happy circumstance for the suitors of that part of the kingdom, that the better mode of trial by jury will prevent those circumstances recurring. These are the reasons, in reference not only to the forms of your Lordships' House, but to the authority of the very learned persons who decided this case, why I should propose to your Lordships that the further consideration of this case be adjourned.

LORD CHANCELLOR.—My Lords, this case, which was argued a few days ago, is one in which, as I have already stated, there are several matters of considerable nicety touching the Scotch forms of pleading, and the general principles of law which must govern the case. There is no material discrepancy in relation to the law of death-bed, but with respect to the particular form of pleading, there was the greatest difference; and although I entertained, myself, a pretty confident opinion what the result of the case ought to be, I was desirous of ascertaining whether the learned Judges who pronounced the judgment had taken a correct view of the facts, in consequence, as your Lordships will recollect, of some of the learned Judges using the expression 'amended summons,' when it is clear the amended summons made no real difference in the form of the pleadings, and it rather appeared to me, that it was the supplemental summons which was adverted to,—the amended summons having been admitted. I wished to look into the case a little further, to remove that doubt. Further enquiry has removed it; and I am now about to submit to your Lordships that this judgment ought to be affirmed. I have stated on a former day, that, generally speaking, it is not my intention, in moving your Lordships to affirm the judgments of the Court of Session, to offer reasons for that proposition. Upon this occasion I shall simply add to that which I stated before, that it appears to be a question simply and purely of Scotch law and Scotch pleading; that I find no reason to doubt, upon the authorities, the soundness of the judgment which the learned Judges have pronounced. One learned Judge, Lord Alloway, gave a distinct opinion as to the technical niceties of the case; his Lordship afterwards appears to have varied, if not changed, his opinion. The other learned Judges held to the opinion they had first pronounced. It is a very great nicety, no doubt. It is a nicety which we do not certainly, by our rules of civil pleading, admit at all, though your Lordships know very well, that, in the criminal proceedings in this country, there are some rules so imperative, and of such exigency on parties pleading, that nothing equivalent can supply the defect of words. I refer to cases of felony and murder. But it appears that, in Scotland, actions for reduction of deeds executed on death-bed being very little favoured, the Courts have held, that, in setting forth the ground upon which the pursuer seeks to reduce such a deed, he must set forth distinctly the right in which he sues. It appears that this party set himself forth originally as the heir of provision to Robert Hunter,—the words heir of provision to Robert Hunter in the amended summons being stated

to be conform to a particular deed; but the pursuer not being the heir of provision to Robert Hunter, but the heir of provision to Ann Cumming, the maker of the deed, he did not sue, describe himself as, and insist (as indeed he could not, in this action) on his right as heir of provision to the grantor of the deed, Ann Cumming. According to the rules of Scotch pleading, a defect in the title of heir cannot be cured by equivalent words, and can still less be amended in a later stage of the case, by a supplemental summons, which, in fact, would create a new action. Dec. 4, 1830.

I cannot help, upon the present occasion, expressing what has often occurred to me as counsel before your Lordships, and which I have also considered in a legislative capacity, in reference to the amendment of our laws, both in Scotland and in England,—I mean the peculiar hardship under which your Lordships are placed—under which the Scotch Courts are placed—under which the Scotch law, and the people of the country of Scotland are placed—by the want of aid from learned Judges cognisant of, and, from long habit, daily conversant with the law, particularly where there occur the technical niceties of the law of that part of the United Kingdom, and most especially is this inconvenience felt, when there has been a difference of opinion below. Your Lordships are aware how much better we are off in England in reference to English law questions, where the learned Judges have differed, and where writs of error are brought, involving points which it is for the interest of the people to have settled. In respect of decisions of the Court on those points, your Lordships, wherever any difficulty occurs, would have the assistance of the twelve Judges, acting as the assessors of your Lordships, and whose opinion is hardly ever deviated from, though, undoubtedly, it is not binding on this House. Unfortunately, no mode is presented in which we can have any such assistance on Scotch law questions; and this leads those who advise your Lordships to be extremely slow in technical questions, or reasoning from technical rules of the law of Scotland—and slow they ought to be, in the situation in which I describe them to be—in calling upon your Lordships to reverse decisions deliberately come to by those learned individuals most constantly conversant with those points of pleading and of technicality. I would humbly move your Lordships, without going farther into this case, that the judgment be affirmed. In this case I should propose no costs.

The House of Lords accordingly ordered and adjudged that the interlocutors complained of be affirmed.

Appellant's Authority.—4 Ersk. i. 66 and 67.

Respondents' Authorities.—Stewart, 21st Dec. 1739, (2472.) Peacock, 24th Nov. 1821, (1 Shaw and Dunlop, 168.) Jackson, 9th Dec. 1825, (4 Shaw and Dunlop, 292.) Macdonell, 20th Jan. 1826, (4 Shaw and Dunlop, 371.) Kerr, 10th July, 1827, (5 Shaw and Dunlop, 926.) A. S. 7th Feb. 1810. Maul, 4th March, 1817, (F. C.)

J. BUTT,—A. M'CRAE, Solicitors.