[18*th March* 1839.]

(Appeal from the Court of Session, Scotland.)

(No. 4.) JAMES FARQUHAR GORDON and others, Trustees and Executors of the deceased DAVID CLYNE, Appellants.—*Tinney*—*James Russell.*

DAVID CLYNE (poor), Respondent.[1]—*A. Haldane.*

Death-bed.—A party, in the event of his predecease, made a conveyance to his parents and the survivor, whom failing, to any persons whom he might name, whom failing, any person they might name. His parents predeceased him, leaving a trust conveyance of their whole property in favour of trustees named. He thereafter executed a deed on death-bed, conveying his whole estate to trustees named, declaring the purposes, and revoking all former settlements so far as they interfered therewith.—Held (affirming the judgment of the Court of Session) that the first deed, neither singly, nor taken in connection with the second deed, was effectual to disinherit the heir, and that the death-bed deed could not be coupled with the first, or with the first and second deeds, so as to exclude a challenge of it by the heir.

Practice.—In a reduction the defender pleaded certain pleas, which he designated preliminary. A record was ordered to be made up on these pleas, upon which the defender reclaimed, when the Court (on the ground that the defences pleaded as preliminary were the only defences pleadable in causâ upon which it might be necessary to make up a record) adhered. The record was then prepared, and the defender repeated his former pleas, but without again designating them as preliminary. The Lord Ordinary "repelled the dilatory defences,"

[1] 15 D., B., & M., 911.

reserving a question arising out of these pleas to be discussed with the defences on the merits, and found expenses due. On reclaiming, the Court adhered. Held, that an appeal against the judgment was competent without leave of the Court.

Execution Pending Appeal.—Incompetent to appeal against a warrant of the Court of Session for interim execution and payment of costs, so as to stay execution of such order as has been thereon made.

Pauper—Costs.—No objection to a warrant for interim execution that a printed copy of the petition has not been laid before each of the Judges, nor is it an objection to such warrant for payment of costs, that the party obtaining the warrant has sued in formâ pauperis, and that his own agent alone signed the bond of caution.

Pauper.—A respondent suing in formâ pauperis, allowed to be heard on presenting his printed cases at the bar, but costs refused him on that account, although there were otherwise sufficient grounds for awarding them in his favour.

2D DIVISION.

Lord Ordinary Cockburn.

ON the 22d of August 1815 the late Mr. David Clyne, S. S. C., executed a disposition whereby, in the event of his predeceasing his parents without leaving lawful heirs of his body, he gave, &c. &c., to and in favour of William Clyne his father and Margaret Swanson his mother, "during their mutual lives, and the longest " liver of them two; and after the death of the longest " liver, to and in favour of any person or persons, or " for such uses, ends, and purposes, as I (Mr. Clyne) " may name and appoint by any deed I may execute " at any time of my life, and even on death-bed; and " in case of my dying without having executed such " deed, then to and in favour of such person or persons " as shall be named and appointed in any deed that " shall be executed (according to law or agreement

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"between themselves in such deed) by my said "parents, and for the same uses, ends, and purposes, "with the same powers, and under the same provisions "and declarations; which deed of theirs, when so "executed, I do hereby declare shall form a part "hereof, and that this my deed shall be as effectual "for conveying my whole means and estate, and "regulating the succession to the same, in the same "way and manner as shall be appointed by the said "deed of my parents as if their said deed were already "executed and herein copied verbatim, any law or "practice to the contrary notwithstanding." The deed then proceeds to convey his whole estate, heritable and moveable, real and personal, wherever situated, and of whatever description, which then belonged, or which might belong to him at the time of his death; and he farther appointed them (his parents) and the foresaid persons to be named by himself, and failing such nomination, the persons to be named by his parents in their deed, his sole executors and intromitters; and containing other usual clauses, with a reservation of full power, at any time of his life, to revoke, alter, or innovate, in whole or in part, as he might think fit, and in so far as not altered or revoked should be valid and effectual, and dispensing with the delivery.

On the 13th September 1815 Mr. Clyne's father and mother executed a mutual trust disposition and settlement, by which, on the narrative of the love and affection which they had to each other, and to David Clyne, S. S. C., their only surviving child, and for other causes and considerations, they with consent severally give, grant, assign, dispone, convey, and make over to and in favour of each other during their lifetime, and to the

longest liver, and after the death of the longest liver to and in favour of the said David Clyne, and the heirs of his body, and his assignees, whom failing, in favour of certain other persons as trustees, for the uses, ends, and purposes therein mentioned, their whole estate, heritable and moveable, and all their other property and effects, and, inter alia, for the purpose of converting their effects into cash, and after deducting debts and expenses, with instructions to divide the produce into ten parts, whereof one tenth part was declared to be payable to the children of the deceased Alexander Clyne, late tenant in Sordale, of which family the respondent is the eldest son.

The deed contained the following reservations:— "Reserving to us and the survivor of us, at any time "of our life, to appoint, as we may see fit and necessary, "other persons as trustees for the purposes aforesaid, "either in addition to or in room and place of the "trustees before named, which trustees so to be named "shall have the same powers as the trustees herein- "before named, &c.; and farther reserving full power "and liberty to them and to the survivor, but only "with the express advice and consent of the said David "Clyne, and not otherwise, at any time of our lives, "and even on death-bed, to alter, innovate, or revoke "the same in whole or in part, and declaring that any "alterations we may make, if done by a regular "writing subjoined hereto, or by a paper apart, shall "be as valid and effectual as if they were engrossed in "this deed, under which declarations these presents "are granted, and not otherwise." Then follows the usual clause declaring the deed valid, in so far as not altered, and dispensing with delivery.

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To this deed a codicil was subjoined, bearing to be subscribed by Mr. Clyne's parents and himself, who also wrote it, dated the 30th October 1826, whereby the said "William Clyne and Margaret Swanson, with "mutual advice and consent, and with the express "advice and consent of our son David Clyne," nominated and appointed three trustees in room of two who had died, and one whose appointment was thereby recalled; and they also, with advice and consent before mentioned, revoked and altered the bequest of one tenth share of their estate, and appointed it to be distributed in proportion to the remaining shares.

On the 1st November 1833, Mr. Clyne executed a trust deed of settlement, which proceeded on the following narrative; viz. — "Considering that circum- "stances have occurred to render necessary various "alterations in the settlement of my means and estate "since the deed of 22d August 1815 years was exe- "cuted by me, and also since the death of my mother "on the 15th day of January 1828, and the death "of my father on the 30th day of December 1829 "years; I do therefore hereby, and for other good "causes and considerations me hereunto moving, give, "grant, assign, dispone, convey, and make over to and "in favour of the appellants, and to the survivor or "survivors of such of them as should accept, the major "part alive and accepting being a quorum, and to "such other person or persons as they or I myself may "afterwards appoint as trustees," his whole means and estate, and particularly a house in Albany Street, therein specially described, for the uses, ends, and purposes therein mentioned, and, inter alia, for payment of an annuity of 10*l.* sterling to the appellant.

The deed concluded with the following clause:— "And I do hereby revoke and recall the foresaid "settlement executed by myself on 22d August 1815, "and another settlement executed by me in voluntary "concurrence with my parents upon the 30th day of "October 1826 years, and all other deeds and settle- "ments, if any, in so far only as they interfere with "the present deed," reserving power of alteration, but declaring always that the same, in so far as not altered, should be valid and effectual.

The deed contained also the following clause:— "But if any of the smaller annuitants or legatees "should alter or attempt to alter this deed, in whole "or in part, by action or otherwise, in any Court "whatever, it is hereby expressly provided and declared "that such party or parties so attempting to alter or "repudiate shall ipso facto amit, lose, and tyne all "right and interest whatever hereby conferred upon "them, and the residue shall go in manner already "pointed out by me in the present deed."

Mr. Clyne died on the same day on which the above deed of settlement was executed, and in April 1835, the respondent, who is the cousin and heir of conquest of David Clyne, having been admitted to the benefit of the poor's roll, brought an action of reduction of this deed of settlement on the head of death-bed, in so far as the heritable property was concerned, against the appellant and the other trustees and executors of Mr. D. Clyne.

In defence the appellants set forth three pleas, all of which they designated as preliminary: 1. Want of title, in respect the respondent was concluded by the deeds of 1815. 2. Want of interest, in respect the value of

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the heritage was less than what he took under the deed attempted to be reduced. 3. That the said deed was executed in virtue of reserved powers in the deed of 1815, and so not liable to challenge. The Lord Ordinary having ordered condescendence and answers, the appellants reclaimed to the Second Division of the Court, when their Lordships (20th November 1835) pronounced this interlocutor: — "The Lords, &c., in "respect it is admitted by the defenders that the deed "under reduction was executed on death-bed, and that "it appears the defences now pleaded as preliminary "are the only defences pleadable in causâ upon which "it might be necessary to make up a record, adhere "to the interlocutor complained of, refuse the desire "of the note, and remit to the Lord Ordinary to "proceed accordingly."

Condescendence and answers were then given in, and the appellants repeated the three preceding pleas in law, with the addition of a fourth, simply to the effect that the pleas of the respondent being groundless, the action should be dismissed, but he did not designate any of these pleas as preliminary. The record being closed, and printed cases afterwards lodged, the Lord Ordinary, on the 24th December 1836, pronounced the following interlocutor:—"Repels the dilatory defences, "and decerns, but without prejudice as to any question "which may arise respecting the amount of the heritage "claimed by the pursuer, which is hereby reserved to "be discussed with the defences on the merits or other- "wise hereafter: Finds the defenders liable in expenses; "appoints an account thereof to be given in, and, when "lodged, remits the same to the auditor, to tax and "report.

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" *Note.*—It is stated by the defenders that there is no " heritage, except a house in Albany Street, Edinburgh, " and that this is not so valuable as the annuity of 10*l.* " which the death-bed deed gives the pursuer, though " he be about fifty years old. The Lord Ordinary " wished this matter of fact to be fixed before deciding " any thing else, but both parties were averse to this, " and therefore, as its determination is not necessary " for the disposal of the dilatory defences, it, or any " such matter, has been reserved."

Judgment of Court, 12th May 1837.

The appellants presented a reclaiming note to the Second Division of the Court, but their Lordships on the 12th May 1837 pronounced the following interlocutor:—" Adhere to the interlocutor of the Lord " Ordinary submitted to review; refuse the desire of " the reclaiming note, and decern: Find additional " expenses due; allow an account thereof to be given " in, and remit the same, when lodged, to the auditor, to " tax and report." The report of the auditor having been brought before the Court, their Lordships, having heard objections by the appellants, on the 31st May 1837, "approve of the account, and decern for payment " to the pursuer of 191*l.* 0*s.* 8*d.* of taxed expenses, with " three guineas as the expense of discussing the objec- " tions and the expense of extract, and allow the decree " to go out and be extracted ad interim."

Judgment of Court, 7th July 1837.

The respondent afterwards applied to the Court of Session for interim execution under the stat. 48 Geo. 3. c. 151., and their Lordships, on the 7th July 1837, " granted warrant for immediate execution, so as to " enforce payment to the petitioner of 191*l.* 0*s.* 8*d.* of " his taxed expenses of process, he finding caution for " the repetition of the same, with interest thereon, in

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" case of a reversal of the judgment of this Court by " the House of Lords, and decern."

Caution having been presented and approved, the decree extracted, and letters of horning raised thereon, a charge to pay was given to the appellants, who thereupon presented a bill of suspension, on considering which the Lord Ordinary on the bills (Lord Fullerton) pronounced the following interlocutor, on the 15th September 1837:—" Refuses the bill: Finds the sus- " penders liable in expenses; allows an account to be " given in, and remits the same, when given in, to the " auditor, to tax and report.

" *Note.*—The words of the statute are conclusive " against the suspenders. The judgment in the case " of Lady Haddington, 20th November 1811[1], is exactly " in point. The Court were not called upon to find " any thing as to the absolute incompetency of the " appeal, though that opinion is ascribed to them in " the report; but the judgment, allowing the extract " to be issued, clearly and necessarily implied their " opinion on the point, which certainly was within " their cognizance, and warranted by the terms of the " statute, viz., that it was not competent by appeal to " stay the execution of their former order. Considering " the terms of the judgment and order for interim " execution here, and the admission of the bond of " caution by the proper officer, the other reasons of " suspension are obviously inadmissible."

The defenders presented a second bill of suspension to the succeeding Lord Ordinary (Lord Meadowbank), when his Lordship pronounced the following inter-

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[1] Fac. Coll.

locutor:—"29th September 1837.—The Lord Ordinary "having considered this bill, with the former bill and "answers, and writs produced, refuses the bill."

Against these interlocutors the defenders presented a reclaiming note to the Second Division of the Court, upon advising which their Lordships, on the 5th December 1837, pronounced the following interlocutor:—

Judgment of Court, 5th Dec. 1837.

"The Lords having considered this reclaiming note, "with the minute and answers and other proceedings, "refuse the desire of the note; adhere to the inter-"locutor reclaimed against; find additional expenses "due; remit to the Lord Ordinary on the bills to "proceed accordingly."

The appellant brought three separate appeals against the proceedings above detailed, which came on to be heard at the same time. The first against the judgment adhering to the Lord Ordinary's interlocutor, which repelled the dilatory defences as above mentioned and the previous interlocutory judgments in reference thereto, and embracing also certain judgments pronounced as to the respondent's admission to the poor roll; the second against the judgment awarding interim execution; the third against the judgment adhering to the Lord Ordinary's judgment refusing the second bill of suspension.

Appellants Argument.

Appellants.—The settlement by Mr. Clyne in 1815 constituted a complete and absolute mortis causâ disposition of his whole means and estate; the terms used reach a great deal farther than a mere disposition to his parents in the event of his predeceasing them. The condition annexed to the deed relates exclusively to the disposition to the parents; his predeceasing his parents was the only contingency upon which it was

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possible they could succeed to his means and estate. The deeds of Mr. Clyne and his parents must be taken together, and when so taken they evidently provide as well for the survivance as the predecease of Mr. Clyne.

The deed by Mr. Clyne constituted an effectual feudal conveyance, and might have been rendered effectual by an express nomination under it. Mr. Clyne's parents were the parties first named, on whose failure the destination to parties unnamed was to take effect. An entail to A. B., whom failing to a series of heirs to be named, is a good entail, though A. B. should never take. Mr. Clyne expressly reserved power, in his deed of 1815, of naming the party who was to take after his parents, and that on death-bed. A deed not effectual as a conveyance may be sustained as a nomination, for the greater includes the less. Either the destination by Mr. Clyne to trustees to be nominated by himself was effectuated by the deed attempted to be reduced, or the nomination by his parents was equivalent to a nomination by himself. Mr. Clyne indicated his intention to exclude the respondent in a deed not challengeable as on death-bed, and having done so the respondent cannot object to his merely effectuating that previously declared intention. There is no essential distinction between a conveyance to trustees for purposes to be declared and a conveyance to parties to be named, because in the one case as much as in the other it requires the execution of another deed to exclude the heir. The heir will take in both cases, except for the execution of a subsequent deed.

The deed attempted to be reduced cannot operate as a revocation of the former deed. The revocation is not absolute. There is no evidence of intention to

revoke irrespective of the death-bed deed. These deeds are not inconsistent with each other; the trustees are different, but the objects of trust are nearly identical.[1]

(Second appeal.) The application for interim executions was irregularly made: 1. Because no copy of the petition of appeal was presented to the judges at the time the warrant was granted in terms of 48 Geo. 3. c. 151. s. 17. 2. Because the dues of Court were not paid. The respondent's privilege as a pauper ceased on his obtaining decree. 3. Because the powers given to the Court pending appeal are limited to the case where money has actually been expended in costs by or for behoof of the party, 48 Geo. 3. c. 151. s. 17. 4. The agent, being the party to receive the costs, is himself the cautioner for their repayment.[2]

(Third appeal.) An order of service of an appeal by the House of Lords, and service following thereon, necessarily stops all procedure on the decree of the inferior Court until the appeal be decided. It has never been disputed that from the time at which the Court of last resort entertains and resolves to decide on an appeal, the case is altogether removed out of the jurisdiction of the Court below; that it remains in dependence before the higher tribunal; and that all

[1] Colquhoun v. Colquhoun, 8th July 1831; Brack v. Hogg, 23d Nov. 1827, 6 S. & D. 113; Coutts v. Crawford, (12th June 1795,) as reversed, 2 Bligh, 655; Mure v. Rae Mure, 15 D., B., & M., 581; Rowand v. Walker, 15 D., B., & M., 563; Kerr v. Vaughan, 24th Feb. 1829, 9 S. & D. 454; Fordyce v. Cockburn, 5th July 1827, 5 S. & D. 897; Willoch v. Auchterlony, 14th Dec. 1769, Mor. 5539; Pennicuick, 18th Jan. 1687, Mor. 3243; Cuninghame, 10th June 1748, Elch. Death-bed, No. 19. affirmed; Anderson v. Fleming, 17th May 1833, 11 S. & D. 612.

[2] Beveridge's Forms of Process, vol. ii. p. 640; Juridical Styles, 2d ed., vol. iii. t. 5. § 4. p. 881-2.

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diligence, execution, or action must remain in the state in which they are at the time when the respondent is made a party to the appeal, until the cause is decided.

It has been already decided by this House that the statute 48 Geo. 3. c. 151. s. 17. does not deprive the party of his remedy by appeal against a decree for interim execution. In the case of Milne against Imlay, 25th January 1822 [1], the judgment of the Court of Session having been appealed from to the House of Lords, and interim execution awarded to the successful party, Imlay appealed against the interlocutor awarding it. Milne presented a petition to the House of Lords, praying that the appeal might be dismissed as incompetent; but the House of Lords adjudged, "that "the said appeal is competent," and ordered that "the "prayer of the said petition be not complied with." A similar decision was given by the Committee of the House of Lords in the case of Clyne against Sclater, 7th August 1833[2], in which the competency of an appeal against interim execution was sustained. There is no case to be found on the records of this House in which the competency of such an appeal in the abstract has ever been decided in the negative.

Respondent's Argument.

Respondent.—The appeal is incompetent in respect that the judgments appealed from are interlocutory merely, and no leave to appeal has been asked or obtained from the Court below in terms of 48 Geo. 3. c. 151. s. 15., and 6 Geo. 4. c. 120. s. 5.

The doctrine contended for by the appellants, if given effect to, would go entirely to subvert the law of

[1] Milne v. Imlay, 25th Jan. 1822, 1 S. & B. 268.
Clyne v. Sclater, 13 S. & D. 1008.

death-bed, inasmuch as it would enable a person in lecto to nominate disponees to take his property, although he had not excluded the heir from taking by a deed executed in liege poustie.

The condition of Mr. Clyne's predecease in the deed of 1815 applies to the nominees of Mr. Clyne as well as to the other substitutes in the deed; and that condition never having been purified, it is plain that even an express deed of nomination by Mr. Clyne, executed in liege poustie, would have been totally inoperative.

The deed by Mr. Clyne's parents had reference only to their own property, and could not possibly operate as a nomination of disponees to the property of their son. If it could be assumed that it did so operate, then it would clearly have been revoked by the death-bed deed. But in fact both of the deeds of 1815 were absolutely non-existent at the time when the death-bed settlement was executed. Whether these deeds are considered as separate and independent settlements, or as linked together in the manner contended for by the appellants, still the effect is the same, —they were not legally in existence at the time referred to. The deed of the son had lapsed from the non-occurrence of the event in which alone, whether as a separate or a conjunctive deed, it was to operate, namely, his predeceasing; and the deed of the parents had operated by carrying their property to the son, and had thereby become exhausted.

Mr. Clyne's intentions can only be collected from the deeds which he executed. If Mr. Clyne intended to exclude his heir, quod voluït non fecit.

(Second Appeal.) It has been expressly provided by the statute 48 Geo. 3. c. 151. s. 17., which regulates this

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matter, that it shall not be competent to appeal against an order of the Court below allowing interim execution pending appeal.

The obvious meaning of that clause is, that the matter of interim execution shall be left in the discretion of the Court of Session, that an appeal against any such order is incompetent, but that the House of Lords will consider and regulate that matter, on hearing the appeal against the principal judgment in the cause.

In the case of the Countess of Haddington v. Stein, 20th November 1811[1], the Court, pending an appeal against their decision in a suspension of a charge on a bill, granted warrant for interim execution, in favour of the charger. An appeal against this warrant was presented, and an order of service obtained and intimated; but it does not appear that the statutory incompetency of this appeal was brought under the notice of the House of Lords. The clerks in the Court below having had some difficulty in extracting the warrant in the face of the appeal, the charger applied to the Court to ordain them to give extract, and "the Court were of opinion that the second appeal "was incompetent, and ordained the clerks to issue "the extract."

Although it may be true that a copy of the petition of appeal was not presented to each of the judges, yet it cannot be denied that a copy of the petition of appeal, duly certified by the clerk of parliament, was produced in process, and laid before the Court along with the petition for interim execution; and this is precisely in terms of the statute 48 Geo. 3. c. 151. s. 17.

[1] Fac. Coll.

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Respondent's Argument.

A party on the poor's roll must be held entitled to the statutory benefit of interim execution, unless he has been expressly excluded from that benefit by the terms of the statute itself. The statute makes no such exclusion, but, on the contrary, provides the benefit to all parties, whatever their circumstances may be, who are in possession of a decree of the Inferior Court for expenses.

(Third Appeal.) It is quite unquestionable, under the provision of the statute 48 Geo. 3. c. 151. s. 17. already referred to, that an appeal against interim execution does not stop execution in the Court below.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, in this case of Gordon v. Clyne your Lordships have lately heard three appeals; the subject matter of the contest between the parties being, according to the case made by the defender, property of less value than a life income which the pursuer is entitled to under the deed in question. It is true, that on the part of the pursuer it was stated that the property was of much larger value, but the defender, the present appellant, contends, that the property is of less value.

The first appeal, (which is that which raises the question,) was objected to upon the ground of incompetency, inasmuch as it was alleged that the adjudication was upon a mere preliminary defence, and not touching the merits.

The facts, so far as it is necessary to consider that part of the case, are these:—The pursuer (respondent), seeking to reduce a deed upon the ground of death-bed, is met by an allegation that there was another deed, a valid deed, which, if the latter deed were impeachable, would be a

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bar to his claim,—namely, a deed of 1815, which it is alleged would equally preclude him from claiming the heritage; so that under those circumstances he would have no interest in impeaching the deed challenged upon the ground of death-bed. This was made the subject of preliminary pleas. The Lord Ordinary decided (which was afterwards affirmed by the Inner House), that that ought not to be treated as a preliminary defence, inasmuch as it went to the whole merits of the case, there being no doubt that the latter deed, the deed to be challenged, was a deed executed so recently before the death of the party as to be void, provided the heir was in a situation to be at liberty to challenge it. The whole case, therefore, turning upon the right of the pursuer, the heir, to challenge and reduce that death-bed deed, it was obvious that that embraced the whole matter in contest between the parties; and therefore the Court was of opinion that they ought not to treat it as a preliminary objection, but that it should be considered as constituting the whole substance and merits of the case. Upon this the defender put in pleas in law to the whole case, and repeated the objections which he had before made as preliminary objections.

Now, my Lords, the four pleas were these:—"First, "The pursuer is barred from challenging the deed "libelled on, in consequence of the settlements exe-"cuted by Mr. Clyne and his parents in 1815. These "settlements were not absolutely revoked by the deed "under reduction, but only in so far as they interfered "with the last deed; so that if this settlement could be "reduced by the pursuer the former settlements would "revive." "Second, The pursuer has no real or

" legitimate interest to challenge the deed libelled " on, as his interest is much greater under the last " settlement than it would be under the former deeds, " which would necessarily regulate Mr. Clyne's suc- " cession, if the settlement now under reduction " were reduced." Upon that second ground no judgment has been pronounced, but the inquiry as to the facts is reserved for further consideration. Third, " The deed under reduction having been executed " agreeably to reserved powers in the settlements of " 1815, and as appears from its narrative being in- " tended to effect certain alterations on these deeds, " and the said deeds being all linked together, the " defenders have in their persons a sufficient title to " exclude the challenge here brought forward on the " part of the pursuer." Fourth, " The pleas of the " pursuer, being groundless both in law and in fact, " ought to be repelled, and the action dismissed."

The result, therefore, is, that upon these four pleas judgment has been given against the defender on the first and third. The second has been reserved for further investigation; and upon the fourth, which is merely raising a question upon the validity of the case set up by the plaintiff, no judgment has taken place. It is therefore undoubtedly an adjudication upon the merits, though an adjudication not exhausting the whole; that is to say, it is an adjudication upon part of the case, which in all probability will leave little or nothing to be hereafter adjudicated upon; but still it is an adjudication upon the merits of the whole case, the whole case being discussed by both parties.

Upon this state of the proceedings two questions were decided by the Court below. Two questions, there-

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fore, are raised for your Lordships consideration; the first being, whether the deed of 1815, and the subsequent deed executed by the parents of the party deceased, are such as to bar the heir, provided the death-bed deed did not stand in his way; or, in other words, whether, supposing the death-bed deed never had been executed, the title of the heir would have been excluded by these transactions of 1815. The second question raised is, whether the deeds of 1815 may be coupled with the death-bed deed, so as to exempt it from the operation of the law respecting death-bed.

My Lords, it appears that the party deceased having certain property of his own, and his father and mother having certain property belonging to them, that this arrangement took place: the first deed which was executed was the deed of August 1815, by which David Clyne, the party deceased, disposed of his property in these terms:—"In the event of my predeceasing my "parents without leaving lawful heirs of my own body, "I do hereby give, grant, assign, dispose, convey, and "make over to and in favour of William Clyne, mer-"chant in Thurso, my father, and Margaret Swanson "his spouse, my mother, during their mutual lives, "and to the longest liver of them two, and after "the death of the longest liver to and in favour of any "person or persons, or for such uses, ends, and pur-"poses as I may name and appoint by any deed I may "execute at any time of my life, and even on death-"bed, and in case of my dying without having executed "such deed, then to and in favour of such person or "persons as shall be named and appointed in any deed "that shall be executed (according to law or agreement

"among themselves in such deed) by my said parents." The fact which happened was, that the parents predeceased this David Clyne.

In the month of September in the same year a deed of disposition and settlement was executed by the father and mother; and they, although it is stated that they had no heritage, use terms which, if they had any, would have operated as a disposition in favour of David Clyne their son, and the heirs of his body; whom failing, in favour of other persons. The terms used are,—"property which shall belong to us, or either "of us, at the time of our death." That provides, therefore, for such property as they might have at a future time; and if the son had died before the parents, and the parents had become possessed of the property, which in that event was destined to them by his deed of August 1815, their deed might have operated upon property so passed to them; but the facts are, that the father and mother died before the son, the consequence of which may be, that the deed of 1815 failed to have any operation at all, being entirely conditional, namely, made in the event of his predeceasing his parents; that, however, is a matter of contest at the bar. But one point cannot be a matter of contest, namely, that the estate to be acquired by the parents was conditional upon their surviving their son, and that by the death of the parents before the son that disposition in their favour fails; and another point will be equally clear, that the power intended to be given to the parents over the estate was also conditional, and could only operate in the event of their being possessed of that estate, which they were to have only in the event of their surviving their son.

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The first point, therefore, contended for, namely, that these two instruments operated, in the event that happened, to disinherit the heir, and that the heir therefore would have no title even if the death-bed deed had had no existence at all, I apprehend wholly fails; and therefore that impediment is removed out of the way of the heir, and he therefore stands in the situation of being a party interested in disputing the validity of the death-bed deed, the prior deeds not being of a nature to deprive him of the right of heirship.

My Lords, then it is said that that being so, although the second deed, namely, the disposition by the parents, cannot be considered as operating upon this property so as to remove the title of the heir; still the deed of August 1815 is a disposition of the heritage, and as such is not open to the objections that are made by law to death-bed deeds. That was the ground principally contended for by the appellant. That argument is founded upon this supposed state of the law, namely, that a party, although he cannot dispose of his estate within sixty days of his death, may execute a deed beyond the limited time, and that then he may, by a deed within sixty days, do that which would perfect that instrument; and in the course of that argument cases were cited to show, that by the law of Scotland, if the whole heritage,—the feudal title, is disposed of by a deed not objectionable upon the ground of death-bed, the trusts may be declared by a deed within the period, or by a will executed in England and according to English forms.

My Lords, I apprehend that those cases have no reference to the present, because in those cases the whole feudal title was complete by the original deed;

and it is very similar to the law existing in this country, namely, that a will disposing of real estate must be executed and attested in a certain form; that being done, and it being part of the provision of such a deed, that the estate shall be subject to the payment of legacies to be afterwards bequeathed, a legacy given by an instrument not properly attested is valid, and will operate upon the property devised, because it is devised by a properly executed and attested instrument. So in this case, provided the heritage be legally divested, and is passed by a deed executed within a period sufficiently long before the death of the party as not to be objectionable on the ground of death-bed, the party may declare the trusts of it by an instrument not executed according to the forms which the law of Scotland requires in passing heritage.

One case, and one case only, was referred to, which seemed to open any argument upon the ground contended for, and that was the case of Fordyce.[1] Now the case of Fordyce was this: A party, by a deed not objectionable upon the ground of death-bed, had conveyed his estate to trustees, of whom a Mr. Cockburn was the survivor; afterwards a will was made, professing to give the estate to the same Mr. Cockburn and another trustee. That other trustee predeceased Mr. Cockburn, so that at that time Mr. Cockburn was the surviving trustee named in the will; and it was contended at the bar, that, being the trustee named in the will, he had asserted a title to the estate in that character, and that title was recognized; but, upon examination, it turns out that Mr. Cockburn's title was as trustee named in

[1] 5th July 1827, 5 S. & D. 897.

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the deed; he had a title entirely independent of the will, which was invalid as a conveyance of heritage upon the ground of death-bed.

My Lords, a case was referred to, namely, that of Crawfurd v. Coutts, 2 Bligh, p. 688, where Lord Eldon, (in discussing the question whether a death-bed deed revoking a former settlement, and professing to dispose of the property, can be bad as to the disposition, but good as to the revocation, so as to let in the heir,) puts this case, which I think your Lordships will see is identical with the present: He says, "In Scotland no "man can make a valid liege poustie deed in this form: "'Know all men by these presents, that I do hereby "reserve a power to dispose of my estate at any time of "my life, et etiam in articulo mortis.' The liege poustie "deed must be some actual deed of disposition existing "at the death of the grantor." My Lords, the argument here is, that the party has said precisely what Lord Eldon supposed a party to say, namely, by the language of the deed of August 1815, "I hereby "dispone of my estate to such persons as I may "hereafter name." No disponee being named you must look, therefore, to the death-bed deed for the disponee. It is, therefore, neither more nor less than what Lord Eldon supposes the party to say: "I hereby "reserve a power to dispose of my estate at any time "of my life, et etiam in articulo mortis." There is no instrument existing anterior to that death-bed deed which disposes of the heritage; there can be no disposition of the heritage without a disponee. There is no existing instrument which can take the title from the heir, unless you have recourse to the death-bed deed, which is now challenged.

My Lords, if, therefore, the case and the arguments raised at your Lordships bar rested upon those two deeds alone, I should have no hesitation in advising your Lordships that the judgment of the Court below should be affirmed; but there is another ground alluded to in the short note[1] which we have of the opinions of the Learned Judges below, and I cannot, therefore, entirely pass that over. According to the argument contended for by the defenders the effect of the deed of August 1815 would be this,—to reserve to himself the power on his death-bed of naming the disponee. To carry that intention into effect one would expect to find a deed performing that service, either referring or not referring to the prior deed (it is not absolutely necessary to refer to it), and naming the disponee to take under the prior disposition. Instead of that we have a deed in which the party states that it is necessary to make alterations in his settlement; and he proceeds actually to dispose of and convey his estate, without reference to any power reserved to him, and not only without reference, which would not be necessary, but the deed actually revokes the former deed so far as that is inconsistent with the present: in fact that deed is absolutely and entirely inconsistent with the death-bed deed. According to the argument he would have nothing to do but to name the disponee; instead of which he conveys and disposes de novo, and recals the former deed so far as that is inconsistent with the latter deed.

My Lords, it was said, when I suggested that to the learned counsel at the bar, that that objection ought to be taken with a good deal of caution, because it had

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[1] 15 D., B., & M., 915.

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not occurred to any of the parties below. I was rather anxious to find out how that matter stood, and upon looking through the papers I find that it was alluded to below. I find this in the 11th page of the appellants case:—"It may be objected to this argument, "that Mr. Clyne intended to make a new deed, not to "exercise a faculty reserved in a former one. The "defenders would reply, in the first place, that it was "decided, in the case of Willoch v. Auchterlony, that "such a faculty may be exercised without a special "reference to it. But farther, the greater includes "the less. It was meant both for a disposition and a "nomination. It may stand for a nomination, just as it "will stand as a testament, although as a disposition "it should be reducible, and, as the deed of 1815 is "declared to be revoked only so far as inconsistent "with that of 1833," &c. That very point is raised; and when the Learned Judges below are found expressing an opinion that the deed of August 1815 was absolutely revoked, they were perfectly warranted in that opinion.

My Lords, this, in my view of the case, would exhaust the first appeal, with one exception, to which I am about to call your Lordships attention. It would also dispose of the matter as far as relates to the merits. But I cannot but observe that this appeal also includes a great variety of interlocutors; I believe there are not less than twenty called in question by these appeals. Three interlocutors are appealed from which relate to the pursuer being upon the poor's roll. The counsel at your Lordships bar have had sense and discretion enough not to advert to that point at all; I cannot but

[1] Morr. 5539.

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observe that they are not properly brought as matter of appeal to your Lordships bar.

My Lords, the second and third appeals are open to very much the same observations, the Court below having decided in favour of the pursuer, to the extent to which their decision goes, under the authority of an act of parliament which directed that there should be a payment of the expenses decreed, notwithstanding an appeal. My Lords, that was made a matter of appeal, and the appeal was attempted to be supported on the grounds, first of all, that there was no printed copy of the appeal appended to the proceedings below.

Now, there was a copy of the appeal; that is not in dispute; and the whole argument is, whether there should be a printed copy, there being nothing in the act of parliament requiring that a copy should be printed. The party being poor and suing in formâ pauperis every unnecessary expense was very properly avoided; and the Judges were informed of the appeal, as the act of parliament requires, by having a copy of the appeal presented to them, but the party did not think proper to incur the expense of printing it, and that is made a subject of appeal to your Lordships House.

There is another ground, and one only, I understand, upon which that appeal is attempted to be supported; namely, that the order is for payment of costs incurred. They say that the party was suing in formâ pauperis, and he could therefore have no costs incurred; just as if any party, whether suing in formâ pauperis or not, could prosecute any appeal without incurring some expense. It was endeavoured to draw into discussion the amount of some of the charges in the bill of costs; the learned counsel's attention was drawn to that, and

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he said that he could not raise at your Lordships bar any argument upon that subject. The question, then, is, whether your Lordships are to take for granted that which every body knows not to be the fact, that a party can sue in formâ pauperis, or prosecute a proceeding in a court of law, without incurring some costs. The costs incurred are all which the Court of Session has ordered to be paid.

The question as to directing interim execution or withholding it is entirely left to the discretion of the Court; they are to have the whole case brought before them, and they are to have liberty, if they think proper, to direct interim execution.

My Lords, the Court having decided against the case made by the defenders to withhold this interim execution, they were not satisfied with that decision, and appealed to your Lordships House. They then brought two bills of suspension; the first, the Lord Ordinary decided against,—that was abandoned; and then they brought another, which was brought into the Inner House. The ground of suspension was this: that having appealed against the order of interim execution, it was not competent for the parties to proceed any further; that is to say, that the act of parliament giving the Court a power at their discretion to award interim execution, and the party being dissatisfied with that order, and appealing against it, that second appeal acted as an estoppel. If that had been so it would obviously have had the effect of destroying the discretionary power granted to the Court; but the act of parliament very wisely guarded against that, and by the 18th section it provides, that no appeal against such an interim order shall stay process: the provisions of the

act of parliament very clearly state that. The 18th section, however, was not enough to satisfy the defenders, for they not only brought these two bills of suspension in the Court below upon that ground alone, but they make the decision of the Court against them on that subject a ground of appeal to your Lordships bar.

My Lords, these two last appeals were for a long time undefended; the party did not appear; and no doubt the appellants would have been in a situation to have had the case heard ex parte,—certainly without any probability of success; and it may have been upon the certainty that the respondent, namely, the pursuer, felt that this House never would assent to the proposition of the appellants, that he abstained from appearing to defend those two appeals. In point of fact, he never did appear till the case was actually called on at your Lordships bar; then the pursuer, the respondent, did appear, and having printed his cases asked leave to present those cases. Your Lordships finding that he was actually there, and that no delay was asked, thought it more advisable to give him the opportunity of appearing than to hear the case ex parte,—your Lordships at that time not knowing the nature of the case, which if your Lordships had, you would not probably have thought it necessary that any party should appear to resist those appeals. Now the question is, whether, as those appeals, if the respondent had appeared regularly, would unquestionably, I apprehend, have been dismissed with costs,—whether under those circumstances it is proper that your Lordships should dismiss these appeals with costs. Upon the merits they ought no doubt to be dismissed with costs; but the only ground upon which your Lordships would pause before giving an

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opinion upon that subject would be this, that if the respondent had appeared, perhaps the appellants might have withdrawn their appeal, and not have come to your Lordships bar at all. Upon these grounds I am inclined to think, that your Lordships having extended to the respondent the indulgence to which he had no claim, of being permitted to come in at the last moment, it would be perhaps imposing too heavy a liability upon the appellants, to dismiss the appeals with costs. Upon the original appeal I apprehend your Lordships will entertain no doubt that it ought to be dismissed with costs.

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LORD BROUGHAM.—My Lords, having attended the greater part of the hearing of this case, though not the whole, and a small part only of the hearing of the two later cases, upon which my noble and learned friend has pronounced his opinion so clearly and distinctly, and in a manner so satisfactory, I may dispense with the necessity of entering at greater length into the particulars of the case than is sufficient for the purpose of stating my own opinion, and the grounds upon which I have arrived at that opinion.

The importance of questions relating to the law of death-bed, whether to the application of the law in particular cases, or to the nature and constitution of the law itself, is manifest, and it is considerable. It is a peculiarity in Scottish jurisprudence, and it is a peculiarity which appears to me most useful and honourable to that system of jurisprudence that distinguishes it from ours and from all others. Our law throws a protection round the death-bed of parties, by requiring certain solemnities to be observed before they can pass real estate,—formerly their real estate only,—now, by

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the late act of parliament, their personal estate also. We all know,—those who have practised in Courts, whether of equity, or of law, or of both (which has been my lot), —all well know, how very ineffectual those conditions imposed upon parties in order to their validly conveying their estates oftentimes prove. For as it is not difficult to obtain the assistance of three witnesses, the number formerly required, or of two witnesses, the number now required, as a conspiracy may very easily be effected,—and I am sorry to say that there are constant instances of it in practice, no character whatever being required to belong to those witnesses except that they should be witnesses of credit, that is to say, that they should not be disqualified by a sentence of an infamous nature from being witnesses,—so it becomes no very hard matter to obtain a will passing large estates, whether real or personal, from a man or a woman in such circumstances, at the close of life, as shall leave the gravest suspicion upon the minds of those who have to deal with and to give effect to that instrument, whether they were in a condition or not to dispose of any part of that property. A much more effectual protection is thrown round that period of human life, a much better security is afforded to the rights of the heir at law, by the Scottish system, which requires, by a most rational and sensible arrangement, that a certain time should elapse, namely sixty days, between the execution of the instrument and the decease of the party, otherwise it shall be void and have no effect. Unless the fact be such as to make presumption yield to it,—the incapacity presumed by the law inures for sixty days. The rule laid down is, that the only fact to which the presumption of incapacity

shall yield is the appearing at kirk or market unsupported during those sixty days; that being taken as the test of liege poustie, or that state of mental capacity which gives the party the power of lawfully and validly disposing of his heritable property. This rule is confined to heritage in Scotland, the old law there, as here, taking no cognizance of personal property, which was then of such trifling amount in the transactions of men as not to be deemed worthy of consideration by the legislature.

Such being the general law, in construing any particular matter with a view to ascertain whether it comes within it or not, we are to keep the purpose and intention of the law constantly and steadily in view, in order to see whether or not the law applies in the manner asserted. Now, it is a law for the protection of the heir at law; hence the first conclusion is, that nobody but the heir at law has a right to avail himself of it to reduce ex capite lecti. Hence a second proposition follows,—that if the heir at law has been already validly excluded, cadit questio, there is an end of the reductio ex capite lecti; he has no interest and therefore no locus standi. But if the deed set up is of such a nature as that it does not exclude the heir, then the law of death-bed applies. Hence a third proposition of necessity follows,—that no man can make, while in liege poustie, such a deed as shall exclude the heir generally, by merely indicating an intention on his part to work an exclusion of the heir. The exclusion must not only be intended by the maker of the deed, but it must be executed; the heir at law must be effectually excluded; and the intention to exclude him is good for nothing unless the exclusion is operated and effected against him. Hence it is perfectly clear,—I can hardly say as a

fourth proposition, for it follows as a parcel of the last which I have stated, as is laid down by Lord Eldon in Crawfurd v. Coutts, which was referred to by my noble and learned friend,—that a man cannot say in liege poustie, "Know all men by these presents, that I "intend that the law of death-bed shall not apply to "any disposition which I may make within sixty days;" —for what would that amount to? It would amount to this, that instead of saying "Be it therefore enacted "by his Majesty, with the advice and consent of the "lords spiritual and temporal, and commons, in par-"liament assembled, that the law of death-bed shall "be repealed generally," it would be saying, "Know "all men by these presents that I repeal the law of "death-bed in my particular case." Now no man can do that; he must conform himself to the law. But it also follows as another proposition, which I take to be quite clear, that no man can work the disinherison of the heir, and exclude the application of the general law of death-bed, by merely saying, "I disin-"herit the heir;" he must disinherit him by conveying the estate out of him, and conveying it to somebody else. Hence it is another, and it is the last proposition bearing upon this question with which I shall trouble your Lordships, viz., that it is clear that no man can make a deed in liege poustie which is blank in the name of the disponee,—I hold that to be quite clear,—that no man can say, "I disinherit the heir in favour of "blank," and then within sixty days fill up that blank: I take that to be clear.

But, my Lords, I must add, that it is not at all necessary for the disposing of the present case that I should affirm or prove the latter of these propositions;

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it is otherwise with respect to powers reserved. If in liege poustie you create a valid power, you may reserve the moment of the execution of that power till within sixty days, just as my noble and learned friend has most properly stated; and moreover I may add this,—you may constitute a trust, and if you, by the constitution of that trust, take out of the heir his succession in liege poustie, you may operate upon the trust so created within sixty days, and it cannot be reduced as ex capite lecti. But why? Because you have validly effected your purpose. You not only have moulded it so as to shew entirely in what way your bounty is to be distributed, but you have entirely defeated the right of the heir by vesting the estate in trustees. You may afterwards declare a cestui que trust, or at all events you may declare the various burdens and legacies connected with it, and the other matters which unite themselves with the disposition of the property: So in England the protection of requiring three witnesses signing in the presence of the testator (now reduced to the number of two by the late law[1]) is analogous to the protection afforded by the law of death-bed in Scotland to the dying moments of a sick person. If I, by will, executed by three witnesses in my presence, or now, by the late change in the law, by two,—if I validly constitute a trust in favour of A. and B., and afterwards, without the three witnesses or the two witnesses, make any legacy connected with it, that will hold without the presence of two witnesses, as the law at present is, or three as the law formerly was; for the instrument which executes the entire purpose of disposing of the

[1] 7 W. 4. and 1 Vict. c. 26.

property being a complete disposition of the property, and that being attested now by two and formerly by three witnesses, that is sufficient,—but without that it would not be sufficient. Now, such is the general principle upon which I take this law to be established, and in support of which I would only refer to a very learned and accurate note (for I have looked into the original book) by Mr. Ivory in his edition of Erskine's Institutes[1], which states it pretty nearly in the same manner:—" Under a trust disposition of heritable " property, with reserved power to regulate the admi- " nistration of the trustees and the application of the " trust estate by a testamentary deed"—(now he clearly means here testamentary, as contradistinguished from liege poustie, that is to say, a deed within the sixty days,)—" by a testamentary deed containing a " special declaration of uses and purposes, or directing " the payment of legacies, donations, &c., such a " testament, if executed in liege poustiė, will effectually " exclude all challenge by the heir, notwithstanding " the trust deed was an undelivered document." But he goes on to say, " And where the trust conveyance " so disposes of the primary interest in the estate"— (what he means by the primary interest is what we should call the legal estate)—" as by its own force, " in default of exercise of the reserved power, to " exclude the heir at law, the reserved power may " be exercised even on death-bed." Why? Because the primary interest, the legal estate, has been validly taken out of the heir at law by the first deed, the valid deed in liege poustie, and consequently the

[1] Ersk. (Ivory's Ed.) b. 3. tit. 8. sect. 98. n. 549.

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intention operates, and the deed made in liege poustie will validate and give effect to the death-bed deed.

Now, my Lords, such being the principles upon which this law is framed, and upon which it is to be applied casibus omnibus, I have now simply to state to your Lordships my opinion upon the present case, by referring to the very distinct statement of my noble and learned friend of the facts of the case, where those facts are totally undisputed. Upon one point your Lordships may observe there is a difference, namely, whether the construction of this deed, taking it altogether, is such as to make it founded upon the event of predecease. But upon the other point, the more essential point of the two, there is no dispute, nor can there be any dispute; I allude to the two deeds, the one of August and the other of September in the year 1815, and which are both of them liege poustie deeds: "I, David Clyne, solicitor in the "Supreme Courts of Scotland, in the event of my "predeceasing my parents without leaving lawful heirs "of my own body, do hereby give," and so forth; and then he adds a disposition to his father and mother during their joint lives, and to the longer liver, "and after the death of the longer liver to "and in favour of any person or persons, or for "such uses, ends, and purposes, as I may name and "appoint by any deed I may execute at any time "of my life, and even on death-bed; and in case "of my dying without having executed such deed, "then to and in favour of such person or persons "as shall be named and appointed in any deed that "shall be executed (according to law or agreement "between themselves in such deed) by my said parents."

Now, this I take to be perfectly undeniable, that two events must concur, two facts must happen. I know that taking it altogether a dispute has been raised upon this, but I hold it to be quite clear that two facts must concur, that two events must happen, before this deed can have any operation at all. What are these two events? That the son, the maker of the deed, shall predecease his parents, and that he shall predecease his parents without issue. Then a third event must be added to these two before the operation of the September deed can take place, that is to say, before there shall be any thing upon which that deed, whatever it is, can operate,—before that can exist,—before that can come in use as a subject matter for the parents deed to work upon. What is that third event? His predeceasing is the first; his predeceasing without leaving a lawful heir of his own body is the second; his dying without executing any deed himself is the third. These three events must all concur: his predecease,—his predecease without issue,—his predecease without issue and without any appointment, without executing any deed himself. All these must concur before the parents can have any one thing upon which their deed operates.

Now, my Lords, in the year 1828 the father dies; in 1829 the mother dies; in 1833 the maker of the deed dies; consequently there is an end of the first material event—the corner stone of the whole of this conveyance,—it all falls to the ground,—for instead of predeceasing them he survived them both. It is not material whether he executed any disposition or not; it is immaterial whether he died without heirs; the predecease never happened.

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Now, it has been contended, that the first condition did not override the whole case; but has it ever been contended that it does not override the father's and mother's deed? The father and mother execute a power. Upon what to operate? Upon the estate of the son. There were other estates upon which it was to operate, independent of the estate of the son, but it could only have any thing to operate upon in the son's estate, in the event of the son's predecease; but they predecease, and therefore it has nothing to operate upon.

My Lords, these are the short grounds upon which I hold that the heir is not excluded here from suing, and upon which I also hold that the law of death-bed here plainly applies. I find that in the Court below, though we have not a very full account (as we have often to lament) here of what passed, we have a very distinct statement, a very intelligible and concise statement, of the reasons of the Learned Judge Lord Glenlee, than whom a more able and learned judge never was upon that or any other bench, in which he says, alluding to the arguments at the bar, "If it had been dis-"tinctly made out that the pursuer was barred by a "subsisting deed"—there was no subsisting deed, for there was nothing for it to operate upon,—"which would "have prevented his claim on the reduction of the "death-bed deed, the defenders might have succeeded "in their argument; but it has not been made out "that such deed was in existence at the date of the "last settlement, and therefore the pursuer is not pre-"vented from claiming."

[1] 15 D., B., and M., 915.

With respect to the other causes, and also to a very great deal of the oppressive litigation in this cause among the eighteen or twenty interlocutors brought before us, I entirely concur with what my noble and learned friend has stated in expressing my great disapprobation, and I will go so far as to say my reprobation, of these proceedings. The first of these appeals ought to be dismissed with costs; that no man can doubt: I only have a doubt whether the second and third ought not also to be dismissed with costs. My first impression was, that they ought. My noble and learned friend has somewhat weakened that impression, by reminding me that it is barely possible that the defenders, the present appellants, if they had seen that the respondent was going to meet them, and that these two cases were not about to be set down and heard ex parte, might have thought better of it, and might not have proceeded. It ought to be observed, however, that that does not apply to any thing but the hearing, and that is to be considered. And for the purpose of further considering it I will beg my noble and learned friend to agree with me, that before finally saying whether or not the respondent should have the costs of the second and third appeals, we should take a day or two to consider that; because if costs would have been incurred by the respondent up to the moment of coming to the bar, all that the appellants at the last moment could have done might have been not to have had the appeals heard here.

Lord Chancellor.—They had not appeared.

Lord Brougham.—Oh! they had not appeared to the appeal; then my observation is misplaced, undoubtedly. That does introduce a very considerable

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doubt in my mind. Then I rather agree with my noble and learned friend, that it will be difficult to give costs; but we had better take a little time to consider that. I should very much regret, and so I am sure does my noble and learned friend, if, under the circumstances of this case, we cannot call upon the appellants to pay the costs of the second and third appeals.

Now my Lords, having disposed of those cases, it is fit that I should state an impression upon my mind, connected with the name of the most learned and venerable judge whose opinion I have just cited, I mean my Lord Glenlee, who has given a very concise, but a most correct and well grounded, judgment in this case, agreeing in every respect with that which your Lordships have now affirmed, and distinctly applying itself to the principal and main ground of the present affirmance. There never was upon any bench, in any country, a more reverend, a more able, a more learned judge. He is a man thoroughly imbued with the most profound, extensive, and masterly knowledge of all the jurisprudence of his own country, and of all the general principles upon which all systems of jurisprudence are grounded. He is a man whose knowledge is not confined to the jurisprudence of Scotland, or even to law in general, but he is one of the most profound scholars in all the most difficult branches of science to which the human faculties can be applied. I know that he has passed his days and his nights in those profound, most difficult, and most sublime investigations; I know that there exists not within the bounds of this country at this moment a man so deep a mathematician (I mention it to his honour) as he has been all his life in the *horæ subsecivæ* of his judicial pro-

fession; I know that up to this last month, from direct communication with that learned judge, his mind is as vigorous and as entire as it was forty years ago.

My Lords, I stand here to perform an act of justice, and of strict justice only, in giving vent to these sentiments of my mind. If there be any man who knows Scotch law better than I do,—if there be any man of any age, of any amount of experience, of any extent of inquiry, in any other place, who from his own personal observation has found reason to look down upon Lord Glenlee, to raise himself above him, and hold that he, this observer, is entitled to pass sentence upon the state of the faculties of that most able, most learned, and most venerable judge,—if any such person knows science so profoundly,—if any such person is so much better versed in Scotch law than the humble individual who now deems it his duty, and his painful duty, to address your Lordships in the performance of an act of strict justice alone,—if any such person, in any other place, shall have taken upon himself the office of pronouncing sentence upon the continuance or the discontinuance of the judicial capacity of that judge,—all I can say is, to that higher authority, to the superior illumination of mind, to the greater knowledge of law, to the larger, and more full endowment of science of that individual, I shall bow with the deference which is due to it from me. But until I am otherwise instructed, and until I have lost my memory, and until my faculties are gone, so that I shall no longer know right from wrong, or a sound judgment such as this, which your Lordships are now occupied in affirming with costs, upon the same grounds upon which he gave it,—or until I know not how to read a letter written three weeks ago upon a scientific topic, or think

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the writer of that letter knew not what he was writing,— I am bound to hold by my own opinion; and it is an opinion which I have deliberately formed, and which I now without hesitation pronounce.

My Lords, an accident prevents your Lordships from having laid before you the testimony of other learned judges concurring in the same opinion. I have had correspondence, and very lately, with them too; and my noble and learned friend who immediately preceded me in the highest judicial office in this country was to have attended to-day for the express purpose of bearing his testimony, much more valuable than mine, to the continuing capacity of these learned judges to exercise the judicial office. Having accidentally not been present at the hearing of this particular cause, he did not think that he ought to come down (and I agree with him, though I lament his absence,) to take part in this interlocutory or rather accidental appendix to the judgment; but I have Lord Lyndhurst's authority for stating that his Lordship has been in recent correspondence with one or two of those learned and reverend judges, that he has been in recent correspondence with the chief of that Court, and that he gives it as his most decided and deliberate opinion, that the great faculties and enlarged mind of that illustrious person, the head of the Scottish law, are as I have described the others to be.

My Lords, it is no light matter to have such things as these fabricated, and such opinions, if I may dignify them by such a name,— things which merit no such respectable appellation, — to have such matter (to give it no more offensive name) vented, and vented in high places. Much depends upon the fancies of men,—much upon their casual impression: promulgate

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the notion that the mind of the soundest man in England who is called upon to deliver judgment is gone, or is going,—I will venture to say, be it the soundest that ever inhabited the frail tenement of a human body, provided age has come upon that body, there will not be wanting people to fancy, and even very honestly to believe, that they see symptoms of failure. I have seen it over and over again in private, when I happened to know that there was not the slightest foundation for it, because the party survived years and years in the full possession of his faculties.

But, my Lords, it is no light matter to have judicial character carped at in such a way; and God forbid that I should ever live to see the day in this country when the conduct of judges should be attacked otherwise than in the manner that the laws and constitution of the realm have provided for its being attacked, namely, an address by both Houses of Parliament; that is the legal remedy,—that is the proper mode. What avails it to the independence of the bench, the most important of all the benefits which the constitution showers down upon us,—what avails it to the independence of the judicial character, that the law says that a judge shall not be removed during his life, and during his good behaviour, if he is to be flung at, if he is to be attacked, if he is to be held up to derision and contempt, more unbearable than public hatred and scorn itself, as one who has survived his intellects, and who sits upon the bench that he can no longer adorn, in order that by neglecting his judicial duties, by filling the place which an abler and

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fitter man ought to occupy, he may have a pretext for receiving the public money in consideration of a duty which he no longer has the capacity to perform? I had rather at once be impeached,—I would rather hold up an arraigned hand at your Lordships bar, where I could defend myself, and where I could appeal to your Lordships for justice, which I know I should have,—than I would submit to be the butt of such shafts, and the victim of such attacks.

My Lords, I have filled the highest judicial office in this country for a longer period of time than any man now living. Had my noble and learned predecessor, who filled it so much longer, the late Lord Eldon, been alive, I should not have been the person to deliver these sentiments before your Lordships. No man better knew than he the great faculties and extraordinary merits of those learned and reverend persons; but he is now taken from us, and the duty devolves upon me, which I have now painfully performed before your Lordships, except that no man ought ever to feel any pain while he knows that he is conscientiously discharging an important duty. It is your Lordships bounden duty, as you have now and then to reverse the judgments of the Court below,—as you have occasionally to differ from those learned judges,—(and you have always respectfully expressed that difference of opinion, and always reluctantly altered their judgments,)—so it is your bounden duty, as it is your special and your precious privilege, to defend, to sustain, to protect those learned judges when you know that they are so foully, falsely, and most unjustifiably assailed. I have received a letter from

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Lord Lyndhurst, begging that I would make known his entire coincidence of opinion with me. We have talked over the subject repeatedly.

My Lords, in the case of Gordon v. Clyne, in which there were three appeals, your Lordships have some doubt with respect to the costs of the second and third appeals. Your Lordships disapproved of the proceedings of the party in bringing those appeals; but as there had been no appearance made for the respondent until the case came on for hearing, the consequence was, that it might naturally enough be said by the appellants, non constat that we should have gone on had we known that the other party meant to defend; and consequently the delay of the respondent in making that appearance, although not blameable in him, considering the poverty of the client, who sued in formâ pauperis, nevertheless has the effect of raising a defence against costs on the part of the appellants. In order to consider whether it was possible to overcome this objection, which at first appeared almost insuperable, it was agreed that we should postpone that only point for the consideration of the House for a few days. My noble and learned friend and I have agreed upon the subject, that we do not find that we can overcome that difficulty; and therefore, however reluctant we are, and confessing our reluctance to refuse the costs, we find that we have no other course open to us. As to the costs of the first appeal there can be no doubt, and those have been already disposed of.

Lord Chancellor.—My Lords, I entirely agree with the opinion of my noble and learned friend as to the order now to be made; at the same time expressing my

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regret that the parties who have brought an appeal of this description to your Lordships House should escape without payment of costs. But I think it is quite clear under the circumstances that your Lordships cannot make any other order.

First appeal.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed, with costs, to be paid to the respondent within one calendar month.

Second appeal.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed.

Third appeal.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed.

DEANS and DUNLOP — JOHN ALISON, Solicitors.