

No. 4. Lords, of which an account is given in the Dictionary, No. 114. p. 8843. ~~are~~
DEATH-BED.

The Lords refused this petition; and a second on the 24th February.

Lord Ordinary, *Meadowbank*, Act. *Maxwell Morison*. Alt. *M'Cormick*.

R. D.

Fac. Coll. No. 217. p. 493.

* * See Note under the case of *Ogilvie against Mercer*, p. 3343.

1805. December 6. CAMPBELL against RANKIN.

No. 5.

The exception of death-bed, not excluded by an anterior unfinished transaction.

HUGH LOGAN, of Logan, being desirous to make some recompence to George Rankin, of Whitehill, for his assistance in the management of his affairs, and being informed, that, in consequence of a destination in the titles of his estate, he could not convey any part of it by a gratuitous disposition, agreed to sell to Rankin, at a price considerably below their real value, the farms of Burnhead and Hylar, reserving possession during his own life. With this view, a minute of sale was executed in September 1801, by which these farms were conveyed to Rankin at the price of £2000; and the entry of the purchaser was to commence at the first term after Logan's death. By a clause in the minute it was provided, that it should be lodged in the hands of Kenneth Mackenzie, Writer to the Signet, till called up by the joint orders of the parties.

Mr. Mackenzie was afterward applied to for the purpose of making out a disposition; but, upon his declining to execute such a deed, and expressing his doubts that a sale of this sort might be reduced as *in fraudem* of the destination of the estate, a new transaction was entered into, by which a feu of these farms was granted to Rankin, and an annual feu-duty of £10. was stipulated in addition to the price formerly fixed. This feu-disposition, was granted on the 26th January 1802, at which time Logan was in an infirm state of health, labouring under a complication of disorders, which terminated in his death on the 12th of March following, without his having been either at kirk or market.

After Logan's death, Hugh Goodlet Campbell, his nephew and heir-at-law, raised an action of reduction of the feu-disposition of the 26th January, upon the head of death-bed; and Rankin raised an action against Campbell, as representing his uncle, to implement the minute of sale executed by Logan in September preceding.

These actions were conjoined, and a proof was allowed by the Lord Ordinary; which being reported to the Court, counsel were heard in presence, and memorials were afterward ordered. The heir-at-law

Pleaded: The object of Logan in granting this feu-right was evidently to make gratuitous alienation of his property, to the prejudice of the heir-at-law, who is entitled to reduce the disposition on the head of death-bed, as the grantor, at the time of executing it, was labouring under the disease of which he

died, without surviving the requisite period. The heir is not barred by the previous minute of sale from insisting in this reduction; because, in the *first* place, that transaction never was properly completed, it being provided, that the minute of sale could not be called up from the depository without the consent of both parties, so that either party, by withholding this consent, had a liberty of resiling; and the circumstance of the defender having afterward taken a feu-disposition of this property from Logan, shews that the sale was not understood to be completed; and, in the *second* place, the feu-disposition may be considered as a virtual revocation of the previous minute of sale, because the bargain in the minute of sale being more favourable to the defender, than the terms of the feu-disposition, his conduct in accepting it amounts to an implied discharge of the former; (See IMPLIED DISCHARGE, Sect. 5.) And as the feu-disposition takes no notice of the previous minute of sale, if it was a subsisting deed, it must be held as revoked by the feu-right, it being impossible that there could be both a sale and a feu of the same lands at the same time.

Answered: The feu-disposition challenged on the head of death-bed, was merely substituted in place of the minute of sale which had been previously executed. The heir-at-law has, however, no title to challenge this deed, because it is more favourable to his interest than the former; and even if this deed were to be reduced, the former one would revive, and be in full force. There is no doubt, that Logan was in *habeas pectus* when he executed the minute of sale; and as by this deed he became debtor to the defender, the subsequent deed was merely in fulfilment of the former deed, which the heir cannot challenge. For, when the heir is excluded from the succession by an irrevocable deed in *habeas pectus*, he cannot complain of any subsequent deed executed on death-bed, which does not contain any addition to the property formerly conveyed; Ersk. B. 3. Tit. 8. § 97; Wilson against Irvine, May 17th, 1796, (not reported.) There can be no doubt that the minute of sale was a complete transaction, though deposited in the hands of a third party; for the presumption is with regard to any mutual contract that is put in the depository's hands for the security of both parties; Bankt. B. 1. Tit. 15. § 10; and a mutual contract does not require delivery to make it effectual; Ersk. B. 3. Tit. 2. § 44; Dict. *voce* WRIT, Sec. 10.

The Lords (13th November 1805) “sustain the reasons of reduction of the minute of sale, and also of the feu-disposition founded on by the defender George Rankin; and in the action for implement, sustain the defences for Hugh Goodlet Campbell, and assoilzie him from the conclusions of that libel.”

A reclaiming petition was afterward refused, without answers.

This cause was likewise argued on its special circumstances, as established by the proof; and it was contended by the defender, that there was not evidence that Logan was labouring under the disease of which he died, at

No. 5. the time when the feu-disposition was executed. Upon this point, it is unnecessary to notice the argument of the parties; but the Court were satisfied that the objection of death-bed was good in the circumstances of the case. Their difficulty lay entirely in the points of law above stated; but, upon the whole, they thought the minute of sale an unfinished transaction, and the feu-right in a great measure gratuitous.

Lord Ordinary, *Armadale*. Act. *Blair, Monyhenny*. Agent, *K. Mackenzie, W. S.*
 Alt. *Hay, Cathcart*. Agent, *Jo. Hunter, W. S.* Clerk, *Home*.

Fac. Coll. No. 238. p. 517.

1808. June 3.

WILLIAM IRVINE against CRAWFORD TAIT, Esq. W. S. and Others.

No. 6.
 A disposition having been executed on death-bed, and the heir having died in minority, reduction at the instance of the next heir was sustained.

ON the 11th June 1801, Andrew Irvine executed a trust-disposition, or settlement, conveying his whole property to William Irvine, his brother, Crawford Tait, Writer to the Signet, and certain other trustees, whom he likewise named tutors and curators to his son. The objects of trust were, after payment of his debts, 1st, "For the maintainance and education of David Irvine, my only son, until he shall arrive at the age of 21 years complete; whom failing, before the age of 21, and having lawful issue of his own body, for payment to, or division among them, such lawful children as he shall so leave, equally among them, share and share alike. 2^{dly}, I hereby appoint my said trustees, so soon as my said son shall attain the age of 21 years, to denude themselves of this trust, and to convey my whole heritable and moveable subjects in favour of my said son, and pay over what balance shall remain in their hands, upon a legal and sufficient discharge of their hail intromissions and management. But in case my said son shall die before attaining the age of 21 years complete, without leaving lawful issue of his own body, then, and in that case, I hereby appoint my trustees to convert my whole heritable and moveable estate into money, and to make payment of the following legacies to the persons under-written, to whom I leave and bequeath the same, and that as soon as possible after the death of my said son as aforesaid," viz. A variety of legacies are then enumerated, of which several were granted to the trustees and their families.

At the time of executing this deed, Andrew Irvine was in bad health; and he died on the 25th June 1801, fourteen days after it was subscribed, without having been either at kirk or market.

Messrs. Irvine and Tait, and the other trustees, accepted of the trust; and proceeded in the arrangement of the affairs, by selling certain subjects, and by finishing buildings which had been begun by the truster. William Irvine was active in the management; and received a pecuniary remuneration for his trouble.