

legacies, he bequeathed a clock, and £5 to buy mournings, to Ross; and £5 for the same purpose to Alexander Tillary, the writer of the deed. He left the residue of his fortune to his widow.

Ross and Tillary were the instrumentary witnesses.

Anne Ingram and others, the nearest of kin of William Ellis, brought a reduction of the deed, *inter alia*, on the ground that the instrumentary witnesses were legatees, and one of them an executor, contending that no person interested in a deed can be a witness in support of it; Ersk. B. 4. Tit. 2. § 27.

Answered: Trifling marks of respect shewn to instrumentary witnesses cannot affect the validity of a deed. Besides, as they merely attest the grantor's subscription, the usual objections, whether of interest or of propinquity, do not apply to them; *D. Lib. 28. T. 1. L. 20.* 8th March 1685, Grahame against Marquis of Montrose, No. 115. p. 16887; 28d November 1708, Sym and Scot against Donaldson, No. 119. p. 16891; Falconer against Arbuthnot, No. 24. p. 16817; 19th December 1786, Scott against Caverhill, No. 204. p. 16779. At all events, the objection could reach only the validity of the legacies and nomination of Ross as executor, but could not affect the interest of third parties.

The Lord Ordinary repelled the reasons of reduction.

The Lords, upon advising a petition with answers, unanimously adhered.

Lord Ordinary, *Mulloch*.
Clark, *Messiers*.

For the Pursuer, *Lumsden*.

Adv. *Williamson*.

D. D.

Fac. Coll. No. 211. p. 482.

1801. February 6. JAMES MERRY and Attorney, against JOHN HOWIE.

In 1777, John Howie executed two separate dispositions, by which he conveyed one-half of the lands of Malside to John Howie, his nephew, but who was not his heir-at-law; and the other half to James Merry, a distant relation by affinity. The disponent reserved the liferent of the whole to himself, and to Mary Smith his wife.

The disposition in favour of James Merry, was deposited by Mary Smith in the hands of David Cochrane.

On the 6th January 1785, John Howie senior executed a new settlement, by which, without formally revoking the two former dispositions, he conveyed the whole lands of Malside, after his own and his wife's death, in favour of John Howie, the former disponent of one half of them.

John Howie senior died on the 8th January 1785, two days after the execution of this deed.

No. 2.

Instrumentary witnesses were legatees for small sums, and that one of them was also one of the executors named in it; repelled.

No. 3.

A disposition *mortis causa* reduced on account of a vitiation in its date,

No. 3. A considerable time after his death, his widow got back from David Cochran the disposition in favour of James Merry, which she probably destroyed, as it never afterward appeared.

She also, soon after her husband's death, renounced her liferent right; and John Howie *junior*, in virtue of the disposition 1785, entered into possession of the lands, continued it for several years, and was infest in 1790.

It was discovered, however, that the date of this disposition had, by means of an erasure, been altered in a different hand-writing, from 6th January 1785 to 6th November 1784. At what time this vitiation was made did not very clearly appear; neither was it distinctly established by whom it was made, or whether John Howie *junior* had had any participation in the fraud; but there were strong grounds for suspecting, that it had been suggested and carried into execution by the notary whom Howie had employed to infest him on the disposition, and who was a person of infamous character. It was also fully made out that Howie thought the deed 1785 challengeable on the head of death-bed, not being aware, that the heir's right of challenge was excluded by the two former dispositions. And this made it not improbable, that the vitiation had been made for the purpose of eluding that objection.

On the supposition that this disposition was void, James Merry, in virtue of the disposition 1777 in his favour, which had never been revoked, was entitled to one half of the lands; and having learned the circumstances above detailed, he resolved to institute a reduction of the disposition 1785, both on the ground of the vitiation, and of the granter's having been in a state of complete mental imbecility when it was granted.

After obtaining a decree proving the tenor of the disposition 1777 in his favour, he accordingly instituted the reduction; but not having been so successful as he expected in establishing the granter's imbecility, he rested his plea on the vitiation of the date of the disposition, contending, that the date being an essential part of the deed, an *ex post facto* alteration of it, especially if it could not be traced to any innocent cause, must be fatal to the settlement; 1429, C. 113, and Mackenzie's Observations on it; Balfour's Practics, p. 368. § 36. 382. C. 5. and 384. § 19. Stair, B. 4. Tit. 42. § 19. Ersk. B. 3. Tit. 2. § 20. 29th March 1626, Keith, No. 20. p. 12271. 10th February 1636, Edmiston, No. 344. p. 17062; 22d November 1671, Pitillo, No. 24. p. 12281; 1st July 1796, Murchie, No. 55. p. 1458; 4 Termly Reports, p. 430. Master *versus* Millar.

The defender, on the other hand, contended,

1st, A date is not essential to a conveyance of heritage; Stair, B. 2. Tit. 3. § 14. and 16. B. 3. Tit. 2. § 3. Bankton, B. 3. Tit. 4. § 2. and 4. Erskine, B. 2. Tit. 2. § 18. Ross on Conveyancing, *vide* Testing clause; 21st July 1711, Ogilvy, No. 123. p. 16896; Blackstone, vol. 2. pp. 295. 304. 308. 381. and 502. And it is only where the alteration is made on a material part of

the deed, that it is rendered void; Stair, B. 4. Tit. 42. § 19. 11th December 1621, Hamilton, No. 157. p. 16923; 4th December 1629, Wintham, No. 172. p. 6749; 14th December 1627, Hepburn, No. 23. p. 12273; 11th March 1753, Durie, No. 175. p. 16936; 5th March 1760, Lockhart, No. 176. p. 16939; Coke's Reports, p. 66. Goddard's Case, p. 825. H. Pigot's Case; Bacon's Abridgment, vol. 5. p. 159. vol. 7. pp. 299. 306, 307, 308, 309, 310. 340. 342. 349.

No. 3.

2dly, At any rate, as the words of the date, 'Seventeen hundred and eighty', remain entire and unvitiated; the deed in favour of the defender must have been *posterior*, and so preferable to the disposition 1777, founded on by the pursuer.

Lastly, There is every reason to suppose that the date was not vitiated at the time of the granter's death, and there is no ground for suspecting, far less any evidence, that the vitiation was done by the defender, or with his privity; and to annul the deed under these circumstances, would not only be attended with much hardship to the defender, but might also open a door on other occasions to very gross frauds. Persons in the pursuer's situation might be tempted, either by themselves or their agents, to get hold of deeds to their prejudice, and vitiate them; for the very purpose of getting them afterward set aside.

After a hearing in presence, the Lords thinking the vitiation of the date an insuperable objection to the deed, "sustained the reasons of reduction."

A reclaiming petition for the defender was refused, without answers, 27th February;) and a second reclaiming petition was (15th May 1801) refused as incompetent.

Lord Ordinary, *Armadale*. Act. Solicitor-General Blair, *W. Erskine*.
Alt. *H. Erskine, Haggart*. Clerk, *Colquhoun*.

R. D. *Fac. Coll. (App.) No. 13. p. 26.*

* * This judgment was appealed, The House of Lords, (17th March 1806,) ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutors complained of be affirmed.

1801. February 24. RONALDSON DICKSON *against* SYME.

No. 4.

THIS objection to an instrument of sasine, that the doquet of the notary bore the instrument to have been written by the hand of another, although the date and names of the Procurator, Baillie, and witnesses were written by the notary himself, was repelled.

* * This case is No. 7. APPENDIX, PART I. *vide* TAILZIE.