

1726. *January 26.*

No 3.

MARQUIS CLYDESDALE *against* The EARL of DUNDONALD.

THE law of death-bed takes place in favour of all sorts of heirs, whether the destination be by infestment or only in a personal deed.

Fol. Dic. v. I. p. 211.

* * * *See* This case *voce* BASE INFESTMENT, No 3. p. 1266.

1738. *November.*IRVING *against* IRVING and her Husband.

No 4.

A substitute cannot reduce in a case where the institute could not.

A DISPOSITION having been granted in *liege poustie* to a younger son, with a power to alter, thereafter a new deed was granted in favour of the son of the said younger son, with a substitution to the eldest son; and, after all, a third deed on death-bed to the said son of the younger son, his heirs and assignees.

Of this last deed, a reduction on the head of death-bed being pursued by the eldest son, not only as heir at law, but as heir substitute, and of which right of substitution he could not be deprived on death-bed; it was found, 'He had no right to reduce either as heir of line, because of the first disposition in *liege poustie*, or as heir substitute; because, however a substitute has been found entitled to reduce, that was only where the deed was prejudicial to the institute. But, in this case, the institute was not prejudiced but benefited; and in no case can the substitute reduce where the institute could not.

Kilkerran, (DEATH-BED) No I. p. 151.

1740. *November 18.*WILLIAM HEDDERWICK *against* JAMES CAMPBELL.

No 5.

Reduction of a death-bed deed was found incompetent, in a case where the institutes in the disposition challenged, who were the nearest heirs at the time had obtained possession, and the action was at the instance of a remoter heir.

WILLIAM PRINGLE, upon deathbed, made over certain heritable subjects to Mary and Marion Pringles, his two daughters, and only children, and failing of these, in favours of James and Adam Parkers his nephews; Marion, the youngest daughter, died an infant, and Mary, the eldest, married the said James Campbell, to whom she conveyed the whole subjects, (by a postnuptial contract), disposed by her father, and thereafter died, in minority, without issue. William Hedderwick being likewise a nephew to William Pringle, by his eldest sister, and being by his uncle's death-bed deed cut out from a share of the succession to him, upon the failure of his two daughters, brought an action of reduction of that deed against James and Adam Parkers, as done on death-bed, to his hurt and prejudice; and against the said James Campbell upon the head of minority and lesion. In support whereof, it was *pleaded*, That the law of death-

bed takes place in favours of remoter heirs, as well as those that are immediate heirs to the granter, unless such deed has been ratified by a person having a title to quarrel it; and that, in the present case, there is no such ratification of the deed in question as ought to exclude this action; see chap. 18. § 7. Book 2. of the Reg. Maj. chap. 13. stat. Will. Craig, L. 1. Dieg. 13. § 36. Margaret Gray, No 16. p. 3196. ; Sir John Kennedy, No 22. p. 1681. It remains then to be considered, if Mary and Marion Pringles, the daughters of William, so far acquiesced in and homologated the deed in question as to exclude the pursuer. As to which, Marion died an infant, and so could not do any deed importing an acceptance thereof; and as for Mary, the other daughter, she never made up any title as heir to her sister, to her interest in the subjects contained in her father's disposition, and which remain *in hereditate* of Marion at this day; and the acceptance of the deed quarrelled by Mary the eldest daughter, appearing only by a postnuptial contract of marriage, cannot exclude the pursuer from this action, in regard she died in minority; during which time, as she could not by any deed of hers settle any order of successors in heritable subjects, neither could she so far ratify her father's deed, as to exclude any person who had a legal title to quarrel the same; nay, she could have revoked that acceptance, and insisted in a reduction of the deed in question, since she was leased thereby, in so far as substitutes were named by her father to her, to the exclusion of her nearest heirs; much more has the pursuer, who is chiefly hurt, a right to insist in the present action, now that the succession is opened to him.

Answered for James Campbell; That supposing there had been no deed of the nearest heir, either express or implied, homologating and accepting of William Pringle's death-bed deed, yet that no action of reduction was competent to a remote heir, when the nearest and immediate heir was institute; but as this is not the present case, it was needless to insist upon it. Further, it was said, that if either Mary or Marion Pringles accepted of the disposition from their father, such acceptance excluded all other remote heirs, such as the pursuer, from challenging the same upon the head of death-bed. *2do*, That Marion Pringle's share of her father's estate was fully vested in Mary, by her survivance, without necessity of a service, in terms of the deed quarrelled. *3tio*, That it was *jus tertii* to the pursuer to make this objection. And, *lastly*, That Mary could not revoke the acceptance, as the terms of the contract of marriage were reasonable, and that it is certain minors may enter into marriage-contracts; and that it could not be maintained she was leased by accepting her father's disposition, and possessing the subjects disposed; which excluded the pursuer from quarrelling the disposition on the head of death-bed, and consequently, from quarrelling the marriage-settlement she afterwards made with James Campbell. See 4th July 1632, Davidson against Hamilton, *voce* MINOR; 22d November 1664, McGill against Ruthven, *voce* HOMOLOGATION.

THE LORDS found, that the institutes in the disposition quarrelled, who were nearest heirs at the time, having attained possession, the same is not reducible

No 5. at the instance of the pursuer, a remoter heir; and therefore found him not entitled to insist in this action of reduction.

Fol. Dic. v. 3. p. 169. C. Home, No 158. p. 268.

No 6. 1741. February. CHRISTIAN BEGG against JAMES ARNOT.

DEBATED, but not determined, whether a donatar of *ultimus hæres* has the same privilege with a natural heir to reduce a deed done on death-bed?

Rem. Dec. v. 2. No 18. p. 32.

1744. November 2. CLEUCH against LESLIE.

No 7.

It is only the person who is heir to the granter of the deed by which he is excluded, to whom the objection of death-bed is competent.

JAMES LESLIE disposed his estate on death-bed to Archibald his eldest son, and the heirs of his body; whom failing, to the children of John his second son, with the burden of an yearly liferent to Violet Johnston his eldest son's wife.

Archibald, the eldest son, about a year after his father's death, died without issue; and, on death-bed, ratified his father's disposition, by executing a new disposition in the precise terms of it.

In the action of reduction of both dispositions, by John, the second son, on the head of death-bed, it was found not competent to him to quarrel Archibald's ratification on the head of death-bed, for this reason, that none can object death-bed but he who is heir to the granter in the subject from which he is by that deed excluded; but, as Archibald died in the state of apparenacy, *quoad* the subject in question, and that, by the disposition to him from his father, the pursuer was excluded, and he could in no shape qualify his being heir to Archibald, he could not therefore quarrel any deed of Archibald's.

Fol. Dic. v. 3. p. 169. Kilkerran, (DEATH-BED) No 3. p. 152.

* * * Lord Kames reports the same case :

A ratification is not a deed that can be reduced as on death-bed.

JAMES LESLIE of Newgrange, in May 1737, being on death-bed, disposed certain subjects, worth about L. 60 Sterling yearly, to Archibald Leslie his eldest son, and the heirs of his body; which failing, to the children of his second son John Leslie, excluding John himself from the succession. And the disposition is burdened with L. 20 Sterling yearly, in name of jointure, to Violet Johnston spouse of the said Archibald Leslie. In March 1738, Archibald Leslie being also on death-bed, and having no hopes of issue, disposed the fore-said subjects to James and Elisabeth Leslies, children of his brother John, bearing to be for fulfilling his father's disposition; and specially ratifying the said provision of L. 20 Sterling yearly in favour of Violet Johnston his spouse. John