

No. 16.

FLORA MACKAY, Appellant.—*Robertson—M'Neil.*JAMES GILLESPIE DAVIDSON, and others, Trustees for Mrs. Mackinnon, Respondents.—*Lushington—Rutherford.*

Fraud and Facility—Death-bed.—Held (affirming the judgment of the Court of Session), 1. that although the grantor of a deed of settlement was proved to have been, prior and posterior to the execution of it, addicted to habits of intoxication, yet as there was no evidence (but the reverse) that she was drunk when executed, it was not reducible; and, 2. that a deed executed on 6th December was not liable to be reduced *ex capite lecti*, although the grantor died on the 13th, and had been in bad health, confined to bed, and frequently intoxicated, both before and after the execution of the deed; but the disease of which she died arose posterior to its execution.

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2^D DIVISION.
LORD MEDWYN.

THE late Major Alexander Mackay (of whom Flora Mackay was the successor) raised an action as nearest lawful heir of Mrs. Elizabeth Campbell or Mackinnon, widow of the Rev. John M'Kinnon, concluding for reduction of a deed of settlement executed on the 6th of December 1822, by which she conveyed to the late Hugh James Rollo, W. S., her estates heritable and moveable, in trust for the purpose, *inter alia*, of paying a legacy of £500 to a Mrs. Macleod, another of the same amount to Mr. Rollo himself, and one of £200 to his clerk, and thereafter to convey the residue to her natural grandson. The reason of reduction (besides the ordinary one of style) was, that “the foresaid trust-deed and settlement was impetrated from the said deceased Mrs. Elizabeth Campbell or Mackinnon, without any just, necessary, or onerous cause, on the 6th day of December 1822, while she was on her death-bed, and labouring under the disease of which she died, and in a state of utter incapacity to execute any effectual deed whatever, and that the foresaid deed is to the prejudice of the pursuer as nearest and lawful heir served and retoured as aforesaid.” These allegations were denied by Mr. Rollo, who, pending the process, assumed Davidson and others as trustees, resigned the office, and renounced his legacy, with a view to qualify himself as a witness, but he died before the question as to his admissibility was settled.

A proof of the allegations in the libel having been allowed, evidence was taken in regard to these points: 1. Whether Mrs. Mackinnon was in such a state of incapacity, at the time of

execution, as to render her unable to make an effectual deed? March 25, 1831.
 2. Whether she had duly authorized the deed in question?
 and, 3. Whether she was not on death-bed at the time of its
 execution?

It appeared that she was proprietrix of the estate of Ormaig in Argyleshire; had two sons, John and James, the former of whom predeceased her, leaving a natural son (the residuary disponee); that her other son James, having become embarrassed, took up his abode within the Sanctuary; and that, having fallen into bad health, she came to reside with him, bringing her natural grandson along with her. James having died on the 2d of November 1822, she employed Mr. Rollo (who was her confidential law agent), and his head clerk, to carry the body to be interred in the family burying ground in Argyleshire, which they did.

The proof in relation to her capacity was confined chiefly to the period immediately preceding and following this event. A servant who had been with her from Whitsunday until Martinmas 1822 deponed, “ That Mrs. Mackinnon’s son, Captain Mac-
 “ kinnon Campbell, was then living with her in bad health, and
 “ died while witness was in her service; that, about eight days
 “ before his death, a Mrs. Macleod from Leith came to the
 “ house, and took the whole charge of it till his death, and con-
 “ tinued to take charge of it when the deponent came away.
 “ Depones, that for some weeks before Mrs. Macleod came there,
 “ Mrs. Mackinnon was quite correct in her habits; that on the
 “ Sunday night of her arrival she filled her quite drunk, and
 “ she kept her so all the time the witness was in the house;
 “ that the spirits which she drank were mostly got from
 “ Mr. Taylor by Mrs. Macleod’s order, and the witness some-
 “ times went for them, and sometimes Mrs. Mackinnon’s grand-
 “ child; that she recollects that Mrs. Mackinnon was very much
 “ the worse of drink on the day of Captain Mackinnon’s death;
 “ that she was lying on the side of his bed on that day, and
 “ was so much intoxicated she did not know what had hap-
 “ pened; that Mrs. Mackinnon was very often in her bed after
 “ Mrs. Macleod came, and was not capable of going about from
 “ drink; that after her son’s death she kept her bed more than
 “ formerly; but she sometimes got up during the day, and went
 “ into the room where her son’s corpse lay; that the witness and
 “ Mrs. Macleod slept in the dining-room, and she has often seen

March 25, 1891. “ her prepare spirits, which she took into Mrs. Mackinnon when
 “ she heard her stirring, sometimes before six in the morning ;
 “ that she always gave her more than a glass, sometimes with
 “ water and sometimes plain ; and some mornings she gave her
 “ more before breakfast, but she always gave her at breakfast ;
 “ that Mrs. Mackinnon sometimes took a hard-boiled egg to
 “ breakfast ; that she got spirits occasionally through the fore-
 “ noon, and if Mrs. Macleod happened to go out, she desired
 “ the witness to give her spirits if she asked for them ; that the
 “ deponent has known her drink a bottle and more in a day ;
 “ but she cannot say how much she took every day ; that she
 “ took scarcely any victuals, and she appeared to the witness to
 “ be getting daily weaker ; that the deponent never saw her get
 “ up after her son’s funeral, excepting to get her bed made,
 “ which was not always done ; that the deponent has heard her,
 “ when she got spirits in the night, go through the room
 “ retching ; that she continued to drink spirits in this way till
 “ the deponent left her service ; that she did not seem to care
 “ about eating ; that the deponent has seen her take half a slice
 “ of bread at a time, but never more, and this when Mrs. Macleod
 “ asked her, but she never asked any for herself ; that they had
 “ very seldom broth, but when they had Mrs. Mackinnon took
 “ a little ; that she did not eat as if she had any appetite.”

The servant who succeeded this witness, and remained with Mrs. Mackinnon till her death on the 13th of December, deponed, “ That she never saw Mrs. Mackinnon before she hired
 “ her, nor did she see her betwixt the time she was hired and till
 “ she went home to her service ; that in going to her service she
 “ found Mrs. Mackinnon confined to bed, and she was not then
 “ taking any charge or management of her own house ; that a
 “ Mrs. Janet Stewart or Macleod was taking charge of it, who
 “ then lived in Leith ; and the witness understood from
 “ Mrs. Mackinnon, that the mother of this Mrs. Macleod was a
 “ natural daughter of an uncle of Mrs. Mackinnon ; that
 “ Mrs. Macleod appeared to take the entire management of the
 “ house till Mrs. Mackinnon’s death, and there was no other
 “ person resided in the house but her and the deponent ; that
 “ Mrs. Mackinnon never rose out of her bed after the deponent
 “ went into her service, except on the second day after she went
 “ there, when she expressed a wish to rise, and she got her
 “ clothes put on, and went into the dining-room ; but she was

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“ not there more than five minutes when she called to the depo-
“ nent to take her back to her bed; and with Mrs. Macleod’s
“ assistance, and leaning upon her, she did get back to her bed;
“ and from that period she was constantly confined to bed, except
“ when she was taken up to get her bed made; that when she
“ did get up for this purpose she required assistance, and
“ Mrs. Macleod and the deponent always assisted her, and
“ placed her upon a couch until the bed was made, and she
“ then immediately returned to it, only remaining up till it was
“ made, and they were as expeditious as they could be in making
“ the bed, as Mrs. Mackinnon was in such a state as not to
“ admit of her remaining out of it for any time; that Mrs. Mac-
“ kinnon lived principally upon toddy, taking no sustenance but
“ a cup of tea in the morning, and sometimes in the evening,
“ and for nearly about the first week she took an egg in the
“ morning; that she took no bread, and never took any dinner;
“ that it was generally Mrs. Macleod who gave her the spirits,
“ indeed always, excepting on one or two occasions the witness
“ gave her some when Mrs. Macleod was out, and it was at
“ Mrs. Mackinnon’s desire she did so; that the toddy was com-
“ posed of whisky, hot water, and sugar; that Mrs. Macleod got
“ up frequently in the night to give her this toddy, and the wit-
“ ness has seen her give it at all hours in the morning, from five
“ o’clock till nine; that the deponent and Mrs. Macleod slept
“ together in a different room from Mrs. Mackinnon for the first
“ fortnight, and after that they slept together on the floor in
“ Mrs. Mackinnon’s room; that the deponent had not much
“ opportunity of seeing what effect the drinking had on Mrs. Mac-
“ kinnon, as Mrs. Macleod would not permit her to go near the
“ bed except when she was making it, or to go near her without
“ her being in the room; and the deponent was seldom in the
“ room except when she was mending the fire or making the
“ bed, and that this was the case for the first three weeks, but
“ for the last week she was more frequently in the room; that she
“ knows that Mrs. Mackinnon drank the toddy that Mrs. Mac-
“ leod gave her; and after the deponent came to sleep in the
“ room she saw her drink the toddy furnished her, but during
“ the last five days of her life she hardly took any thing; that
“ Major Mackay came to the house about five days before
“ Mrs. Mackinnon died, and the bed that used to be her son’s
“ was made up for him before he arrived; that the witness, seeing

March 25, 1831. “ that Mrs. Mackinnon took no sustenance but the toddy, did of
“ her own accord, the third day after she went home to her,
“ prepare a little panada, in which she mixed a glass of white
“ wine; and the witness gave it to her, and she took it in pre-
“ sence of Mrs. Macleod; that the next night after this she
“ prepared some gruel for her, which she also took; and the wit-
“ ness having asked her in the morning whether she was the worse
“ for it, she said, Oh no; she was better for it; and in conse-
“ quence of this the witness was preparing some gruel for her the
“ next night, but Mrs. Macleod in a very haughty way said to
“ her, that if Mrs. Mackinnon would not take it from her, she
“ would not take it from a servant; and the witness therefore
“ desisted from making any more for her; that two nights after
“ this there was a lodger of Mrs. Macleod’s of the name of
“ Gordon came to sup with her at Mrs. Mackinnon’s, and
“ while they were together the witness was desired by Mrs. Mac-
“ leod to prepare some gruel for Mrs. Mackinnon, which she
“ did, and carried it into the room to Mrs. Macleod, who took
“ a bottle of spirits and poured a certain quantity into the gruel;
“ and the witness heard Mr. Gordon exclaim, ‘ Good God! do
“ you put all that spirits in?’ and Mrs. Macleod said, that if
“ she did not do so she would have no peace with her; and
“ the witness saw Mrs. Macleod give the gruel thus mixed to
“ Mrs. Mackinnon, and she saw the latter drink it; that
“ Mrs. Mackinnon drank in the course of a day, during the first
“ three weeks, fully a bottle of spirits; and when they ran out of
“ spirits the witness has been sent at ten o’clock at night for a
“ mutchkin, and the first thing she had to do in the morning
“ was to get a farther supply; that during this time Mrs.
“ Mackinnon appeared to be getting daily weaker, and some
“ days she was not able to get out of bed or be shifted; that
“ Mrs. Mackinnon was occasionally complaining of pain, and about
“ three weeks after the deponent was in the house the deponent
“ mentioned to Mrs. Macleod that she was afraid she had some
“ sore, and she proposed to examine her, and endeavour to do
“ something to relieve her; but Mrs. Macleod said she did not
“ know her temper so well as she did, and she would be apt to
“ spit in her face if she proposed any thing of the kind; that the
“ witness, however, took occasion, when she was in the room
“ alone with her, and with her consent examined her, and she
“ found a sore upon her bottom, which was black, and running

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“ a little, and inflamed ; that she put a little fresh butter on it,
 “ till she had an opportunity of procuring some ointment, and
 “ Mrs. Mackinnon thanked her for what she had done, and after
 “ this she shifted her frequently ; that there were but few visitors
 “ came to the house during the time the deponent was there,
 “ and she had instructions from Mrs. Macleod to allow none to
 “ see Mrs. Mackinnon while she was out ; that there was no
 “ medical attendant on Mrs. Mackinnon until about a fortnight
 “ or less before her death ; that Mrs. Macleod told witness that
 “ Mrs. Mackinnon did not wish to have any doctor ; that two or
 “ three days before Major Mackay came, a young man of
 “ Dr. Ross’s called to inquire after Mrs. Mackinnon, as witness
 “ understood, by Dr. Ross’s desire, who had attended her son,
 “ and wished to know how she was after his death ; that the de-
 “ ponent told him of the state in which Mrs. Mackinnon was,
 “ and that she was sorry she could not admit him into the room
 “ where she was, as Mrs. Macleod was out, and had charged her
 “ against letting any body in ; that the young man said there was
 “ no matter, as he would let Dr. Ross know she was ill ; that
 “ Dr. Ross accordingly came the next day or the day after ; that
 “ Mrs. Macleod was then out, but upon his mentioning who he
 “ was, the deponent told him, that although she had been pro-
 “ hibited from letting any body in to Mrs. Mackinnon, she
 “ would let him see her ; that about this time, or before it, she
 “ is not quite certain which, Mr. Rollo had called, and said to
 “ the deponent that he thought Mrs. Mackinnon should have a
 “ doctor ; that she is sure this was after the will was signed, and
 “ that Mr. Rollo was in the use of calling frequently before the
 “ will was signed ; that on these occasions Mr. Rollo saw both
 “ Mrs. Mackinnon and Mrs. Macleod ; that she knew Mr. Rollo
 “ was sent for on one occasion by Mrs. Mackinnon after Major
 “ Mackay came, but she does not know whether he was always
 “ sent for ; that Mrs. Mackinnon was desirous to get rid of
 “ Mrs. Macleod ; that she told the deponent she was perfectly
 “ happy with her, and that she had requested Mr. Rollo to
 “ desire Mrs. Macleod to go home, and the deponent also heard
 “ Mrs Mackinnon herself say to Mrs. Macleod, ‘ Go home,
 “ Jessy, and mind your own house ;’ that Mrs. Macleod after-
 “ wards said to the deponent, that if she did go home, it would
 “ not be to the care of a servant she would leave her dear

March 25, 1831. “ aunt ; that Mrs. Mackinnon always appeared displeased when
“ Mrs. Macleod called her her aunt ; that the deponent never saw
“ Mrs. Macleod drink, excepting perhaps a glass of wine ; that
“ the spirits which were got into the house were not consumed
“ by visitors ; that Dr. Ross’s attendance began after the will
“ was signed, as she thinks, and she is sure it was a full fortnight
“ after she entered to her service that the will was signed, and she
“ thinks not more than a fortnight ; that she recollects several
“ people coming about the executing the will, viz. Mr. Rollo,
“ Mr. Lebrun, and Bailie Gordon, and she was informed of the
“ purpose of their coming by Mrs. Macleod ; that this Bailie
“ Gordon was a wright and undertaker in the Canongate, and had
“ made the coffin for Mrs. Mackinnon’s son, and afterwards made
“ her own ; that it was in the afternoon the will was executed, but
“ before day light had gone ; that Mrs. Mackinnon was, as usual,
“ confined to her bed during that day, but had got it made
“ before they came ; that the deponent observed Mrs. Macleod
“ frequently giving Mrs. Mackinnon toddy in the morning and
“ forenoon of that day, and that rather more than usual ; that
“ the day before the witness remarked, it was dreadful to be
“ giving her so much spirits ; that Mrs. Macleod answered, it
“ was all her own ; that Mrs. Mackinnon latterly could not do
“ without spirits, and Mrs. Macleod gave her them whenever
“ she called for them, which she did frequently ; that the witness
“ saw Mrs. Macleod go into the room with the gentlemen at the
“ time of executing the will, and the deponent saw her standing
“ within the door at the foot of the bed ; that the kitchen-door
“ was on one side of the passage, and the bed-room opposite ;
“ that, previous to the gentlemen coming, Mrs. Macleod told
“ the witness that they were to come that day, for the purpose
“ of making out the will ; that the witness thinks they were nearly
“ about an hour in the room upon this occasion ; that she thinks
“ that there were one or two gentlemen more present besides
“ Mr. Rollo and Mr. Lebrun ; that a day or two after this
“ Mrs. Macleod told the deponent that Mrs. Mackinnon was to
“ go to her house in Leith to reside ; and she gave as a reason
“ for this, that the will would not be worth a farthing unless she
“ went, and she desired the witness to get ready to go with
“ her ; but the witness said that she had come to serve Mrs. Mac-
“ kinnon in her own house, and would not go to Mrs. Macleod’s ;

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“ and Mrs. Macleod said, it would be all the witness’s fault if the
 “ will was not good ; that upon her going in after this to Mrs.
 “ Mackinnon’s room, she repeated the same thing to her ; and
 “ Mrs. Mackinnon took hold of her hand, and said, ‘ No, Betty,
 “ you shall bide with me in my own house ;’ that Mrs. Macleod
 “ had all her things prepared, and put out to the fire to air,
 “ and Mrs. Macleod told the witness they were to go round by
 “ the Cross on their way to Leith, and she understood they
 “ were to go in a carriage, but there was no farther attempt
 “ made to remove her ; that the witness was told by Mrs. Mac-
 “ leod that she had put away one of her lodgers to make
 “ room for Mrs. Mackinnon ; that the night the will was
 “ signed Mrs. Macleod went down to Leith, and upon her
 “ return she informed the witness she had been telling her
 “ lodgers, that although she did neglect them, she would be
 “ better of Mrs. Mackinnon’s will, and that, failing Mrs. Mac-
 “ kinnon’s grandson, the estate of Ormaig was to go to her
 “ (Mrs. Macleod’s) son, and that she was to have also £500,
 “ Mrs. Mackinnon’s body clothes and her jewels ; that Mrs. Mac-
 “ kinnon never was out of her bed, except to get it made, after
 “ the will was signed, and she continued drinking the quan-
 “ tities of spirits before described until within five days of her
 “ death ; that Mrs. Mackinnon never spoke to the deponent
 “ while making her bed, and Mrs. Macleod appeared always
 “ anxious to prevent her speaking to the witness, and would
 “ come flying into the room whenever the witness went in ; that
 “ the room had a strong smell of liquor, and Mrs. Mackinnon
 “ also smelt strong of it. Interrogated, whether she can say,
 “ upon her oath, that she appeared to her to be generally in a
 “ state of intoxication ? depones, that she can and does say,
 “ upon her oath, that she was always in a kind of stupor, which
 “ the witness imputed to intoxication. Interrogated, whether she
 “ appeared to be in that state on the day the will was signed ?
 “ depones, that she had taken the same quantity on that day, what-
 “ ever more, and was in the same kind of way that day as she
 “ always was. From the time the deponent entered her service,
 “ she got no directions regarding the house from Mrs. Mackin-
 “ non, as Mrs. Macleod took the charge of every thing. Inter-
 “ rogated, whether Mrs. Mackinnon was able to carry on
 “ conversation with any body who might visit her ? depones,
 “ that there were very few people allowed to see her, and

March 25, 1831. “ Mrs. Macleod was anxious to prevent their doing so ; that
 “ she recollects Mr. Colin Campbell, an exciseman, who was
 “ well acquainted with Mrs. Mackinnon, calling for her, and
 “ Mrs. Macleod said she would tell Mrs. Mackinnon he was
 “ there, and she went away apparently for that purpose ; and
 “ when she came back she said, that Mrs. Mackinnon could
 “ not take the trouble to see him.”

The next witness, Dr. Ross, physician in Edinburgh, adduced by the pursuer (appellant), deponed, “ That he attended the
 “ son of Mrs. Mackinnon about two years ago, who was then
 “ living with his mother in the Abbey ; that this was during his
 “ last illness, and he had attended him for several months ; that
 “ he died about the 2d day of November 1822 ; that, in the
 “ course of his attendance on the son, the deponent frequently
 “ saw Mrs. Mackinnon in a state of intoxication, and, in the
 “ deponent’s opinion, this habit was carried to a great and
 “ disgusting extent ; and she addicted herself, and continued
 “ to drink, during the last days of her son’s life ; that he saw the
 “ son about two hours before his death, when he was moribun-
 “ dus, and the witness considered him in extremity ; that on this
 “ occasion the mother was lying on the bed beside her son, and,
 “ to the deponent’s best belief, in a state of intoxication, and
 “ apparently unconscious of any thing, and he has seen her
 “ repeatedly in the same state of intoxication before her son’s
 “ death ; but except when under the immediate influence of
 “ drink, the witness was not particularly struck with the woman’s
 “ appearance ; that the deponent did not see her again for more
 “ than a month after the son’s death ; that he sent one of his
 “ young men to inquire for her, (as is the deponent’s common
 “ practice in families where he attends as medical adviser ;) that
 “ this was on the 7th day of December, the Saturday pre-
 “ ceding her death ; and, in consequence of the information he
 “ got from his young man, he called himself upon the 9th ; that
 “ he has no recollection of seeing Major Mackay on that day ;
 “ but the appearance of the house and habits of the family were
 “ so disgusting to him, that he took little notice of who were
 “ present, unless forced on his notice. Depones, that he saw
 “ Mrs. Mackinnon on the 9th of December, at which time she
 “ appeared to him a feeble exhausted old woman, with no formed
 “ complaint, to the best of his knowledge, except such irritation
 “ and weakness of stomach as he conceived to arise from the

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“ habits of the party. He therefore prescribed, upon that occa-
 “ sion, a simple stomachic mixture, from which on the day
 “ following his apprentice reported that she had received benefit.
 “ He did not see Mrs. Mackinnon again till the 11th, when, in
 “ his opinion, a material change had occurred in the aspect of
 “ the case, the symptoms then present indicating a disease of the
 “ lungs, for which a blister and draught were recommended; on
 “ the Thursday the symptoms were aggravated; he then consi-
 “ dered the case hopeless, which opinion was confirmed in the
 “ progress of the day. A slight remission occurred on the Friday
 “ morning, fallacious, however, as the party died before night.
 “ Being interrogated, whether he considers the disease in the
 “ lungs to have been occasioned by, or to have arisen from, the
 “ irritability of stomach which he witnessed upon the Monday?
 “ depones, that in his opinion there was no necessary connection;
 “ and he conceives none between the state of the stomach on the
 “ Monday and the state of the lungs on the Wednesday. Being
 “ interrogated, whether, in his opinion, the habits of intoxica-
 “ tion of the patient occasioned or contributed to the disease in
 “ the lungs to which he ascribes her death? depones, that in his
 “ opinion it certainly did contribute to give a disposition to such
 “ an affection of the lungs; that the deponent considers the
 “ disease of which the party died a frequent consequence of in-
 “ temperate habits, especially in subjects in advanced life; but
 “ that, in his opinion, the state in which he found Mrs. Mackin-
 “ non on the Monday did not lead him to the conclusion, that
 “ the disease under which she laboured on the Wednesday was
 “ likely to occur, nor did he consider her life in any immediate
 “ jeopardy on that day; and he has no reason to suppose that a
 “ continuance of those habits would have led to a speedy termi-
 “ nation of her life; but that event could not have been very
 “ distant, and a continuance in those habits in a few months
 “ must have led to a fatal event by exhaustion, or from the frame
 “ being worn out by debility; that, from the state of the patient,
 “ the remedy of bleeding appeared to be inadmissible; that from
 “ the first the disease assumed a fatal character, and when that
 “ is the case it generally terminates in about the same time as
 “ happened here; that the species of inflammation of which
 “ Mrs. Mackinnon died is of a different character from legiti-
 “ mate inflammation, and is peculiar to debilitated habits, and is
 “ commonly called the Bastard Peripneumonia Notha—a dis-

March 25, 1831. “ ease especially occurring in persons of advanced age, or in
“ debilitated habits, from whatever cause, of which intemperance
“ is a very common one; the disease is more likely to occur at
“ an earlier period of life, where those causes have been in
“ force, than in persons of common habits or ordinary constitu-
“ tion. Interrogated for the defender, depones, That he had
“ attended the son for eighteen months previous to his death,
“ and that during all that time Mrs. Mackinnon and her son
“ lived together, to the best of his belief. Depones, that during
“ the progress of the son’s illness Mrs. Mackinnon expressed a
“ natural anxiety about him when she was in a condition to do
“ so, but the witness saw her often in a state that she was un-
“ able to exhibit any feeling. Depones, that when he called on
“ the Monday, he has no recollection of the servant having told
“ him he could not be admitted, or that she had orders not to
“ admit him, though the fact might have been so, but he would
“ have disregarded such prohibition. Depones, that he will
“ furnish the commissioner with a copy of the prescription he
“ used for Mrs. Mackinnon on the Monday. Depones, that he
“ certainly thinks, if Mrs. Mackinnon had been affected with the
“ disease of the lungs of which she died when he saw her on the
“ Monday, he would have observed it. Depones, that Mrs. Mac-
“ kinnon, when he visited her on the Monday, seemed capable of
“ understanding, and did answer the questions he put to her.
“ Depones, that he has a perfect recollection of some person, as
“ he understood from Mr. Rollo, inquiring at the witness, who
“ was at that time at Baron Hume’s, whether he thought
“ Mrs. Mackinnon was in a state of mind to be capable of
“ altering her settlements? That this was on the Thursday night
“ before her death; and the deponent’s answer was, that, from
“ the state he had left her in the forenoon, he certainly did not
“ think she was competent to do so; that, to the best of his
“ recollection, he had some conversation on the same subject
“ that same evening, after seeing the woman, with Mr. Rollo,
“ and that he remained of the same opinion, but he is not per-
“ fectly sure; but he believes he gave this opinion to Mr. Rollo
“ in Mrs. Mackinnon’s house; that he cannot charge his me-
“ mory or speak certainly as to his having had a conversation
“ with Mr. Rollo on the Friday on the same subject; that the
“ witness, seeing a remission of the symptoms on the Friday,
“ though but a feeble one, had resolved to take the assistance of

“ Dr. Abercrombie about her capability ; but before Dr. Aber- March 25, 1831.
 “ crombie went there, which was in the evening, she had
 “ died ; that his belief is, that his proceedings on the Friday
 “ were in concurrence with Mr. Rollo, but he cannot say so
 “ with certainty.” The prescription referred to was the follow-
 ing: “ R. Spt. ammoniæ aromat. 2 drachms.—Tinct. gentianæ
 “ comp. 12 drachms.—Aquæ 8 oz.—M.—Sig. cochleare mag-
 “ num ter in die sumendum.”

One of the subscribing witnesses deponed, “ That the deed was
 “ executed while she was sitting in bed, and that it was not read
 “ over to her, at least during the time he was present.” The other
 subscribing witness, who was one of Mr. Rollo’s clerks, deponed,
 “ That they were sent for to go in to Mrs. Mackinnon’s bed-
 “ room, and he thinks it was Mrs. Macleod who came for them ;
 “ that he thinks they found Mr. Rollo in the bed-room ; that
 “ Mrs. Mackinnon was sitting up in bed, not supported by any
 “ person, and appeared to have a flannel petticoat about her
 “ shoulders ; that he observed several papers lying on the table ;
 “ that he heard Mr. Rollo ask her if she had heard the deed
 “ read over, and she answered that she had ; that it is his im-
 “ pression that he also asked her if it was her last deed, and he
 “ thinks she said it was ; but he cannot swear as to this question
 “ or answer ; that he thinks Mr. Rollo then had the deed in
 “ his hands, and the deponent saw Mrs. Mackinnon sign it ; that
 “ she was not assisted in signing it ; that he remembers her
 “ taking a watch from the side of the bed to affix a seal to the
 “ deed ; that he thinks it was a wafer seal ; that Mrs. Mackinnon
 “ appeared at this time to be sober.” In this he was confirmed
 by another clerk of Mr. Rollo who had been in attendance.
 Mrs. Mackinnon was about sixty-seven years of age.

After the proof was closed the Lord Ordinary reported the
 cause to the Court on Cases, and on the 14th of June 1827 their
 Lordships “ repelled the reasons of reduction, in so far as these
 “ are maintained on the alleged incapacity of Elizabeth Mackin-
 “ non the grantor at the date of the deed under challenge ;” but
 appointed counsel to be heard as to the objection of death-bed.
 Thereafter, on the 17th of January 1828, their Lordships also
 repelled this reason of reduction, and assoilzied the defenders,
 found them entitled to the expenses of the discussion relative to
 the incapacity, but not in regard to the plea of death-bed.*

March 25, 1831. Mackay appealed.

Appellant.—1. The alleged instructions for the preparation of the deed were confessedly not given till after the death of Mrs. Mackinnon's son on the 2d November 1822; but it is proved, that from that period till within a day or two of her death she was kept in a continued state of intoxication. This was done by a person to whom a large provision was made by the deed; and that deed was prepared and carried into execution by a law agent who was nominated sole trustee, and to whom and to his clerk large legacies were bequeathed. These facts, together with the exclusion of her heir-at-law (with whom she was not on any hostile terms), and the conveyance to a natural child of a son, demonstrate that the deed was not truly the deed of Mrs. Mackinnon.

2. In judging of the question of death-bed, the state of her mind, arising from the circumstances already mentioned, ought not (as was done by the Court below) to be thrown out of view, and the case judged of as if no such circumstances existed. The very object of the law of death-bed is to protect persons in her position from the effects of undue influence; and the general rule of law is, that a deed is reducible *ex capite lecti* where it can be shown that the grantor was ill at the date of the deed, did not survive its execution for sixty days, and never so far convalesced as to be able to go to church or market unsupported. In the present case all the essentials, both of this rule, and all the grounds of expediency on which that rule rests, concur to justify a reduction of the deed. It is proved that the disease of which Mrs. Mackinnon died was a sequel of the state in which she was at the time when she executed the deed, and she died within a few days thereafter, without ever having left her bed. It is also established, that she was precisely in that situation to which the rule is most beneficially applied. She was withdrawn from the management of her affairs and from public view, and subjected to the influence of self-interested persons.

*Respondents.**—1. The deed being *ex facie* perfectly valid and unexceptionable, it is incumbent on the appellant, before she can succeed in setting it aside, to establish, by the clearest and most conclusive evidence, sufficient legal grounds of reduction.

* This was the argument raised in the respondents' case, laid before the House of Lords. They were not, however, on the hearing, required to enter upon it.

It is not pretended that Mrs. Mackinnon was naturally fatuous or imbecile, nor that she had been reduced by any cause, previous to her death, to a state of permanent mental imbecility; but the allegation merely is, that she was much addicted to spirits, and that this had an effect on her corporeal and mental powers; but a habit of intoxication is not a relevant ground of reduction, unless it be alleged that, at the time of executing the deed, the party was in a state of absolute drunkenness, so as to be deprived of the exercise of reason; but, as observed by Mr. Erskine, “a lesser degree of drunkenness, which only darkens reason, has not the effect of annulling.” It is proved, however, by the subscribing witnesses and others, that at the time of executing the deed she was quite sober, and understood perfectly what she was about. There is no averment of fraud in the summons, and consequently all the evidence in relation to undue influence is incompetent and irrelevant. The sole question is, Whether, at the date of executing the deed, she was of sufficient mental capacity to do so; and as the appellant has not proved that she was not so, effect must be given to the deed.

2. The appellant has not only not proved that Mrs. Mackinnon was on death-bed when she granted the deed, but has established that she was not so. To constitute a death-bed deed, the grantor must have laboured under the distemper of which he afterwards died immediately before signing it. The deed in question was executed on the 6th of December; and the appellant's witness, Dr. Ross, deponed, that on the 9th “she had no formed complaint, except such irritation and weakness of stomach as he conceived to arise from the habits of the party; and he therefore prescribed upon that occasion a simple stomachic mixture, from which she received benefit; that he did not see her till the 11th, when, in his opinion, a material change had occurred in the aspect of the case, the symptoms then present indicating a disease of the lungs;” and that in his opinion “there was no necessary connection, and he conceives none, between the state of the stomach on the Monday and the state of the lungs on the Wednesday.” The disease of which she died, having thus not come into existence till posterior to the execution of the deed, cannot afford any ground of reduction; and the circumstance of the previous habits predisposing to that or any other disease is not relevant, as was decided in the case of Paterson's trustees.

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March 25, 1831. LORD CHANCELLOR.—My Lords, in this case I submit to your Lordships that there is no occasion for the learned counsel on the part of the respondents to proceed, as, on the facts and the law, there can be no doubt that the decision of the Court below must be affirmed. I say this with great respect for the authority of my Lord Glenlee, who differed with the learned Judges on one point; but I must say, that he takes a view of the law extremely different from that which I have always considered to be laid down by the most approved text writers. On the first question I think there is no doubt whatever. The counsel for the appellant have discharged their duty to this poor person, and stated the case in the only way in which it could be stated with any chance of success, by abandoning the first point. They had no ground to stand on after the evidence of the two professional men, who deposed that the lady knew perfectly well what she was about; that she made an objection to taking another person's seal; that she motioned to take her own, and accordingly did seal the deed with her own wafer-seal. No will could ever stand if this instrument were set aside on the ground of general irregularity of habits previous to the execution of it. The only question is, whether it can be reduced *ex capite lecti*, and can be brought within the rules on this head of the Scotch law, which protects a party on his death-bed from the effects of disease—from the efforts of bystanders—on a mind enfeebled by disease, or labouring under great weakness and general infirmity. We have always understood the law of death-bed to be this,—that if a party does not go out unsupported to church or market, or survive sixty days the execution of a deed, the deed is reducible *ex capite lecti*, at the instance of the heir-at-law, who is ousted of his succession by its operation, or of the parties who have a right to stand in the shoes of the heir-at-law, with this qualification, that the maker of the deed must at the time of execution have been ill of the sickness of which he died. It is of great importance that so material a part of the law of Scotland— one so wholesome and so judicious—should be well understood, to prevent mistakes and consequent litigation. I should have been satisfied with merely moving your Lordships to affirm this judgment, without going into the case, had it not been for my Lord Glenlee's doubts; but, in the first place, there is the high authority of Lord Stair, who is plainly of opinion that you must connect the disease with the death, otherwise it is not death-bed. “ If sickness contracted be presumed or proved, whether there
“ be necessity to prove the continuance of the sickness till death,
“ or that the defunct died from the sickness, or if the sickness once
“ contracted be presumed to continue, unless convalescence and
“ recovery of health be proved, it is commonly held, that if it be
“ proved sickness was contracted, and that death followed, probatis

“*extremis præsumuntur media*; and sickness once being proved is
 “presumed to continue, otherwise it were scarce possible, by a posi-
 “tive probation, to instruct the continuance of the sickness till death;
 “and this is only, *præsumptio juris*, laying the burthen of probation
 “upon the party that alleges convalescence.” That the convalescence
 must be such as is recognized by the cases appears clear; for about
 the time of my Lord Stair’s book there were two old decisions on
 the express ground I am now taking, and which the majority of the
 Court below took in this case. Consequently, we may assume that
 Lord Stair had the law as laid down by these decisions more imme-
 diately in view when he holds that convalescence means, not a total
 convalescence of the disease, whatever it was, but such a conva-
 lescence as disconnects the effect of his death from the disease.
 If a party is labouring under the disease A. at the time of exe-
 cuting a deed, and if the disease is such as he shall within six days
 be convalescent, you disconnect the disease A. with the death,
 the death being occasioned by the disease B. Then observe what
 Erskine says: “It is sufficient to constitute a death-bed deed, that
 “the granter laboured under the distemper of which he afterwards
 “died immediately before signing it.” These writers, then, lay
 down the doctrine very clearly; but neither their statement nor the
 direction of the learned Lord Chief Commissioner, in the case of
Paterson’s Trustees v. Johnson, appear to have been sufficiently at-
 tended to by the eminent judge I have alluded to. There the disease
 was of the prostate gland, which in an old man, I believe in most
 men, is incurable, and must have terminated fatally. If no other
 had supervened he might have lived for some time; but acciden-
 tally he goes out and commits an act of irregularity, as it is called,
 but which one can hardly give so harsh a name to, that of eating
 fried eggs for his supper, and drinking a little brandy and water—
 certainly not an act of intemperance, but of imprudence, in a vale-
 tudinarian. A bilious attack followed. No doubt there was a mate-
 rial difference between the two cases, inasmuch as in the one you may
 see connexion between a very debilitated habit and the intemper-
 ance; but you cannot say there was any connexion between the
 disease of a prostate gland and the imprudence which the man was
 guilty of. But we find that the learned judge, in dealing with that
 case, lays down the law precisely as it is given by Lord Stair and
 by Erskine. “The jury will attend particularly to Dr. Gregory’s
 “evidence. Upon a very particular and correct statement of the
 “evidence given by the other medical men, Dr. Gregory has been
 “asked, whether he considered the death to arise from the irregu-
 “larity or from the previous disorder? And he has given it de-
 “cidedly as his opinion that the death arose from the irregularity,
 “and not from the previous disorder. That coincides with the

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March 25, 1831. “ opinion of two of the witnesses, and it is for you to consider
 “ whether there be any testimony to affect that evidence ;
 “ not, then the law of death-bed does not apply, as it is necessary,
 “ to bring the case within that law, that the person should die of the
 “ disease of which he was ill at the time he executed the deed ; but
 “ if he died of another disease, though within that time, it has no
 “ effect on the deed.” If a man has a disease on him which continues till the time of his death, but dies by an accident, or of a different disease, the deed executed under the first disease will not be reducible *ex capite lecti*. A new trial was moved for in the Court of Session, showing that there was no disposition to give up the question—no compromise—and that the party had the means of carrying the proceeding further ; but what I have just cited was not even alleged as a misdirection of the learned judge. This seems to show that the sense of the profession in Scotland is with the law as laid down by the Chief Commissioner and Lord Pitmilley in *Paterson v. Johnson*, and they appear not to differ with what was held in the case of *Primrose*. There the surgeon who attended the old man saw him a week before his death ; and he proved in evidence, that, in his opinion, the iliac passion threw him into a lingering distemper, whereof he at last died. You need not inquire how long the disease lasted, or how slow may have been its progress. It may have crawled on from day to day with the slowness of a chronic disease. Still if it was in the party at the time he executed the deed, and continued without the supervention of any other disease, or the occurrence of any fatal accident, until the time of his death, nothing but the sixty days, or going to church or market unsupported, can get rid of the objection *ex capite lecti*. This case of *Primrose*, so far from being an authority against the law as laid down by the judges, is a precise authority in support of it.

I shall not enter into the facts of the present case ; but Ross’s evidence gives reason to believe that a new disease supervened. I don’t say there might not be a predisposition—that is given up. A person may be predisposed to a disease half his lifetime, or he may have an organic affection, which may in the end terminate in death. We have had cases on the subject in the Courts of law as to policies of insurance, where this discussion is frequently raised ; but if, in consequence of the organic mischief, a person takes another disease, which, without the organic mischief, he would in all probability never have been stricken with—if there is any affection of the liver, the heart, or the bowels, which predisposes him, upon any accidental circumstance, to take a disease, which, but for the peculiarity in his organic structure, he would not have taken, you cannot say that the mere predisposition arising from the habit of the man’s body, or that the organic disease, was that of which he died. The disease is one

thing, the predisposition is another. Drunkenness predisposes to many things, such as apoplexy and paralysis, and no doubt, among others, to bastard peripneumonia. It predisposes to all diseases. The predisposition is the remote cause; the accident is the proximate cause; the disease is one thing, and predisposition is another. If I see in the evidence of Dr. Ross that there was nothing but the predisposition which existed from drunken habits, then it brings the case within the law, as I have ventured to lay it down. What is the fact? On the 6th the deed is executed. On the 9th he sees her; and he is so little struck with her being in a dangerous state of bastard peripneumonia, or any other mortal malady, that he prescribes for her, what I have no doubt was a usual prescription, a draught, to give her an appetite, or what is commonly called a stomachic tincture. He gives her two drachms of aromatic spirit of antimony; then he gives her twelve drachms of tincture of gentian, and eight ounces of water; and she is to take this three times a-day, in order to repair her injured stomach. On the 11th he returns (five days after the execution of the deed), and he finds that things are totally changed. She is much worse then, having been seized with a violent affection of the lungs. He would have bled her (he did blister her), had she not been in so exhausted a state that he could not venture to have recourse to the lancet. He tells you in distinct terms that he considered this to be a new disease supervening even after the 9th—much more after the 6th. Then he says she died in about the same number of days he had expected. This is very material, as it distinguishes the disease from the habit of body, which might have predisposed to it. It certainly brings this case within the principle of the authorities I have referred to. On these grounds, I move your Lordships that you should, in this case, without costs, affirm the judgment of the Court below.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellant's Authorities. — Reg. Mag. II. 18. 7 et 9; Craig, De Feudis, Lib. 2, Dieg. 1, sec. 28; Dirleton's Doubts v. Legitima Liberatorum, p. 112; Act of Sed., 29th February 1692; Stair, III. 4. 28; IV. 20, 41; Mackenzie III. 8. in fin.; Mackenzie's Works, I. p. 47; Bank. III. 4. 32; Ersk. III. 8. 95, 96; Bell's Com. I. p. 84; Crawford v. Coutts; 2 Bligh's Rep. 660; Tait on Evidence, p. 435; London Medical Dic. V. Peripneumonia Notha; Urquharts v. Urquharts, 24th June 1742 (Elchies, vo. Death-bed, No. 14.); Primrose v. Primrose, 27th July 1756 (3300); Crawford v. Kincaid, 27th July 1782 (Hailes, II. p. 907); Hiddleston v. Goldie, 12th April 1819 (Murray's Rep. II. p. 115).

Respondent's Authorities. — Ersk. III. 1. 16; Stair, III. 4. 28; IV. 20, 44; III. 8, 96; Paterson's Trustees v. Johnston, 24th June 1816 (Murray's Reports, Vol. I. p. 71); Hiddleston v. Goldie, supra.

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