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-

scribed by Henry Ainslie in presence of witnesses. Besides this deed, there were three other deeds granted by William Ainslie in favour of Henry Ainslie. In the first place, there was a disposition, dated 1st May 1852, which was duly subscribed and tested; in the second place, there was an assignation, dated 5th January 1856, which was holograph of the granter William Ainslie, and had a testing clause and witnesses; in the third place, there was an assignation, dated the 12th April 1856, which was subscribed and tested in ordinary form.

In consequence of these deeds the partnership was dissolved, and Henry Ainslie continued to carry on business, and enjoyed the absolute use and possession of the property assigned and disponed to him by William Ainslie in the deeds already referred to.

In 1871, however, William Ainslie alleged that the deeds of 3d January and 5th January were invalid, on the ground that the witnesses had not seen him sign, and that their signatures had been adhibited long after the date in the testing clause. He also averred, in regard to the disposition and assignation, that although they were *ex facie* absolute conveyances by him to his brother Henry, yet they were not really so, but were truly conveyances in trust, and that there had been an arrangement to this effect between him and his brother.

He accordingly raised an action against his brother Henry, containing conclusions—(1) for reduction of all these deeds; (2) for a declarator of trust, and (3) for count, reckoning, and payment.

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

"*Edinburgh, 4th June* 1872.—The Lord Ordinary having heard counsel, and made avizandum, and considered the debate and whole process—before answer, allows to both parties a proof of their respective averments on record, said proof to proceed before himself, on a day to be hereafter named."

The defender reclaimed.

SHAND and M'KIE for him.

TAYLOR INNES for the pursuer.

At advising—

LORD PRESIDENT—I think that the Lord Ordinary has in this case committed a miscarriage in allowing a proof at large.

There are three conclusions in this action—first, for reduction of certain deeds; second, a declarator of trust; and third, a conclusion for accounting. Now, whether there is to be an accounting or not we need not at present determine, but if an accounting should ultimately be found necessary, it will make a material difference whether the pursuer prevails or not in the reduction and declarator of trust, and we must dispose of these in the first place.

As regards the reduction, I see no ground for it at all in reference to the deeds of 1st May 1852 and 12th April 1856. The only thing which has the semblance of an attack upon them is the averment that although the deeds bore to be granted for onerous causes, they were really granted for temporary purposes, according to arrangement between the defender and pursuer. Now, this may be an averment of trust, but there is here no ground for reduction. This, then, confines the question as to reduction to the two deeds of 3d and 5th January 1856. In regard to them the pursuer's averment is this—"The said first-mentioned deed bears to have been signed by the pursuer at Fort William on the 3d January 1856, being the same day with the signature of the defender; and the other deed to have been signed there on the 5th January 1856. They were not so signed, and the pursuer was not at Fort William for many months before or after the alleged date. They bear also to have been signed before certain witnesses. They were not so signed, nor was the pretended signature of the pursuer ever acknowledged to the said witnesses; on the contrary, the signatures of the witnesses were procured to be adhibited to the said deeds by the defender in the absence of the pursuer, and they were so adhibited at the defender's instance at or near Fort William, while the pursuer was, in the knowledge of the defender, living in Manchester, and they were adhibited a year and a-half after the dates which the deeds bear." Now, there is a distinction between these two deeds. The last is a unilateral deed issuing from William to Henry, and Henry does not subscribe, and is not a party to it. This deed appears to be written by the pursuer, and the testing clause states that it is so, and it is not alleged that that statement is inaccurate. So the deed is holograph, and the allegation as to the execution of the deed as regards witnesses is wholly irrelevant, as no testing is required. As regards the other deed, the dissolution of the 3d January, it is in a different position from the deed we have just been considering, for it is a bilateral deed, and is subscribed by both the pursuer and defender. As regards the pursuer, this deed stands in the same position as the deed of the fifth, for it is written and subscribed by him. But in this case we must have a valid subscription by both parties, and if the pursuer had averred that Henry's signature had not been before witnesses, that would have been a different case. As it is, however, he only says that his own was not before witnesses, and as the deed is holograph of him, and he does not deny that the signature is his, the deed so far as he (William) is concerned is good. And as regards Henry the deed is subscribed and witnessed, so the deed is holograph as regards the pursuer and tested as regards the defender. So I am of opinion that the conclusions of the summons for reduction are irrelevant, and that as regards them the action should be dismissed.

As regards the declarator of trust, it is almost unnecessary to say anything, for it was not maintained by counsel that it can be sustained except upon the writ or oath of the defender. The learned counsel indeed referred to the averment in the condescendence, that the defender had a fraudulent intention when he accepted the trust; but to allow a proof at large upon this would be to frustrate the statute, and cannot be sanctioned. This is a pure declarator of trust, and the pursuer must rest upon the writ or oath of the defender.

LORD DEAS—I am of the same opinion as your Lordship in the chair, both as to the reduction and the declarator of trust.

The only ground of reduction is the averment that the two deeds of the 3d and 5th January 1856 are not duly tested, because witnesses did not see the pursuer sign. Now, the obvious answer to this is, that as far as he is concerned both the deeds are holograph.

As regards the declarator of trust, what is said about it is this, that the pursuer "resolved to hand over to his brother, the defender, as trustee for him, the whole property of which the pursuer was possessed, and at the same time to take up his own

residence in England, and leave to his brother the local management of the affairs of the firm. It was in connection with the said resolution that the said deeds were signed by the pursuer (in so far as they were signed) but it was arranged and understood and agreed to between the parties that all such conveyance of property, though on the face of the deeds onerous, was really gratuitous, and was purely and wholly a conveyance in trust by the pursuer to the defender for the pursuer's behoof and benefit, and this was the true nature of the deeds and transaction. The procuring and acceptance of the said deeds by the defender, and the acceptance and retention by him of the said property, were fraudulent on his part, both in respect of the use to be made by him of the deeds, with third parties and the public, and in respect of his intention towards the pursuer, as now disclosed." Now, this is just the sort of case to which the statute was meant to apply. The statute was introduced to prevent the property of one person from appearing to be the property of another. I am clearly of opinion that this trust can only be proved by the writ or oath of the defender.

LORDS ARDMILLAN and KINLOCH concurred.

Agents for the Pursuer—Lindsay, Paterson, & Hall, W.S.

Agents for the Defender—Wormald & Anderson, W.S.

Tuesday, June 25.

M'INTOSH *v.* SKINNER & WILSONE AND OTHERS.

Superior and Vassal—Confirmation—Writ—Process—Summary Petition.

A purchaser of heritable subjects sent in his titles to the superior's agents to have a writ of confirmation prepared. Differences having subsequently arisen as to the sum payable as casualty to the superior, the purchaser withdrew his request to be confirmed. *Held* that the purchaser was entitled to recover his titles from the superior's agents on payment of the expenses incurred, and that a summary petition in the Sheriff-court was a proper process for recovering the titles.

Observed that the proper remedy of the superior was to bring a declarator of non-entry.

This was an appeal from the Sheriff-court of Aberdeen.

The proceedings were commenced by a summary petition presented by Daniel M'Intosh, butcher, Aberdeen, against Skinner & Wilsone, advocates, Aberdeen, in which the petitioner set forth, that on 11th December 1865 he transmitted to the respondents the titles of certain heritable subjects in Aberdeen which he had purchased, in order that a writ of confirmation from the superior might be prepared. After the writ of confirmation was prepared, but before it was delivered, the petitioner and the respondents, as acting for the superior, differed about the casualties payable by the petitioner, and the petitioner declined to proceed further with the transaction, and intimated this to the respondents. The respondents notwithstanding refused to deliver up the title deeds. The petitioner prayed the Court to ordain the respondents to deliver up the deeds.

The petitioner subsequently presented a supplemental petition against the marriage-contract trustees of Captain and Mrs Fisher, the superiors of the subjects.

The defence was that the superiors or their agents were entitled to retain the title deeds till the composition was paid, viz., a year's rent of the subjects. By applying for a writ of confirmation the petitioner had agreed to pay the composition, and he was not entitled subsequently to draw back, and offer to present the heir of the last vassal for an entry, as he had done. The respondents also stated a preliminary plea that the petition was incompetent, as involving a question of heritable right.

The Sheriff-Substitute (DOVE WILSON) sustained this plea, and sisted the petition for three months, in order that the petitioner might institute proceedings in the Court of Session to determine the question of heritable right between him and the respondents.

The petitioner appealed.

The Sheriff (GUTHRIE SMITH) pronounced the following interlocutor:—

"*Edinburgh, 1st February* 1872.— . . . . Sustains the appeal, recalls the interlocutor appealed against: Finds that the document called for in the petition, to wit, a disposition of certain heritable subjects in Hutcheon Street, Aberdeen, in favour of the petitioner, is his property, and was delivered to the respondents, Messrs Skinner & Wilsone, as agents for the superiors, the other respondents, in order that a writ of confirmation by them might be written thereon, but differences having arisen as to the sums payable by the petitioner in respect of said confirmation, he withdrew his request to be confirmed, after the writ had been prepared and executed: Finds that, as the writ had not been delivered, he was entitled so to do, but is liable to the respondents, Messrs Skinner & Wilsone, in the costs and charges connected with the preparation and execution of said writ; appoints an account thereof to be given in and taxed; remits the case to the Sheriff-Substitute to ordain the respondents to give delivery to the petitioner of said disposition on payment of the taxed account; to dispose of the question of expenses, and *quoad ultra*, to refuse the prayer of the petition, and decerns.

"*Note.*—It appears from the correspondence in process that the superiors of the subjects in question, belonging to the petitioner, having, in the month of December 1865, called on him to enter, he transmitted his titles to their agents, with a request that a writ of confirmation by the superior should be prepared in his favour. A draft of the writ prepared by the superiors' agents was thereafter received by the petitioner's agent and sent back for execution, on the understanding, he says, that the dues of the entry were to be double of the feu-duty. This, however, was not agreed to; and, on 19th January 1866, the petitioner intimated to the superior that he declined to enter at all, and refused to take up the writ of confirmation, which by this time had been endorsed on his disposition and signed by the superiors. Some further correspondence took place, and in February 1871 the superiors intimated that, as he had never entered, they intended to raise an action of declarator of non-entry against him. The petitioner replied that he was ready to enter the heir of the former vassal, and to pay the dues chargeable under the charter on the entry of heirs.