tion by the Crown was actually disposed of and given effect to in the very same interlocutor. The Lord Ordinary thinks it must be held that the Crown was a party to the whole procedure.

"(3) It was urged that the College of St Leonard's was not a party to the judgment; but the answer is, that Mr Thomson, as perpetual tacksman, really represented the College. He had an interest to plead, and was allowed to plead that the teinds were college teinds, and the judgment which he obtained was a judgment in favour of the College as well as in favour of himself. The College are benefited by the judgment, and no doubt, if they have interest, would adopt it.

"(4) It was urged that the merits of the question were not discussed before Lord Woodhouselee, or decided by him. This may or may not be true. It is impossible to say what took place before Lord Woodhouselee, or what arguments or views were submitted, before he made avizandum on 23d December 1809. It would be very dangerous to assume that nothing passed which does not appear in the comparatively meagre records which have now been recovered, but which certainly raise the question by reference to the gifts and statutes which constitute the title of the teinds. It is safer to presume that everything was urged which could be urged, and that all parties were satisfied with the resulting judgment.

"(5) And this affords the answer to the plea founded upon the statute 1600, cap. 14, which enacts that the Crown is not to be prejudged by the sloth or negligence of its officers in pursuing or defending actions. There is no proof that there was either sloth or negligence. On the contrary, the Crown was there fully represented by competent counsel and agents, and the Lord Ordinary sees no ground for even suspecting that they did not fairly do their duty. It was hardly maintained, and in the Lord Ordinary's view could not be maintained, that the statute of 1600 makes it impossible to have *res judicata* against the Crown.

"(6) It was urged that the Crown in 1810 had really no interest to inquire whether the teinds in question were college teinds or not. But this is not so. The direct interest might not immediately emerge, but the question as to the order of allocation was directly raised, and the Crown, as holding the bishop's teinds, had an interest to object to a claim of postponement in allocation to the whole of these teinds. No doubt it was not necessary to discuss whether bishop's teinds or college teinds came first in allocation, and the question is still open in point of law, if the Crown thinks fit to raise it; but it was surely fixed by the judgment of 1810 that the objector's teinds were not held on heritable right and liable *primo loco* in the locality, and yet this is what the Crown now seeks shall be found.

"(7) The Crown admitted that the judgment of 1810 was binding in a question with the common agent, and with all the other heritors whom he represented; but it was urged that the common agent did not represent the Crown. It is certainly true that a common agent does not necessarily represent the titular or titulars, at least when adverse interests arise. But a common agent really represents all having interest in the allocation, and he decides and reports upon the rights of all who have any interest in the teinds. So far as his proceedings are not objected to, he really represents all concerned. Heritors are only interested as titulars or tacksmen of the teinds of their own lands.

"(8) But if the judgment of 1810 be binding against the whole heritors (and the Crown admitted that it was so), it is difficult to hold that it should not be binding on the titular and on the holder of the bishop's teinds. It would be very anomalous, very awkward, and perhaps lead to inextricable confusion, to hold the objector's teinds college teinds in a question with heritors, and not college teinds in a question with the Crown—that is, to hold a matter of fact decided in the same process in two different and opposite ways. The only answer to this would be to hold everything wrong since 1810, and to open up everything as from that date. But this is impossible, and on the whole the Lord Ordinary feels compelled to give effect to a judgment which was certainly intended at the time to be a final judgment, and which has been acquiesced in and acted on as such for sixty years."

The Lord Advocate reclaimed.

SOLICITOR-GENERAL and KINNEAR for the reclaimer.

WATSON and ORPHOOT for the objector.

The Court, however, adhered unanimously to the interlocutor of the Lord Ordinary.

Agent for Reclaimer—Warren H. Sands, W.S.
Agents for Objector—Leburn, Henderson, & Wilson, S.S.C.

Saturday, June 22.

GRAY *v.* GRAY.

Deathbed—Succession—Debtor and Creditor.

Held that a disposition of heritage executed on deathbed to the prejudice of the heir-at-law was reducible, although it bore to have been granted in payment of a debt not otherwise proved.

David Gray, wright and joiner at Harthill, father of the pursuer and defender, died on 4th May 1871, possessed of certain heritable subjects. The pursuer was his eldest son and heir-at-law. Sometime after the death of David Gray, the pursuer was informed by the defender that the deceased had left the latter his heritable property, under the burden of providing a free house to their sister Mary Dickson Gray. The deed founded on by the defender was dated 1st May 1871, and was of the following tenor:—"I, David Gray, wright at Harthill, in consideration of the sum of One hundred and twenty-five pounds sterling, advanced and paid to me, and on my behalf at sundry times preceding the date of these presents, by John Gray, wright at Harthill, my son, which sum is hereby held and declared to be the full and adequate price and value of the subjects hereinafter described and conveyed, and of which sum so paid to me as aforesaid I do hereby acknowledge the receipt, and discharge the said John Gray, have sold and disponed, as I do by these presents sell, alienate, and dispone from me, my heirs and successors, to and in favour of the said John Gray, his heirs and assignees whomsoever, heritably and irredeemably, all and whole that piece of ground," &c.

The following document was also granted by the defender to the deceased:—

"*Harthill, 3d May* 1871.—Mr David Gray, Harthill,—My dear father, With reference to the dis-

position to the subjects in Harthill, granted by you in my favour upon the first day of May current (which subjects have been sold by you to me), it is hereby declared that it is the arrangement and understanding betwixt us, that I am to give and provide my sister Mary Dickson Gray, residing in family with you, with a dwelling-house of not less than two apartments, in the village of Harthill, and which she is to occupy, rent free, during her lifetime after your decease, but that so long only as she shall remain unmarried thereafter, declaring hereby that all right to enjoy and possess such house shall cease and be at an end so soon as she shall be married, and that the same shall not again revive upon her widowhood: And I hereby bind and oblige myself, and my heirs and successors, accordingly; I also hereby agree and bind myself and my foresaids to pay all the just and lawful debts which shall be due and owing by you at your decease, and also to pay and defray your sick-bed and funeral charges and expenses, and to free and relieve my said sister, both individually and as your residuary legatee, of the whole of such debts and sick-bed and funeral charges."

The pursuer maintained that these documents were a device to defeat his rights as heir-at-law, and that the statement in the said disposition that a sale was made and a price paid was without foundation in truth. The defender averred that the said disposition was granted in consideration of a price truly paid by him to his father David Gray, seeing that he had made advances to and for his father which had not been repaid to him, exceeding the £125 mentioned in the disposition. On 1st May 1871, the date on which the disposition in favour of the defender was executed, David Gray was ill of the disease of which he died, and he died three days afterwards, without having been able to leave his house.

The pursuer pleaded that the disposition, having been executed on death-bed, ought to be reduced.

The defender pleaded that the disposition had been granted for onerous causes, and for further obligations undertaken by the defender, and was therefore not reducible *ex capite lecti*.

The Lord Ordinary (GIFFORD) pronounced the following interlocutor:—

"*Edinburgh*, 12*th February* 1872.—The Lord Ordinary . . . finds that the disposition challenged . . . was executed when the granter David Gray was *in lecto*, but finds that the narrative of the said deed, the cause of granting thereof, and the acknowledgment by the granter therein contained, are true; and finds that at the date of the said deed the granter thereof, the said David Gray, was justly indebted to the defender John Gray the sum of One hundred and twenty-five pounds; finds that the moveable estate of the said deceased David Gray, and the whole value of the heritable subjects contained in the said disposition, were insufficient to pay the debts of the said David Gray, including the said sum of One hundred and twenty-five pounds; and finds that the pursuer, as heir-at-law of the said David Gray, is not prejudiced by the said disposition and conveyance, and has no interest to insist in the present action: further, finds that the pursuer does not offer to pay the debts of the said David Gray, including as above, so far as not provided for by his moveable estate; therefore assoilzies the defender from the whole conclusions of the action, and decerns," &c.

The pursuer reclaimed.

PATTISON and BALFOUR for the reclaimer.

WATSON and JAMESON for the defender.

At advising—

LORD COWAN—The Lord Ordinary has found that the disposition under challenge was executed by the deceased when on death-bed, but that a good defence had been stated to the reduction; in other words, that the pursuer, as heir-at-law, is not entitled to have the deed set aside, inasmuch as he "is not prejudiced by the said disposition and conveyance, and has no interest to insist in the present action."

The grounds on which the interlocutor proceeds are, that, by the narrative of the deed, the granter acknowledges that he is indebted to the defender John Gray, his second son, in the sum of £125; that the value of the deceased's estate, heritable and moveable, is insufficient to pay the debts of the granter, including this said sum; and that the pursuer has not offered to pay the debts of the deceased, in so far as not provided for by his moveable estate. These grounds of defence are, in my opinion, irrelevant, and insufficient to support the conclusion at which the Lord Ordinary has arrived.

The law of deathbed entitles the heir-at-law to set aside all deeds executed to his prejudice by the deceased *in lecto;* and I cannot doubt that the deed in question has the effect of injuring the heir's right of succession. There is an acknowledgment of indebtedness, to the extent of the alleged value of the heritable subjects, in sums "advanced and paid to me and in my behalf at sundry times preceding the date of these presents," but in evidence of which advances no specific vouchers are produced or alleged to exist. It is not the case of a sale of the subjects for a price paid at the time. Neither is it the case of a burden created for a present advance of money on loan. For anything that appears, these alleged advances may have been made with no view of creating debt or on the footing of loan. And the main question thus is, whether on death-bed heritage can be effectually alienated to an alleged creditor, and the heir-at-law's right of succession defeated by means of such an acknowledgment of debt as occurs in this deed? I think this quite inconsistent with the heir's right. He is entitled to have the heritage of his ancestor free of all deeds executed to his prejudice on death-bed. It may be that from the ancestor's dying insolvent, or from his personal estate being insufficient to pay his debts, the heritable subjects may be liable to be attached by the diligence of creditors. That cannot affect the heir's right to have the heritage. When the creditors take measures to constitute their debts, the heir may be able to state a good defence, or he may pay any just debts that are due to creditors of the ancestor, and thus prevent the heritage from adjudication. Such considerations are not *hujus loci*. The heritage of his ancestor descends to him, and no death-bed deed can be permitted to affect or injure his undoubted right of succession.

There were various views stated on which it is contended that this deed is not to the prejudice of the heir. It is first said that the acknowledgment by the deceased of moneys received is binding on the pursuer, and that his interest to have the heritage is thus destroyed. But it is manifest that to give such effect to the mere statement of advances having been made or debt in-

curred to the grantee would be to prevent the operation of the law of deathbed altogether. Whatever may be the effect of the acknowledgment in an action of constitution against the deceased's representatives, including the heir-at-law, it can be of no avail against his right to have the heritable subject free of the injurious act executed on deathbed. Until properly constituted, the debt set forth in the narrative of the deed cannot be held binding on the heir-at-law to the effect of debarring him from his right to challenge the death-bed conveyance.

But then it is said that there is no moveable estate sufficient to meet the debts due by the deceased, including the sum acknowledged to be due to the disponee, and that this has been established by the proof. The answer is, that this matter of deficiency of funds to meet the debts of the deceased is not for enquiry in this action. The heritable subjects may possibly be carried off from the heir-at-law by the diligence of creditors, but this eventuality is no legal bar to the heir's right of challenge. It is not matter relevant for enquiry under this action of reduction. The heir may choose to have, and is entitled to have, the heritage, though the succession may be ever so deeply burdened with debt.

The same answer occurs to that part of the reasoning in support of the interlocutor which is based on the heir not offering to make payment of the debts due, including the sum acknowledged by the deed under challenge. No such offer has ever been required or made a condition of the heir's right of challenge in such circumstances as the present. Where, indeed, there has been a sale to a third party, and a price paid to the granter on death-bed, or where there has been a burden created over the heritage for an immediate advance in money on death-bed, it has been made a condition of the right of challenge that the heir should make restitution of the price, or of the advances; and there are other peculiar cases where such a condition has been imposed. But in such a case as the present there is no example of this course being followed. The creditors in personal debts will have their remedy, if the moveable estate is deficient, by legal diligence against the heritage.

For these reasons I think the interlocutor under review must be recalled, and decree of reduction pronounced.

The other Judges concurred, and the Court accordingly unanimously recalled the interlocutor of the Lord Ordinary, and found the pursuer entitled to reduce the death-bed deed.

Agent for Reclaimer—R. P. Stevenson, S.S.C.
Agents for Defender—Hill, Reid, & Drummond, W.S.

Tuesday, June 11.

FIRST DIVISION.

MACKENZIE, PETITIONER.

(*Sequel of Catton* v. *Mackenzie*, ante, *p.* 425.)

Process—Appeal—House of Lords—Petition to apply Judgment. Circumstances in which a petition to apply the judgment of the House of Lords was *held* a competent course, although the only object of the petition was to obtain decree for the certified costs in the House of Lords.

In this case the Lord Ordinary, on 7th June 1870, assoilzied the defender from the whole conclusions of the summons.

On 19th July 1870 the First Division recalled Lord Mackenzie's interlocutor of 7th June, and (on different grounds) assoilzied the defender, and found the pursuers liable in expenses.

On 11th March 1872 the House of Lords recalled the interlocutor of the First Division of 19th July 1870, except in so far as the pursuers were thereby found liable in expenses; affirmed the interlocutor of the Lord Ordinary of 7th June 1870; ordered the appellant (pursuer) to pay the costs of the appeal as taxed and certified; and remitted back to the Court of Session "to do therein as shall be just and consistent with this judgment." It was further ordered "that unless the costs certified as aforesaid shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the Court of Session in Scotland, or the Lord Ordinary officiating on the Bills during the vacation, shall issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary."

The practical result of each interlocutor being the same, nothing remained for the Court to deal with except the costs in the House of Lords.

On 6th May the defender obtained a certificate of the costs from the Clerk of the Parliaments, and, on the narrative that the pursuer A. R. Catton (Mrs Catton having died) had not paid the same within one month, the defender, on 8th June, presented a petition to the First Division "to apply the above judgment of the House of Lords, and in respect of said judgment, and of the certificate above mentioned, to decern against the said Alfred Robert Catton for payment to the petitioner of the costs incurred by him in respect of said appeal, amounting to the sum of £559, 13s. 2d., as certified by the Clerk of the Parliaments as aforesaid; to find the said Alfred Robert Catton liable to the petitioner in the expenses of this application, as the same shall be taxed by the Auditor of Court, and to remit," &c.

The Court decerned in terms of the prayer of the petition, and found A. R. Catton liable in the expenses of the petition.

Counsel for Petitioner—Shand. Agents—W. F. Skene & Peacock, W.S.

Saturday, June 22.

AINSLIE *v.* AINSLIE.

Reduction—Authentication—Trust—Proof.

Circumstances in which the Court refused to allow a proof at large, both in regard to a conclusion of reduction of certain deeds *ex facie* valid, and also in regard to a conclusion of declarator of trust; the deeds by which the trust was said to have been constituted were *ex facie* absolute conveyances, and there was no offer to prove the trust by the writ or oath of the trustee.

William and Henry Ainslie, who were brothers, entered into partnership in 1831 as general merchants in Fort-William. This partnership continued until 1856, when it was dissolved by deed of dissolution of copartnery by William and Henry Ainslie, dated 3d January of that year. This deed was holograph of William Ainslie, and was sub-