No. 5. the time when the feu-disposition was executed. Upon this point, it is unnecessary to notice the arguiment 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, Monypenny.* 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. *2dly*, 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 com-"plete, 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 per-"sons 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.

No. 6.

William Irvine, the trustee, died on the 27th August 1804; and David Irvine, the son of Andrew, having entered into the navy, died in the month of August 1805, in minority.

William Irvine, the eldest son of the deceased William, who now became heir-at-law of Andrew, then raised a process of reduction, on the head of death-bed, for setting aside the trust-deed executed by his uncle Andrew, and under which his father had acted. The trustees raised a process of multiplepoinding and exoneration; and these conjoined actions having been advised by Lord Meadowbank, Ordinary, the following interlocutor was pronounced, (May 12. 1807): "Finds, that the possession of David Irvine, under his father's settle-"ment, being that of a pupil or minor, did not bar the challenge, of the per-"son who might be heir-at-law to him at his death, of that settlement: Finds, "that the actings of William Irvine as a trustee under that settlement, while "the succession had not opened to himself, do not bar the same challenge, "and that even though the person who brings it happened to represent him, "(which, however, is not alleged in the present case to be the fact,) therefore "repels the defences; and in the reduction, reduces, decerns, and declares in "terms of the libel."

The cause came before the Inner-House by petition and answers.

The argument for the trustees.

1*st*, The deed having been accepted by David, the immediate heir, and his tutors and curators, all challenge at the instance of a remoter heir is precluded.

The origin of this branch of law is lost in obscurity; but from the earliest accounts it conferred on the heir, *alioqui successurus*, a right to reduce any deeds affecting heritage executed by his predecessor on death-bed, and to his prejudice. This right, however, might be renounced, either by consenting to the deed at the time of its execution, or by ratification after the granter's death.

At one time it was even doubted whether, where the immediate heir had died without either approbating or reprobating the deed, challenge was competent to the remoter heir. But such right was at last acknowledged, 21st January 1668, Schaw, No. 15. p. 3196; 16th July 1672, Gray, No. 16. p. 3196.

It was then agitated whether the ground of challenge, competent to the remoter heir, arose from the injury done to himself, or whether he must plead in right of the immediate heir, against whom it was necessary to shew that lesion had been committed; and the Court at one time sanctioned the principle that "the exception of death-bed was competent to remoter heirs, though the deed "was not in prejudice of the immediate heir apparent." Kennedy against Arbuthnot, 13th July 1722, No. 17. p. 3198.

But by a series of decisions, the Court have departed from this principle, and required that lesion to the immediate heir shall be established to found a

No. 6. reduction at the instance of a remoter heir, 13th February 1739, Craigs, No. 18. p. 3199; November 1738, Irving, No. 4. p. 3180.

In the present instance, David the immediate heir, so far from being injured, derived material benefit from the deed challenged. It left him the entire disposal of the property, as soon as the law authorised him to exercise such power,—it saved him from the expense of a judicial nomination of tutors and curators; and enabled the trustees to take those measures for the beneficial arrangement of his property, which could not otherwise have been without considerable expense.

The deed being thus beneficial to the pupil, the trustees were entitled in his name to homologate, and act under it. Such ratification being a beneficial act of administration, is as binding in law as if it had been done by a person of full age. Such a proceeding does not amount to a settlement or alienation of heritage, to which a minor is incompetent, but is an useful act of administration which must validly infer its legal consequences. The trustees were bound to adopt the alternative of repudiation or ratification, and at the same time to consult most effectually the interest of the pupil.

It is impossible, therefore, to establish that lesion has been committed against the pupil, the immediate heir, by the deed challenged; and the ratification of the deed, and possession under it, now preclude challenge. For it has been determined, by the most recent decisions on the subject, "That the institutes "in the disposition quarrelled, who were nearest heirs at the time, having at- "tained possession, the same is not reducible at the instance of a remoter heir," 18th November 1740, Hedderwick, No. 5. p. 3180.

2*d*, William the trustee, the father of the pursuer, and the uncle of the minor, homologated the trust-deed. This William, next to the minor, was *alioqui successurus;* and his acceptance, joined to that of the minor, must remove all ground of challenge. If William, the uncle, had survived the minor, challenge would have been incompetent to him, for he could not have approbated the deed, so far as the nephew was concerned, and reprobated it so far as it contained the substitution. The one provision was as illegal as the other; and both must have fallen or none. To have sustained reduction at his instance would have been to reduce all those dispositions and sales of the heritable property which himself had authorised and subscribed. It is no answer to say, that he had no interest, in respect the succession had not opened to him. His situation is the same as that of a remoter heir of entail, who may challenge contravention; and there exists for this right the same necessity. To wait till the succession devolved, would be to allow the period to elapse during which alone the necessary facts could be proved; viz. that the granter, at the date of the deed, laboured under the disease of which he died, and did not walk unsupported to kirk and market.

Argument for pursuers.

That the minor could not himself homologate the settlement challenged, is indisputable, because "a pupil has no person in the legal sense of the word;

"he is incapable of acting or even of consenting." Erskine, Lib. 1. Tit. 7. No. 6.
§ 14.

Farther, the possession of the trustees cannot, in law, be held to be that of the minor, because they had a distinct personal interest to support the deed, in as much as, considerable legacies were eventually to arise to them under it. Besides they did not take those measures, by making up tutorial and curatorial inventories, to invest themselves with the character of tutors and curators, which alone could identify them with their pupil, and render their actings his. They acted merely as trustees, in which character they had an interest distinct from that of their pupil. But it was *ultra vires* of the trustees to homologate the settlement, for such a proceeding amounts to alienation of heritage. Accordingly, if an heir ratify a death-bed deed, his creditors are entitled to set it aside under the act 1621, on the principle, that ratification is equivalent to a conveyance. Bank. Lib. 3. Tit. 4. § 44.

Such being in law the nature and amount of ratification, it was incompetent to the trustees, because they cannot authorise the alienation of a minor's heritage. Erskine, Lib. 1. Tit. 7. § 33. 8th March 1797, Cunninghame, No. 80. p. 8966.

Even the possession of a wife along with her husband, does not infer homologation or consent on her part in such a case; 16th July 1672, Gray, No. 16. p. 3196.

So likewise in the case of a minor or infant. DEATH-BED, Sect. 13. Bank. Lib. 3. Tit. 4. § 45.

In contemplation of law, the minor suffered lesion by the deed challenged; 1*st*, From the substitution of stranger heirs, in case he died in minority and without issue; and, 2*d*, From the distribution of the property among his children, in case of his dying in minority and leaving issue. In one event, his lawful heirs were altogether excluded; and, in the other, their interest was injured by a division of the estate different from that which the law would have declared. Accordingly, such lesion has been recognized in law. DEATH-BED, Sect. 2.

Sir George Mackenzie (Treatise on Tailzies) likewise doubts whether a minor can, with consent of his curators, make a tailzie, "in respect that a minor may "be justly said to be lesed, in that he wrongs his family and nearest relations."

That lesion against the immediate heir is not required to entitle the remoter to reduce, and that the latter pursues on the injury done to himself, may be considered to be determined. Erskine, B. 3. Tit. 8. § 99. Bank. B. 4. Tit. 4. § 34.

And there are several decisions in support of this opinion. DEATH-BED, Sect. 3. 13th July 1722, Kennedy, No. 17. p. 3198.

In the last place, nothing has been done by William Irvine to preclude the pursuer. He acted as trustee under the settlement, and not *privato nomine*; and, therefore, that which is essential to homologation is wanting, viz. intention and consent.

No. 6. But into his intention it is unnecessary to inquire, because, till the death of the immediate heir, any challenge at his instance was incompetent; and there is not to be found an instance in which such a challenge has either been made or sustained. Till the death of the immediate heir, he has no interest; he has only a precarious and defeasible right, a *spes successionis*, on which he was not entitled to pursue. An heir of entail is in a different situation; and has a *jus crediti* in the estate, which entitles him to challenge every act which interferes with his right. The pursuer, however, does not in any shape represent William the trustee.

The Court agreed in opinion with the Lord Ordinary. It was observed, that homologation cannot be inferred against a minor, even where acting with consent of his tutors and curators; and in the present case, the introduction of strangers into the succession was lesion, of which the heir was entitled to complain; neither did the acceptance of the trust, and the proceedings under it by William the trustee, preclude him. Homologation implies a right to challenge; and till the death of the immediate heir, the remoter was not entitled to pursue.

The Court adhered to the interlocutor of the Lord Ordinary; and upon advising another petition and answers, adhered, (3d June 1808.)

Lord Ordinary, *Meadowbank.* Act. *Tho. W. Baird.* Alt. *Alex. Irvine.*
Ja Greig, W. S. and *Will. Callender*, Agents. *S.* Clerk.

J. W. *Fac. Coll. No. 48. p. 178.*