

curred to the grantees 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 donee, 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 grantor 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, assolized 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) assolized 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-