Edward Lyson & atty Sol Reported June 21. 1770. Walter Leater (a very special case) Reduction authe Reporter.] Whether a brideter of the approved INFORMATION heir prieludid from setting the Deed adide by a Ratitudion executed by

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the heir a a contain contetion but WALTER SCOTT Writer to the Signet, Trustee appointed by the deceased Thomas Cockburn delined Writer in Edinburgh, de a chos

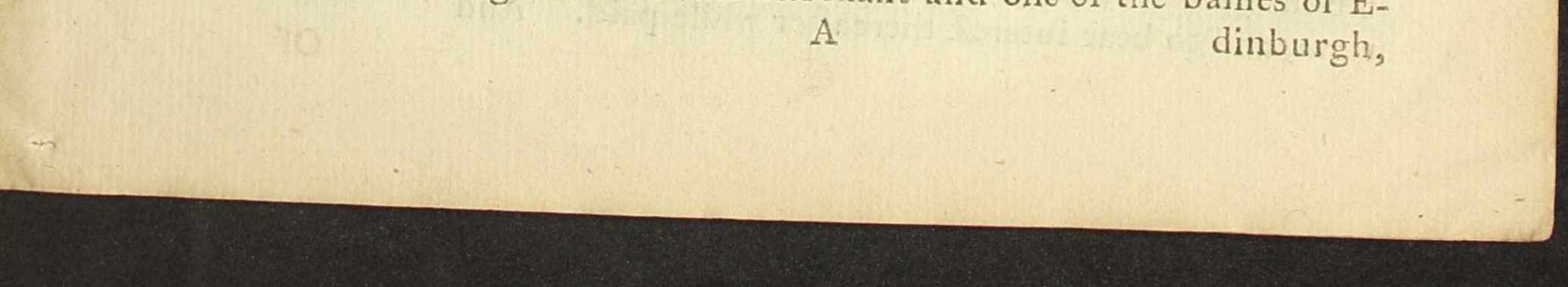
AGAINST

EDWARD TYSON of London, Merchant, and his Attorney, Cheasen

THE faid Thomas Cockburn, by great care and diligence, ac-quired a pretty confiderable fortune and having 1.1 quired a pretty confiderable fortune, and having had no child of his own, he appears to have formed a refolution to beflow the greatest part thereof upon John Simpson his nephew. -

John Simpfon was educated in the mercantile bufinefs, and after having spent some years in this country, he went to London, and practifed for fome time as a clerk in a compting-house there, under the inspection of Sir James Cockburn of Langtoun.

Sir James Cockburn and Mr Simpfon's other friends, being of opinion that he might make an advantageous settlement in America, they prevailed upon his uncle Mr Cockburn, to afford him a very handsome stock as a foundation for his entering into businefs; and with this capital he feveral years ago fet out for South Carolina, where he entered into a copartnery with John Dunbar, fon to George Dunbar late merchant and one of the bailies of E-

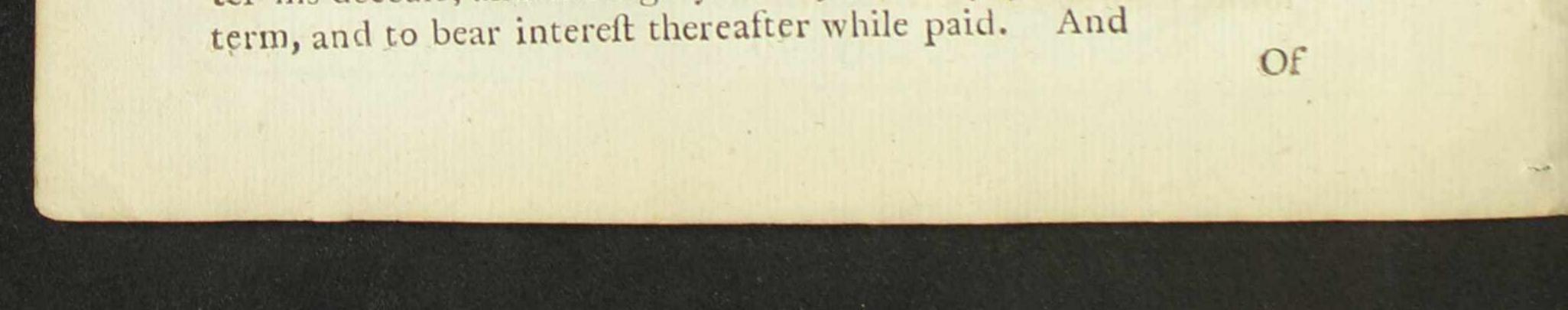


dinburgh, and Thomas Young; and it is to be obferved, that Mr Cockburn took fecurities from John Simpfon his nephew, for the money which he fo advanced him, and which till lately remained in the poffeffion of Sir James Cockburn and Mr Henry Douglas merchant in London, the particular friends of Mr Simpfon, and the gentlemen who by Mr Cockburn's orders advanced the money.

Mr Cockburn, 14th March 1758, execute a general difpofition, whereby he difponed to the faid John Simpfon his whole effate heretable and moveable, that fhould pertain to him at his death, and he thereby nominate him his fole executor, but with the burden of his debts, and with the burden of certain provifions and legacies contained in the fundry deeds to be after-mentioned, in favours of Elifabeth Campbell his fpoufe, Agnes Cockburn his fifter, and Elifabeth and Agues Simpfons his nieces, the mother and fifters of John Simpfon.

Of the same date with this disposition, a mutual deed was exe-

cuted betwixt Mr Cockburn and Elifabeth Campbell his spouse. mentioning that there had been no contract of marriage between them, whereby Mr Cockburn obliged himfelf and his heirs, in the event of her furviving him, to pay to her an annuity of L. 50 Sterling yearly, during her life, beginning the first term's payment thereof at the first term of Whitfunday or Martinmas, after his decease; and he further thereby obliged himself in the event forefaid, to pay to her at the first term of Whitfunday or Martinmas after his decease, a legacy of L. 50 Sterling, with annualrent, from the term of payment, during the not payment of the fame; and he also thereby bequeathed to her his whole household furniture, filver plate, and heirship, moveables included, free of all debts and incumbrances; and upon the other hand, the faid Elifabeth Campbell accepts of these provisions in full of all which fhe or her nearest of kin could claim by and through the decease of her faid hufband, any manner of way; and by a codicil fubjoined to the faid deed, bearing date 19th April 1763, Mr Cockburn makes an addition of L. 20 to his wife's annuity, and gives her a further legacy of L. 50 Sterling, the faid additional annuity to be payable at the first term of Whitfunday or Martinmas after his decease, and the legacy of L. 50 to be payable at the same



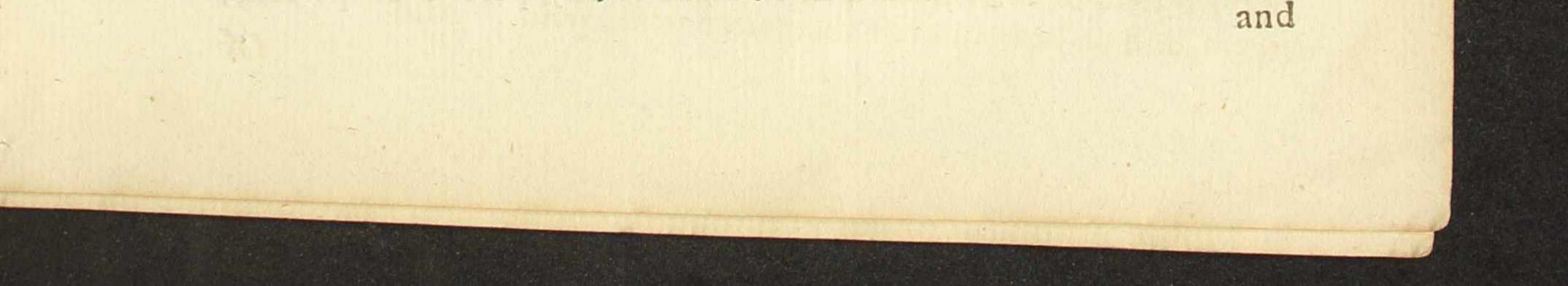
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Of date likeways the 14th March 1758, Mr Cockburn execute a bond in favours of Agnes Cockburn his fifter, and Elifabeth and Agnes Simpfons his two nieces, whereby, in the event of his deceafe, he fettled an annuity of L. 20 Sterling, yearly, upon his fifter, with a provision of L. 200 Sterling to each of his two nieces, payable at the first term of Whitfunday or Martinmas after his deceafe.

Agnes Cockburn predeceased her brother, and the faid Elisabeth and Agnes Simpsons having married, Mr Cockburn, in the contracts of marriage with their respective husbands, became bound to pay L. 200 to each of them, and the last mentioned bond appears to have been thereupon cancelled.

At the time of executing these deeds, and for some time thereafter, Mr Cockburn's estate confisted altogether of moveable funds. But,

About this period he purchased the lands of Grueldikes in the June 1764shire of Berwick, of about L. 60 Sterling of yearly rent, from Sir James Cockburn, Bart. and about the end of that year he acquired right to a house in Edinburgh. The rights to the lands ftand devifed to him and his heirs whatfomever, and the rights to the house were taken to him and the faid Elisabeth Campbell his spouse, in conjunct fee and liferent, for her liferent use allenarly, and him and his heirs in fee. About the end of the 1763, Mr Cockburn, at that time in the feventy-second year of his age, fell ill, and continuedin a bad state of health ever after; but as his complaints were intirely bodily, without any feverish diforder, he possessed the full exercise of all his faculties almost to the last hour of his life. When Mr Cockburn laboured under this indifpolition, he wrote once, if not oftner, to John Simpson his nephew, and Sir James Cockburn likewife wrote at his defire; the import of which letters was, to know the true state of Mr Simpson's affairs, which Mr Cockburn, from Mr Simpson's long filence, apprehended to be in disorder. Mr Cockburn having, with great impatience, expected answers from his nephew to these letters, but none having come, he, about the 1st November 1765, sent for the defender, and having fignified to him a defire to make a fettlement, he then proceeded to inform him very minutely of the fituation of his affairs,



and of the deeds above mentioned, which he had formerly executed. He likeways told the defender, that he was apprehenfive his nephew John Simpfon had not been very fuccefsful in bufinefs; and that he had been very neglectful of him, in never communicating the true flate of his affairs, and as in the event of his deceafe he or his creditors might foon diffipate his fmall fortune, he was therefore refolved to execute fuch deeds as might be the moft proper for preventing that event; and propofed for this purpofe to convey his whole means and effate to truftees; and having requefted of the defender to accept of the truft, he then proceeded to give him his directions with regard to the making out of faid truft-deed: And accordingly, the defender did make a feroll of a truft difpofition, which was revifed by Mr Cockburn, and having been thereafter extended, the fame was figued by him the 4th November 1765.

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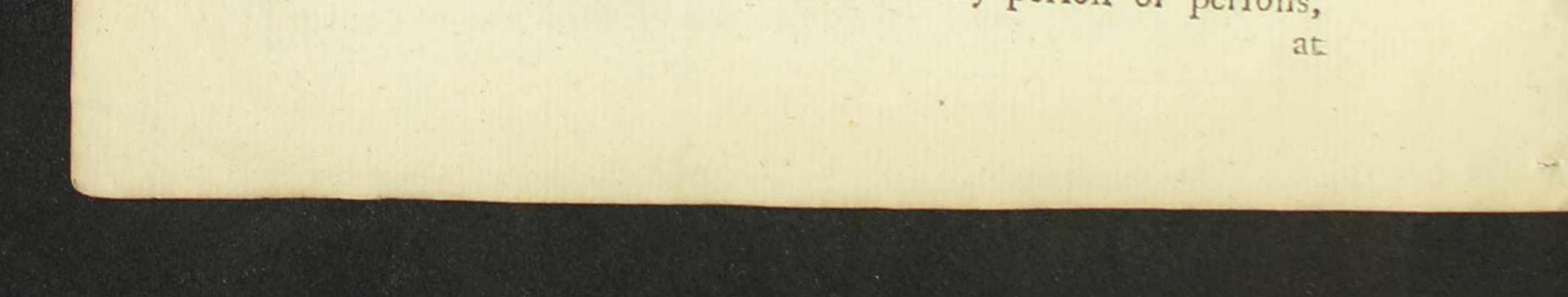
By this deed, Mr Cockburn difpones to the defender, Mr Scot, whom failing by death, or non-acceptance, to John Hay writer in Edinburgh, and to the affignees of the furviver who fhall accept in truft, for the ufes and purpofes, and under the provifions therein and after mentioned, heretably and irredeemablys his whole lands, and other heretable fubjects that fhould belong to him at his death ; and particularly, the lands of Grueldykes, and another fmall parcel of land adjoining thereto, acquired by him from Patrick Vertie; and likeways his dwelling houfe in Edinburgh, fubject to his wife's life-rent thereof. And laftly, his whole moveable fubjects and debts, (excepting the houfhold furniture, formerly conveyed by him to his wife;) but under the following, among other burdens.

1 mo, With the burden of all his debts, fick-bed and funeral expences.

2do, With the burden of the fums of money, liferent provifions contained in the forefaid bond of provision to Elizabeth Campbell his fpouse, and eik of codicil thereto fubjoined.

3*tio*, With the burden of the payment of L. 200 fterling to Robert Home, and the like fum to George Home, in terms of the contracts of marriage, betwixt them and the faids Elizabeth and Agnes Simpfons.

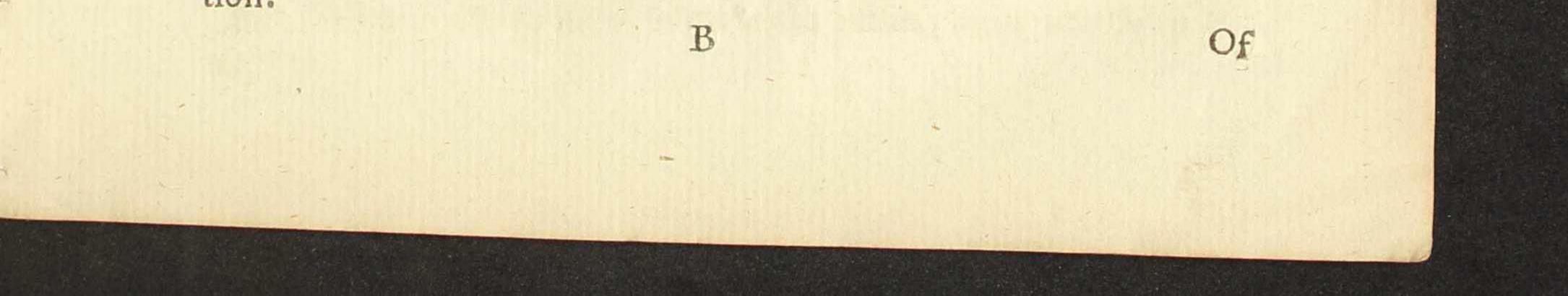
And, *lastly*, with the burden of other legacies, gifts, or donations which he might think fit to make to any person or persons,



at any time of his life, by a miffive letter, or otherways; but with and under the following provision : "That if John Simpson "his nephew, merchant in South Carolina, or his heirs, should ra-"tify and approve of the faid trust-right, by a deed under their "hand, then and in that cafe, he thereby appointed the acting "trustee for the time, to discharge and give up in favours of him or them, all bonds, bills, or other documents of debt due by them to him the faid Thomas Cockburn, at the time of his "death."

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And the faid Thomas Cockburn, by his faid truft-deed, appointed and ordained the acting trustee for the time, to make payment of the rents or yearly profits of his heretable estate, (if any should remain, after deducing the yearly annuity payable to his wife,) to John Simpfon his nephew; whom failing, to the heirs male of his body; whom failing, to certain other heirs therein mentioned. And Mr Cockburn thereby further ordained the acting truffee for the time, to uplift and receive, and ware out and employ, the refidue of his moveable estate, (after deduction of his funeral charges, debts and legacies,) in purchasing land, or upon sufficient heretable security; and to take the rights and infeftments to him, the acting truffee, and his affignees in truft, and to make payment of the rents or yearly profits thereof to John Simpson; whom failing, to the other heirs and fubstitutes therein specified, in the order thereby prefcribed, but always with the burden of the forefaid yearly annuity, payable to his wife. And it is thereby declared, that it shall not be lawful to John Simpson, or the other heirs or substitutes therein mentioned, to burden or affect his heretable estate thereby disponed, further than to the extent of the annual profits thereof, during their respective life-times; and that no debts or deeds done, or to be done, by him or them, shall burden or affect the fee or property of the said heretable or moveable subjects, but the same shall remain free of any such incumbrances, until the expiration of the faid truft, and to the end there may be a fuccession of trustees for manageing the faid trust, power is thereby given to the defender, Mr Scot; and failing of him by death, or not acceptance, to the faid John Hay, and the furvivor of them, to substitute other trustees, with the powers, burdens, and faculties mentioned in the faid truft-right and difpofition.



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Of the fame date with the truft-difpofition, Mr Cockburn executed a teftament and nomination, appointing the defender; and failing of him by death, or non-acceptance, the faid John Hay, and the affignees of the furvivor, to be his fole executors, and univerfal intromitters, with his whole moveable effects, of whatever kind or denomination; but in truft for the ends and purpofes, and under the burdens and conditions contained in the faid truftdeed, which are all held as repeated therein; and it is thereby declared, that if any event fhall happen, whereby the faid truft-difpofition may be liable to be quarreled or reduced, yet the fame fhall neverthelefs ftand and abide in full force, in fo far as is therein referred to, and fhall have the fame effect, as if the whole ufes, purpofes, conditions and burdens of the faid truft-right were word by word inferted and ingroffed therein.

At the fame time, Mr Cockburn fubfcribed an inventary of his moveable means and eftate, as relative to faid truft-deed; one article of which is in thefe words: "Sundry fums due by bond, " bill, or otherways, by John Simpfon merchant in South Caroli-" na, amounting, with intereft, to about L. 1500 fterling, the in-

" structions of faid debts not being at present in my hands."

In fact, by the vouchers of the debts now in procefs, it appears that the fum of advances made by Mr Cockburn to his nephew Mr Simpfon, in place of L. 1500, amounted to a fum exceeding L. 1800 fterling.

Some days after thefe deeds had been executed, Mr Scot was again fent for by Mr Cockburn, who informed him, that, in perufing the truft difpofition above mentioned, he obferved in the fubfitution of heirs, that Sir James Cockburn of Langtoun was placed before Sir James Cockburn of that ilk, which was contrary to his intention; and he therefore recommended to Mr Scot to alter that part of his fettlement, which was done accordingly by a feparate deed, intituled an eik and ratification of the truft difpofition, and which laft mentioned deed was figned by Mr Cockburn, 20th November 1765.

From the time of executing these deeds, and for several months before Mr Cockburn was confined to the house, though he was all the while capable of business, and, in fact, transacted business



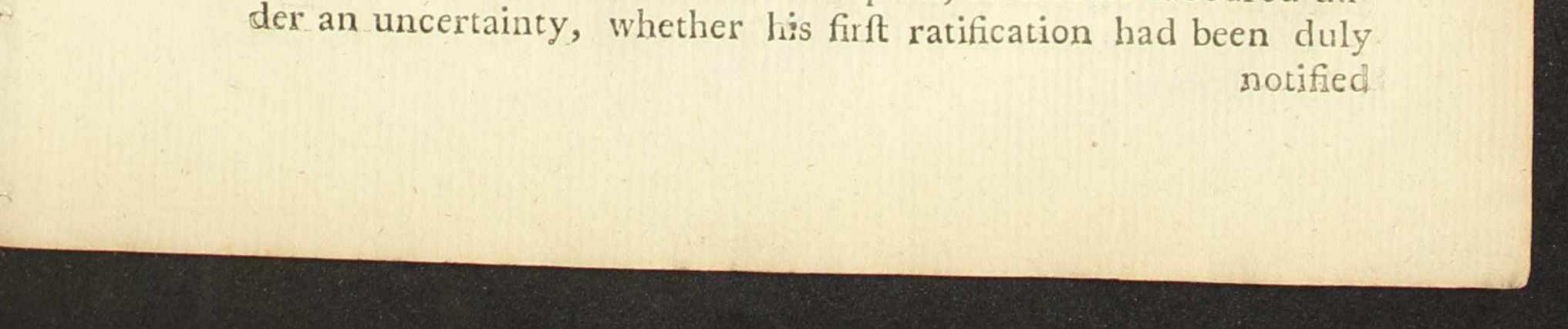
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business of confiderable importance both for himself and clients in that period, and he died upon the 2d December 1765.

After Mr Cockburn's interment, upon 5th December 1765, his repositories were opened, and the feveral deeds above mentioned were found therein, as appears from a minute fubscribed by the gentlemen prefent; and Mr Scot thinking himfelf bound, by the promife which he had made to the defunct, undertook the management in confequence of the trust-deed, and has accordingly been infeft in virtue thereof in the heretable fubjects, and has applied his intromissions for the ends and purposes directed by the trust-disposition.

A few days after Mr Cockburn's death, copies of the whole deeds above mentioned were transmitted to John Simpson in South Carolina, and sometime thereafter he transmitted a power of attorney to one Mr Henderson in this country, and along with it a ratification of the forefaid trust-deed.

Upon the receipt of this ratification, Mr Henderson delivered it to the truftee, in whose hands it lay for some months; but as the vouchers of the debts due by Mr Simpson, were in the hands of Sir James Cockburn and Mr Douglas at London, and as the deed of ratification was tacked to the power of attorney, Mr Scot returned the papers to Mr Hendersen, it being a matter of no importance to him or to the trust right, in whose hands the ratification lay, as the notification of it to the truftee was the only thing requisite to place the trust-disposition beyond all possibility of challenge ; but from this circumstance of the ratification being in Mr Henderson's hands, it never entered into his imagination, that the ratification was not compleat and valid, and accordingly has ever fince gone on with the management of the truft fubjects, applying the proceeds thereof to the uses and purposes directed by the deed. The power of attorney in favours of Mr Henderson, and the deed of ratification, bears date as far back as the 2d February 1767. Mr Henderson, whose deposition has been taken in this cause, and is hereto subjoined, does not appear to have been a very active attorney, or, at least, if he has wrote letters giving an account of his receiving the ratification, there is no doubt that these letters never came to the hands of Mr Simpson, fo that he laboured un-



notified to the truftee or not; and accordingly, in the month of August last, he thought proper to write another ratification in the fame terms, and as ample as the former, proceeding upon the narrative of the condition in Mr Cockburn's deed; and this ratification he transmitted alongst with a power of attorney to Mr Alexander Scot merchant in Edinburgh, which came to his hands prior to the commencement of this action; and, it being by him notified to Mr Cockburn's truftee, it is likeways produced in process.

It now appears, that Mr Cockburn's fufpicions, with regard to the fituation of his nephew's affairs, were but too well founded; for, upon the 31st July 1769, an arrestment was used in the defender's hands, at the inftance of Edward Tyfon of London, the only acting executor of the deceast John Watson merchant in London, arrefting all goods and gear in his hands belonging to the faid John Simpfon, and Thomas Young his partner in bufinefs, ay and while payment of L. 7842 : 15 : 9 Sterling, as the balance of an accompt current, faid to be due by Dunbar, Young, and Simpson, to the faid John Watson, with interest from the ist of January 1768, deducing L. 100 Sterling, paid the 31st of August 1768; as also L. 100 Sterling of expences of process, all faid to be contained in a decreet obtained before the Lords of Seffion the 31st of July 1769. And further, the faid Edward Tyfon has attempted to evict the heretable eftate of Mr Cockburn, and, in that view, brought an adjudication of the fame; but this being opposed by the defender, on account of the truft-deed executed by Mr Cockburn, it was answered by Mr Tyson, that the trust-disposition was on death-bed, and might be reduced by Mr Simpson; but as the purfuer is only now infifting to adjudge any intereft the defender has in these lands, it can do no hurt to the trustees that a decreet should go out in these terms. It was replied by the defender, that the truft-difposition had been long ago ratified by Mr Simpson, and could not now be reduced, but that the truftees had no objection to the purfuers being allowed to adjudge any faculty in Mr Simpson, to reduce the death-bed deed, but infifted, that, until the truft-deed is fet afide, no decreet could pass against the lands themselves.



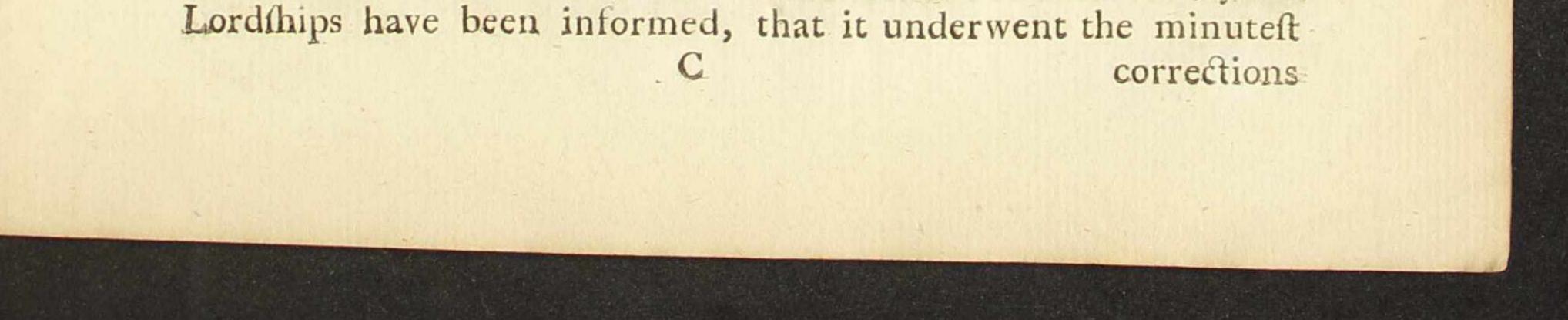
The Lord Kennet Ordinary in the caufe " adjudged in the " purfuer's favour any faculty in the defender as apparent-heir,

" to fet afide the truft difposition produced, and decerns and declares accordingly; and, of confent of parties, allows the purfuer to repeat a reduction of faid difposition in this process."

A process of reduction was accordingly brought, calling as defenders the truffees, and whole fubftitutes in Mr Cockburn's truffdifposition, and insisting, that the trust-disposition itself, and the eik thereto, as already mentioned, together with the ratification thereof by Mr Simpson, should be sec aside and reduced; because, headens 1mo, " The faid deeds are all void and null, being erafed and thege " vitiate in substantialibus, and wanting writer's name and witnef-" fes, and labours under many other nullities and informalities. " 2do, The faid deeds are all granted in letto agritudinis within " fixty days of the granter's death, and after contracting the difease " of which he died; and being granted in prejudice of the faid " John Simpson the heir at law to the granter, the pursuer as " creditor to the faid John Simpson, has a title to set aside the " same. 3tio, The said deeds are in themselves whimsical, ab-" furd, and irrational. 4to, The faid ratification, or other deed " granted by the faid John Simpfon, falls to be fet afide, as be-" ing granted in defraud of the purfuer, or the faid John Watson, " to whom he is executor, who was a prior onerous creditor to " the faid John Simpfon."

Parties were heard before the Lord Ordinary, and his Lordfhip having taking the caufe to report, and appointed informations, the following is humbly offered on the part of the truftee, and the fubflitutes, in fupport of the difpofition executed by Mr Cockburn.

When the purfuers, in this action, first formed to themselves the idea of evicting this estate contrary to the disposition of Mr Cockburn, the unlimited proprietor of it, it is believed they were very much in the dark, with regard to the real circumstances of the case. It is a notorious fact, that at the time Mr Cockburn executed this disposition, he was of as found mind and judgment as ever he had been at any former period of his life; and when the feroll of the settlement was laid before him to be revised, your



corrections by him: At the fame time, the fact is believed to be true, that he died within fixty days from the time the fettlement was executed; and being fome how informed of this fact, the purfuers bethought themfelves of overturning his deed. They were however ignorant of the ratification, and were not a little difconcerted by the production of it, and were therefore obliged in fo far to amend the libel, as to conclude for a reduction of the ratification likewife.

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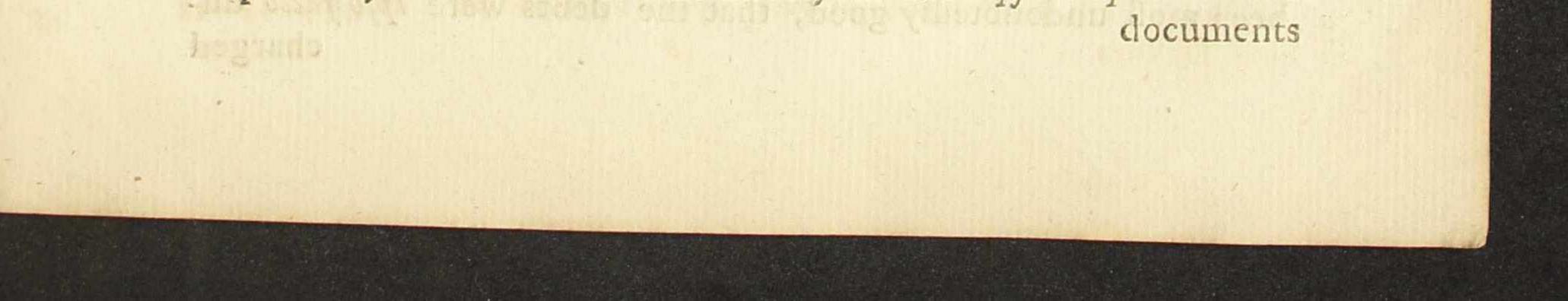
It is the validity of this ratification therefore which is properly the subject of your Lordships confideration; and you are to determine whether the purfuers have offered any reason why this ratification should not have the effect of preventing those heretablefubjects, which were acquired by the industry of Mr Cockburn, from being carried off in a channel contrary to his will and inclinations. The law of death-bed is favourable or unfavourable, according to the nature of the deeds against which it is directed : When it is used in order to defeat the ends of deeds unduly impetrated from a dying perfon, to the prejudice of his nearest connections, it will be liberally interpreted, for fuch was the falutary reason which introduced it into our law: When, on the other hand, the law of death-bed is laid hold of to take the advantage of the natural dilatorinefs of mankind to execute their fettlements ; and, in fuch circumstances, attempts made to overurn just and rational settlements, it merits a different consideration, and will not receive the favour of a Court of Law. Under which of these predicaments, the attempt of those pursuers falls to be classed, your Lordships cannot entertain much dubiety, when you confider, that the fubject of the deed under reduction was the fole acquisition of Mr Cockburn's own induftry and care : That he had a just title to difpose of it as he thought proper: That he accordingly did difpole of it for the common benefit of his friends; and that the tendency of the present attempt, is to carry off those subjects to the prejudice of all those friends for the behoof of the creditors, of one whom Mr Cockburn had cared for in a very handfome and generous manner. Under these circumstances, the defenders flatter themfelves, they will be under no difficulty to fatisfy your Lordships, of the invalidity of all those objections which have been offered against the deed of ratification.



It has, in the first place, been objected, that the ratification of the trust-deed cannot have effect, because clogged with a condition, that the bonds, bills, and other documents of debt, due by Mr Simpson to his uncle, should be delivered up to him; whereas, in fact, these documents of debt never have been delivered up, but have always remained in the custody of Sir James Cockburn, and Mr Douglas at London.

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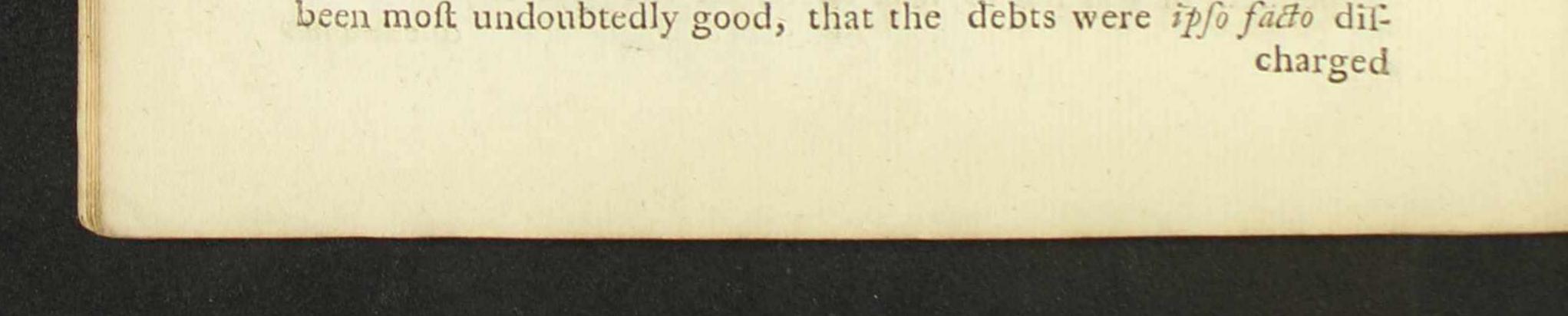
The best answer to this objection is, to recite the words of the Answer. deed of ratification itself. It proceeds upon a recital of the trustright executed by Mr Cockburn, and then goes on in thefe words : " And whereas in the faid deed, it is provided and de-" clared, that if the faid John Simpfon, or his heirs, should rati-" fy and approve of the faid trust-right, by a deed under their " hands; then, and in that cafe, he the faid Thomas Cockburn " did thereby appoint the acting trustee, for the time, to dif-" charge and give up, in favours of him or them, all bonds, bills, " and other documents of debt, due by the faid John Simpfon to " the faid Thomas Cockburn, at the time of his death. Now " know all men, by these presents, that the faid John Simpson, " in confideration of all and every the faid bonds, bills, and o-" ther documents of debt, due by the faid John Simpfon to the " faid Thomas Cockburn, at the time of his death, being duly " discharged, cancelled, and delivered up to him, or his lawful " attorney or attornies, authorized and empowered by him to " afk, demand, and receive the fame, and of his the faid John " Simpfon, his heirs, executors, and administrators, being abfo-" lutely and effectually acquitted for ever therefrom, doth declare " his approbation of the faid deed of truft, and of all and every " the trufts, dispositions, articles, matters, and things therein " contained; and doth hereby ratify, allow of, and confirm the " fame, and all other deeds, writings, dispositions, and settle-" ments whatfoever, duly made and executed by the faid Tho-" mas Cockburn in his lifetime, subsequent to the faid deed of " truft." The deed of ratification afterwards transmitted to Mr Scot, is precifely in the fame terms. Thus, your Lordships, from a perusal of the deeds of ratification themselves, will perceive, that the pursuers proceed upon a mistake, when they suppose that the effect of the ratification was suspended, or was not to take effect, till the ipsa corpora of the



documents of debt were delivered up. The deeds of ratification very properly recite the discharge of the debt due to Mr Cockburn, as the inductive motive of ratifying the truft-disposition, but it is no where said, that the circumstance of these documents of debt being in the hand of one perfon or another was to have any effect upon the validity of the ratification. In fact, it was not optional to the trustees or substitutes in the trust-difposition to accept of a ratification, or grant a discharge of the debts. The discharge of those debts was secured to Mr Simpfon by the deed of Mr Cockburn himfelf, the moment Mr Simpfon by a writing under his hand notified his approbation of the trust disposition : It was that notification, which compleated the discharge, nor was it in the power of the trustee or the substitutes in the deed to have refused the delivery, or cancellation of the documents of debt; or if they had done fo, a court of law would have compelled the cancellation in an action brought by Mr Simpfon, proceeding upon the narrative that he had appro-

ved of the truft deed. But in fact, it is not pretended that this ever was refufed, or that those debts were ever confidered as fubfifting debts against Mr Simpson, from the moment that he notified his approbation of the truft deed by the deed of ratification transmitted to Mr Henderson, so far back as the year 1767.

It is extremely true, that at the time of fending over both the first and second deeds of ratification, powers of attorney were sent over first to Mr Henderson, and then to Mr Alex. Scot for managing Mr Simpfon's bufinefs in general, and amongst other particulars, it is mentioned that they should receive the documents of debt due at the time of Mr Cockburn's death from the acting truffee; but it is no where infinuated, that the difcharge of the debts themselves, or the finishing the transaction, as it has been called, was to depend upon the delivery up of the documents of the debt; that is a circumftance highly immaterial, as the discharge of the debts was most effectually operated by the trust deed itfelf, from the moment the approbation of the deed was declared. For let it be supposed, that after the ratification arrived in this country, and had been shown to the trustee, he nevertheless had infifted against Mr Simpson for payment of the debts due to Mr Cockburn, it is asked, Whether the defence would not have



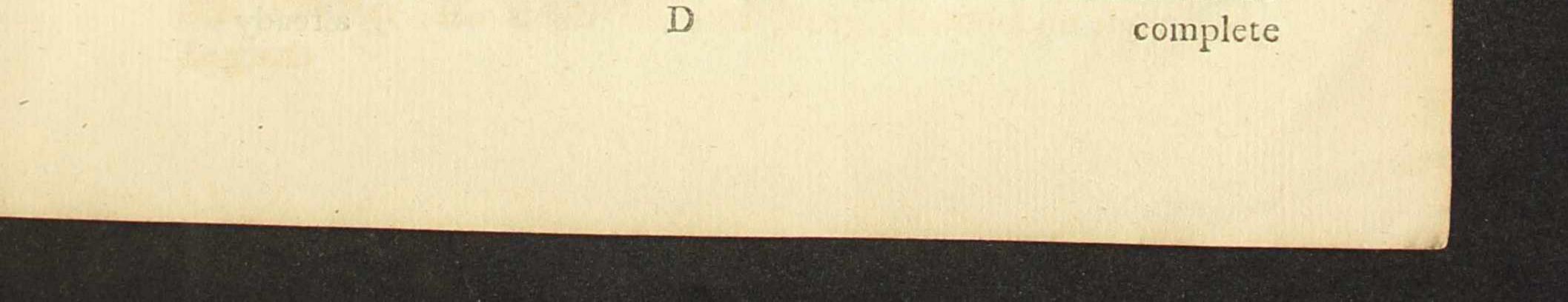
charged by the declared approbation of the deed? It certainly would, and therefore it is idle to talk of the transaction not being compleated, merely because the documents of the debt difcharged had remained in the hands of Sir James Cockburn and Mr Douglas at London, the common friends of Mr Cockburn and Mr Simpson himself.

It has been further objected, that this ratification was not a delivered evident.

This objection is probably founded upon that part of Mr Henderfon's deposition, wherein he depones, " That he did not " underftand the ratification to be a delivered evident until fuch " time as Mr Scot should deliver up the grounds of debt, due " by Mr Simpson, in terms of Mr Simpson's instructions to the " deponent."

The defenders must beg leave to observe, that Mr Henderson's opinion, with regard to the delivery, is not confiftent with the fact, as acknowledged by himfelf; for he fays, that, upon the receipt of the ratification, he gave it to Mr Scot, who retained the posseffion of it for some months; and as this was a complete notification to him of the approbation of Mr Simpfon, by a writing under his hand, which was the only thing required in Mr Cockburn's deed, it is difficult to understand what other kind of delivery the nature of the thing was capable of. Mr Scot has no doubt of Mr Henderson deponing, agreeable to his best recollection ; but, in justice to the trust which he accepted of, he must be forgiven to fay, it differs somewhat from his own; and that the redelivery of the ratification was a thing about which Mr Henderson was so little sollicitous, that Mr Scot thinks he could eafily have retained the possession of it till this day, if he had confidered it as of any moment. Nor did Mr Scot ever underftand that Mr Henderson had the least scruple about delivering up the ratification to him, till about the commencement of this litigation, when he scrupled to do so, because it may tend to hurt some interest of his own, in the affairs of Mr Simpson and his partners.

But, with great fubmission, all this controversy about the delivery of the deed, is totally foreign to the case. When there is a question, Whether the maker of a deed meant it should be



complete and thoroughly effectual, for the purposes thereby intended? The delivery of the deed is, no doubt, of importance to ascertain the will of the maker of it; because, while in his own cuftody, or that of his doer, as a cuftodiar thereof for his behoof, the prefumption of law is, That he did not mean that the deed should be completed. But here there is no room for fuch a question, or indeed for prefumptions of any kind ; for the deed of ratification was not transmitted to Mr Henderson, as custodiar for Mr Simpfon's behoof, not to be delivered without further orders from him; but it is transmitted for the special purpose of notifying his approbation of his uncle's fettlements; and therefore, from the moment it arrived in this country, and was made known to the truftee, the debt of Mr Simpson was thereby ipfo facto discharged, and a jus quasitum, as to the validity of the trustdifposition, was thereby secured for the substitutes in the deed, which it was not in the power of Mr Simpson himself, far less of his attorney, to defeat.

In the *third* place, it has been objected, that this ratification falls to be fet alide, as being granted in defraud of the purfuer Mr Watson, who was a prior onerous creditor of Mr Simpson.

Till this objection is more diftinctly explained, the defenders muft confefs they do not thoroughly underftand it. The ratification cannot be called an alienation in favour of a conjunct or confident perfon, granted after contracting onerous debts, without a true or juft caufe : Nor is it an alienation, in defraud of the more timeous diligence of another creditor; fo that the deed is not exceptionable upon either branch of the act of Parliament 1621 : Neither does it occur, how it is poffible for the purfuer to rear up any reafon of reduction upon the act of Parliament 1696; for not only is there here no alienation in favour of a creditor, but likeways it is not pretended, that Mr Simpfon, at the date of the ratification, was bankrupt, in terms of any one requifite of the ftatute.

Indeed it is an abufe of words to talk of this ratification as an alienation, in defraud of a prior onerous creditor; for, fuppofing the conduct of Mr Simpfon in ratifying his uncle's deed, was to be examined in the most critical manner, it will be found that he acted a most wife and rational part; for your Lordships have

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already been informed, that the debt due by Mr Simpson to Mr Cockburn, exceeded L. 1850 Sterling. You will likeways have observed from the narrative already premised, that the trustees in the heretable fubjects were likeways named executors in the moveable subjects, and consequently in that character would have been intitled to demand immediate payment of the debt due by Mr Simpson, in the event of his refusing to ratify his uncle's deed. You will further be pleased to attend to the view of Mr Cockburn's effects at the time of his death, hereto subjoined, together with the deductions therefrom, even upon the footing of Mr Cockburn's deeds, prior to his death-bed fettlement; and upon due confideration of all these, you cannot fail to be of opinion, that Mr Simpfon acted the part which every wife man would have done in the same circumstances, viz. ratifying his uncle's deed, and thereby procure to himself a full discharge of the large debt that was due by him, together with a settlement in his own favour, in the first place, of the annual proceeds of the remainder of the estate, with the deduction only of the provisions in favour of Mrs Cockburn, and his own fifters, which in all events were to be paid, even upon the footing of the fettlements executed prior to the deed in question, and against which there could not have lain any challenge whatever.

The purfuers in their fummons, and likeways in their pleadings, complain of Mr Cockburn's deeds as being in themfelves whimfical, abfurd, and irrational.

But, with fubmiffion, the defenders will be pardoned to fay, that there never was a charge more unjuftly held furth againft any deeds. Mr Cockburn was the acquirer of his own fortune, and in law and juffice had the unlimited difpofal of it to his nephew Mr Simpfon: He was peculiarly generous and profufe; and altho', from his long filence and neglect to give him any information relative to his own affairs, he had juft reafon to be diffatisfied with him, yet he did not carry it the length of totally excluding him from his fucceffion, as others in fimilar circumftances would have done, but he put him in that very place where the law would have put him; only taking care, by the form of his fettlements, and proper claufes there introduced, that the fmall eftate which he had acquired, fhould not be carried off from those connections



whom he meant to serve, in order to answer the calls of his nephew's creditors, with whom he had no connection.

And therefore, upon the whole, it is hoped your Lordships will have no difficulty in giving effect to Mr Cockburn's settlements, by affoilzieing from the reasons of reduction.

In respect whereof, &c.

HENRY DUNDAS.

Copy of George Henderson's Deposition.

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28th February, 1770.

IN presence of Lord Kennet, Ordinary, compeared George Henderson farmer in Craigton, cited on a diligence at the pursuers instance; who being solemnly sworn, examined, and interrogate, If he did not receive the ratification in procefs, together with a power of attorney annexed thereto, in a letter from Mr Simpfon? and if he has the letter that accompanied the fame? depones, That the deed of ratification marked by him and the Lord Examinator, of this date, as relative hereto, came to him, along with a power of attorney, by Mr Simpfon, in the deponent's favours; and that, at the fame time, the deponent received a letter from Mr Simpfon, which he now exhibits along with the faid power of attorney; and which letter and power of attorney are also marked by the deponent and the Lord Examinator, of this date, as relative hereto. Depones, That the deponent flowed the ratification, and power of attorney, with the above letter, to Mr Walter Scot; and after that Mr Scot had had the fame in his possession for fome months, he returned these papers to the deponent, acquainting him, at the fame time, that



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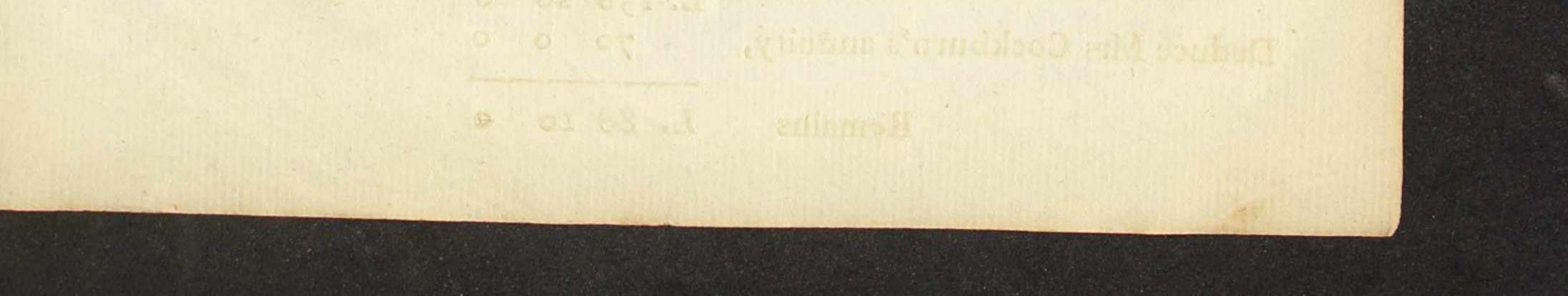
he could not finish the transaction, in respect the vouchers of the debt due by Mr Simpson were not in his, Mr Scot's, possession. Depones, That fince the faid deed of ratification was returned to the deponent by Mr Scot, as above, the fame was never out of the deponent's possession, till within these two months, that the deponent sent the fame to Mr Scot in a letter : That the deponent never accepted of the above power of attorney, or did any other act in consequence thereof, than what is above deponed to, except getting from Mr Scot an inventary or state of Mr Cockburn's funds, a copy whereof the deponent transmitted to Mr Simpfon; and having wrote two letters to Mr Simpfon, to which he never received any anfwer: That the deed of ratification, and power of attorney aforefaid, were tacked together when the deponent first received them, as above, and a large feal appended thereto; but that the deponent separated the ratification from the power of attorney when he fent the ratification to Mr Scot, about two months ago. Depones, That when the ratification was first left with Mr Scot, it was with an intention, that Mr Scot might take a copy thereof, and to have tranfacted with Mr Scot, in terms of Mr Simpson's letter, if Mr Scot had been ready fo to do; and that the deponent did not understand it to be a delivered evident, until such time as Mr Scot should deliver up the grounds of debt due by Mr Simpfon, in terms of Mr Simpfon's instructions to the deponent. And this is truth, as he shall answer to God.

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VIEW



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VIEW of the FUNDS belonging to the deceast THOMAS COCKBURN, Writer in Edinburgh.

Mr Patrick Home per bond, - L. 2000 0 0 Intereft from 10th July 1765, John Douglas per bond, - 270 0 0 Intereft due from 8th February 1765, Promiffory-note by John Coutts and Company, 22d September 1765, at 4 per cent. - 100 0 0 Mr Cockburn's claim on the eflate of Langtoun, about - 100 0 0

L. 2470 0 0

_____ 500 0 0

DEDUCTIONS.

Mr Cockburn, by an obligation in the contract of marriage 'twixt George Home and Agnes Simpfon, his niece, is bound to pay her - L. 200 0 0 And he became bound to pay Elizabeth Simpfon, his other niece, the like fum, in her contract of marriage with Robert Home, 200 0 0 His legacy to Mrs Cockburn, his widow, - - - - - 100 0 0

L. 1970 0 0 The interest of said L. 1970, at 5 per cent. - L. 98 10 0 The rent of Grueldykes about - 60 0 0

L. 158 10 0

