

*Edward Tyson & ally* *(Not Reported)*

*R.*  
June 21. 1770.

30.

*Walter Scott* *(A very special case)*

[LORD KENNET Reporter.]

*Reduction on the head of deathbed -*  
*Whether a Creditor of the apparent*

# INFORMATION

*being prohibited from setting the Deed*  
*aside by a Ratification executed by*  
*the heir on a certain condition, but*  
*which condition had not been fulfilled, nor the*

WALTER SCOTT Writer to the Signet, Trustee  
appointed by the deceased Thomas Cockburn  
Writer in Edinburgh,

*Ratification*  
*Received*  
*Delivered*

*See Depo-*  
*sition in*  
*appended*  
*to this*  
*Petition*

A G A I N S T

EDWARD TYSON of London, Merchant, and his Attorney,  
Pursuers;

*See Reasons*  
*of Red<sup>n</sup>*  
*p. 9.*

THE said Thomas Cockburn, by great care and diligence, ac-  
quired a pretty considerable fortune, and having had no  
child of his own, he appears to have formed a resolution to be-  
stow the greatest part thereof upon John Simpson his nephew.

John Simpson was educated in the mercantile business, and  
after having spent some years in this country, he went to Lon-  
don, and practised for some time as a clerk in a compting-house  
there, under the inspection of Sir James Cockburn of Langtoun.

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

A  
dinburgh,



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

Mr Cockburn, 14th March 1758, execute a general disposition, whereby he disposed to the said John Simpson his whole estate heretable and moveable, that should pertain to him at his death, and he thereby nominate him his sole executor, but with the burden of his debts, and with the burden of certain provisions and legacies contained in the sundry deeds to be after-mentioned, in favours of Elifabeth Campbell his spouse, Agnes Cockburn his sister, and Elifabeth and Agnes Simpsons his nieces, the mother and sisters of John Simpson.

Of the same date with this disposition, a mutual deed was executed betwixt Mr Cockburn and Elifabeth Campbell his spouse, mentioning that there had been no contract of marriage between them, whereby Mr Cockburn obliged himself and his heirs, in the event of her surviving 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 Whitsunday or Martinmas, after his decease; and he further thereby obliged himself in the event foresaid, to pay to her at the first term of Whitsunday or Martinmas after his decease, a legacy of L. 50 Sterling, with annual rent, from the term of payment, during the not payment of the same; and he also thereby bequeathed to her his whole household furniture, silver plate, and heirship, moveables included, free of all debts and incumbrances; and upon the other hand, the said Elifabeth Campbell accepts of these provisions in full of all which she or her nearest of kin could claim by and through the decease of her said husband, any manner of way; and by a codicil subjoined to the said 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 said additional annuity to be payable at the first term of Whitsunday or Martinmas after his decease, and the legacy of L. 50 to be payable at the same term, and to bear interest thereafter while paid. And

Of



Of date likewise the 14th March 1758, Mr Cockburn execute a bond in favours of Agnes Cockburn his sister, and Elisabeth and Agnes Simpsons his two nieces, whereby, in the event of his decease, he settled an annuity of L. 20 Sterling, yearly, upon his sister, with a provision of L. 200 Sterling to each of his two nieces, payable at the first term of Whitsunday or Martinmas after his decease.

Agnes Cockburn predeceased her brother, and the said 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 consisted altogether of moveable funds. But,

About this period he purchased the lands of Grueldikes in the shire 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 stand devised to him and his heirs whatsoever, and the rights to the house were taken to him and the said Elisabeth Campbell his spouse, in conjunct fee and liferent, for her liferent use alienarily, and him and his heirs in fee. June 1764.

About the end of the 1763, Mr Cockburn, at that time in the seventy-second year of his age, fell ill, and continued in a bad state of health ever after; but as his complaints were intirely bodily, without any feverish disorder, he possessed the full exercise of all his faculties almost to the last hour of his life.

When Mr Cockburn laboured under this indisposition, he wrote once, if not oftner, to John Simpson his nephew, and Sir James Cockburn likewise wrote at his desire; the import of which letters was, to know the true state of Mr Simpson's affairs, which Mr Cockburn, from Mr Simpson's long silence, 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 signified to him a desire to make a settlement, he then proceeded to inform him very minutely of the situation of his affairs,  
and



and of the deeds above mentioned, which he had formerly executed. He likewise told the defender, that he was apprehensive his nephew John Simpson had not been very successful in business; and that he had been very neglectful of him, in never communicating the true state of his affairs, and as in the event of his decease he or his creditors might soon dissipate his small fortune, he was therefore resolved to execute such deeds as might be the most proper for preventing that event; and proposed for this purpose to convey his whole means and estate to trustees; and having requested of the defender to accept of the trust, he then proceeded to give him his directions with regard to the making out of said trust-deed: And accordingly, the defender did make a scroll of a trust disposition, which was revised by Mr Cockburn, and having been thereafter extended, the same was signed by him the 4th November 1765.

By this deed, Mr Cockburn disposes to the defender, Mr Scot, whom failing by death, or non-acceptance, to John Hay writer in Edinburgh, and to the assignees of the survivor who shall accept in trust, for the uses and purposes, and under the provisions therein and after mentioned, heretably and irredeemably his whole lands, and other heretable subjects that should belong to him at his death; and particularly, the lands of Grueldykes, and another small parcel of land adjoining thereto, acquired by him from Patrick Vertie; and likewise his dwelling house in Edinburgh, subject to his wife's life-rent thereof. And lastly, his whole moveable subjects and debts, (excepting the household furniture, formerly conveyed by him to his wife;) but under the following, among other burdens.

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

*2do*, With the burden of the sums of money, life-rent provisions contained in the foresaid bond of provision to Elizabeth Campbell his spouse, and eik of codicil thereto subjoined.

*3tio*, With the burden of the payment of L. 200 sterling to Robert Home, and the like sum to George Home, in terms of the contracts of marriage, betwixt them and the saids Elizabeth and Agnes Simpsens.

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

at



at any time of his life, by a missive 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 said trust-right, by a deed under their  
 " hand, then and in that case, 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 said Thomas Cockburn, at the time of his  
 " death."

And the said Thomas Cockburn, by his said trust-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 Simpson 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 trustee for the time, to uplift and receive, and ware out and employ, the residue 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 infestments to him, the acting trustee, and his assignees in trust, and to make payment of the rents or yearly profits thereof to John Simpson; whom failing, to the other heirs and substitutes therein specified, in the order thereby prescribed, but always with the burden of the foresaid 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 disposed, 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 said trust, and to the end there may be a succession of trustees for managing the said trust, power is thereby given to the defender, Mr Scot; and failing of him by death, or not acceptance, to the said John Hay, and the survivor of them, to substitute other trustees, with the powers, burdens, and faculties mentioned in the said trust-right and disposition.



Of the same date with the trust-disposition, Mr Cockburn executed a testament and nomination, appointing the defender; and failing of him by death, or non-acceptance, the said John Hay, and the assignees of the survivor, to be his sole executors, and universal intromitters, with his whole moveable effects, of whatever kind or denomination; but in trust for the ends and purposes, and under the burdens and conditions contained in the said trust-deed, which are all held as repeated therein; and it is thereby declared, that if any event shall happen, whereby the said trust-disposition may be liable to be quarreled or reduced, yet the same shall nevertheless stand and abide in full force, in so far as is therein referred to, and shall have the same effect, as if the whole uses, purposes, conditions and burdens of the said trust-right were word by word inserted and ingrossed therein.

At the same time, Mr Cockburn subscribed an inventory of his moveable means and estate, as relative to said trust-deed; one article of which is in these words: "Sundry sums due by bond, bill, or otherways, by John Simpson merchant in South Carolina, amounting, with interest, to about L. 1500 sterling, the instructions of said debts not being at present in my hands."

In fact, by the vouchers of the debts now in process, it appears that the sum of advances made by Mr Cockburn to his nephew Mr Simpson, in place of L. 1500, amounted to a sum exceeding L. 1800 sterling.

Some days after these deeds had been executed, Mr Scot was again sent for by Mr Cockburn, who informed him, that, in perusing the trust disposition above mentioned, he observed in the substitution 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 settlement, which was done accordingly by a separate deed, intituled an eik and ratification of the trust disposition, and which last mentioned deed was signed 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



business of considerable 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 several deeds above mentioned were found therein, as appears from a minute subscribed by the gentlemen present; and Mr Scot, thinking himself bound, by the promise which he had made to the defunct, undertook the management in consequence of the trust-deed, and has accordingly been infest in virtue thereof in the heretable subjects, 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 foresaid trust-deed.

Upon the receipt of this ratification, Mr Henderson delivered it to the trustee, 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 Henderson, 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 trustee 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 since gone on with the management of the trust subjects, 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, so that he laboured under an uncertainty, whether his first ratification had been duly notified



notified to the trustee or not ; and accordingly, in the month of August last, he thought proper to write another ratification in the same 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 trustee, it is likewise produced in process.

It now appears, that Mr Cockburn's suspicions, with regard to the situation 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 instance of Edward Tyson of London, the only acting executor of the deceased John Watson merchant in London, arresting all goods and gear in his hands belonging to the said John Simpson, and Thomas Young his partner in business, ay and while payment of L. 7842 : 15 : 9 Sterling, as the balance of an accompt current, said to be due by Dunbar, Young, and Simpson, to the said John Watson, with interest from the 1st of January 1768, deducting L. 100 Sterling, paid the 31st of August 1768 ; as also L. 100 Sterling of expences of process, all said to be contained in a decret obtained before the Lords of Session the 31st of July 1769.

And further, the said Edward Tyson has attempted to evict the heretable estate of Mr Cockburn, and, in that view, brought an adjudication of the same ; but this being opposed by the defender, on account of the trust-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 pursuer is only now insisting to adjudge any interest the defender has in these lands, it can do no hurt to the trustees that a decret should go out in these terms.

It was replied by the defender, that the trust-disposition had been long ago ratified by Mr Simpson, and could not now be reduced, but that the trustees had no objection to the pursuers being allowed to adjudge any faculty in Mr Simpson, to reduce the death-bed deed, but insisted, that, until the trust-deed is set aside, no decret could pass against the lands themselves.

The



The Lord Kennet Ordinary in the cause “ adjudged in the  
 “ pursuer’s favour any faculty in the defender as apparent-heir,  
 “ to set aside the trust disposition produced, and decerns and  
 “ declares accordingly ; and, of consent of parties, allows the  
 “ pursuer to repeat a reduction of said disposition in this  
 “ process.”

A process of reduction was accordingly brought, calling as de-  
 fenders the trustees, and whole substitutes in Mr Cockburn’s trust-  
 disposition, and insisting, that the trust-disposition itself, and the  
 eik thereto, as already mentioned, together with the ratification  
 thereof by Mr Simpson, should be set aside and reduced ; because,  
 1<sup>mo</sup>, “ The said deeds are all void and null, being erased and  
 “ vitiate *in substantialibus*, and wanting writer’s name and witnes-  
 “ ses, and labours under many other nullities and informalities.  
 “ 2<sup>do</sup>, The said deeds are all granted *in lecto aegritudinis* within  
 “ sixty days of the granter’s death, and after contracting the disease  
 “ of which he died ; and being granted in prejudice of the said  
 “ John Simpson the heir at law to the granter, the pursuer as  
 “ creditor to the said John Simpson, has a title to set aside the  
 “ same. 3<sup>tio</sup>, The said deeds are in themselves whimsical, ab-  
 “ surd, and irrational. 4<sup>to</sup>, The said ratification, or other deed  
 “ granted by the said John Simpson, falls to be set aside, as be-  
 “ ing granted in defraud of the pursuer, or the said John Watson,  
 “ to whom he is executor, who was a prior onerous creditor to  
 “ the said John Simpson.”

Parties were heard before the Lord Ordinary, and his Lordship  
 having taking the cause to report, and appointed informations,  
 the following is humbly offered on the part of the trustee, and  
 the substitutes, in support of the disposition executed by Mr Cock-  
 burn.

When the pursuers, 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 sound mind and judgment  
 as ever he had been at any former period of his life ; and when  
 the scroll of the settlement was laid before him to be revised, your  
 Lordships have been informed, that it underwent the minutest  
 C corrections

*Sutton*

*Reasons  
of Redu*



corrections by him: At the same time, the fact is believed to be true, that he died within sixty days from the time the settlement was executed; and being some how informed of this fact, the pursuers bethought themselves of overturning his deed. They were however ignorant of the ratification, and were not a little disconcerted by the production of it, and were therefore obliged in so far to amend the libel, as to conclude for a reduction of the ratification likewise.

It is the validity of this ratification therefore which is properly the subject of your Lordships consideration; and you are to determine whether the pursuers have offered any reason why this ratification should not have the effect of preventing those heretable-subjects, 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 person, to the prejudice of his nearest connections, it will be liberally interpreted, for such was the salutary 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 dilatoriness of mankind to execute their settlements; and, in such circumstances, attempts made to overturn 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 consider, that the subject of the deed under reduction was the sole acquisition of Mr Cockburn's own industry and care: That he had a just title to dispose of it as he thought proper: That he accordingly did dispose 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 handsome and generous manner. Under these circumstances, the defenders flatter themselves, they will be under no difficulty to satisfy your Lordships, of the invalidity of all those objections which have been offered against the deed of ratification.

It



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.

The best answer to this objection is, to recite the words of the deed of ratification itself. It proceeds upon a recital of the trust-right executed by Mr Cockburn, and then goes on in these words: “ And whereas in the said deed, it is provided and declared, that if the said John Simpson, or his heirs, should ratify and approve of the said trust-right, by a deed under their hands; then, and in that case, he the said Thomas Cockburn did thereby appoint the acting trustee, for the time, to discharge and give up, in favours of him or them, all bonds, bills, and other documents of debt, due by the said John Simpson to the said Thomas Cockburn, at the time of his death. Now know all men, by these presents, that the said John Simpson, in consideration of all and every the said bonds, bills, and other documents of debt, due by the said John Simpson to the said 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 ask, demand, and receive the same, and of his the said John Simpson, his heirs, executors, and administrators, being absolutely and effectually acquitted for ever therefrom, doth declare his approbation of the said deed of trust, and of all and every the trusts, dispositions, articles, matters, and things therein contained; and doth hereby ratify, allow of, and confirm the same, and all other deeds, writings, dispositions, and settlements whatsoever, duly made and executed by the said Thomas Cockburn in his lifetime, subsequent to the said deed of trust.” The deed of ratification afterwards transmitted to Mr Scot, is precisely in the same 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



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 trust-disposition, but it is no where said, that the circumstance of these documents of debt being in the hand of one person 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-disposition to accept of a ratification, or grant a discharge of the debts. The discharge of those debts was secured to Mr Simpson by the deed of Mr Cockburn himself, the moment Mr Simpson by a writing under his hand notified his approbation of the trust disposition: It was that notification, which completed 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 so, a court of law would have compelled the cancellation in an action brought by Mr Simpson, proceeding upon the narrative that he had approved of the trust deed. But in fact, it is not pretended that this ever was refused, or that those debts were ever considered as subsisting debts against Mr Simpson, from the moment that he notified his approbation of the trust 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 sending 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 Simpson's business 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 trustee; but it is no where insinuated, that the discharge 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 circumstance highly immaterial, as the discharge of the debts was most effectually operated by the trust deed itself, 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 insisted against Mr Simpson for payment of the debts due to Mr Cockburn, it is asked, Whether the defence would not have been most undoubtedly good, that the debts were *ipso facto* discharged



charged by the declared approbation of the deed? It certainly would, and therefore it is idle to talk of the transaction not being completed, merely because the documents of the debt discharged 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 Henderson's deposition, wherein he depones, " That he did not  
" understand the ratification to be a delivered evident until such  
" 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 consistent with the fact, as acknowledged by himself; for he says, that, upon the receipt of the ratification, he gave it to Mr Scot, who retained the possession of it for some months; and as this was a complete notification to him of the approbation of Mr Simpson, 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 say, it differs somewhat from his own; and that the redelivery of the ratification was a thing about which Mr Henderson was so little solicitous, that Mr Scot thinks he could easily have retained the possession of it till this day, if he had considered it as of any moment. Nor did Mr Scot ever understand 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 submission, 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

D

complete



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 custody, or that of his doer, as a custodiar thereof for his behoof, the presumption of law is, That he did not mean that the deed should be completed. But here there is no room for such a question, or indeed for presumptions of any kind; for the deed of ratification was not transmitted to Mr Henderson, as custodiar for Mr Simpson'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 settlements; and therefore, from the moment it arrived in this country, and was made known to the trustee, the debt of Mr Simpson was thereby *ipso facto* discharged, and a *jus quaesitum*, as to the validity of the trust-disposition, 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 set aside, as being granted in defraud of the pursuer Mr Watson, who was a prior onerous creditor of Mr Simpson.

Till this objection is more distinctly explained, the defenders must confess they do not thoroughly understand it. The ratification cannot be called an alienation in favour of a conjunct or confident person, granted after contracting onerous debts, without a true or just cause: Nor is it an alienation, in defraud of the more timeous diligence of another creditor; so that the deed is not exceptionable upon either branch of the act of Parliament 1621: Neither does it occur, how it is possible for the pursuer to rear up any reason 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 Simpson, at the date of the ratification, was bankrupt, in terms of any one requisite of the statute.

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



already been informed, that the debt due by Mr Simpson to Mr Cockburn, exceeded L. 1850 Sterling. You will likewise have observed from the narrative already premised, that the trustees in the heretable subjects were likewise 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 settlement; and upon due consideration of all these, you cannot fail to be of opinion, that Mr Simpson acted the part which every wise 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 sisters, which in all events were to be paid, even upon the footing of the settlements executed prior to the deed in question, and against which there could not have lain any challenge whatever.

The pursuers in their summons, and likewise in their pleadings, complain of Mr Cockburn's deeds as being in themselves whimsical, absurd, and irrational.

But, with submission, the defenders will be pardoned to say, that there never was a charge more unjustly held furth against any deeds. Mr Cockburn was the acquirer of his own fortune, and in law and justice had the unlimited disposal of it to his nephew Mr Simpson: He was peculiarly generous and profuse; and altho', from his long silence and neglect to give him any information relative to his own affairs, he had just reason to be dissatisfied with him, yet he did not carry it the length of totally excluding him from his succession, as others in similar circumstances 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 settlements, and proper clauses there introduced, that the small estate which he had acquired, should not be carried off from those connections  
whom.



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 assoilzieing from the reasons of reduction.

*In respect whereof, &c.*

HENRY DUNDAS.

## COPY OF GEORGE HENDERSON'S Deposition.

*28th February, 1770.*

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

he



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 since the said deed of ratification was returned to the deponent by Mr Scot, as above, the same was never out of the deponent's possession, till within these two months, that the deponent sent the same 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 inventory or state of Mr Cockburn's funds, a copy whereof the deponent transmitted to Mr Simpson; and having wrote two letters to Mr Simpson, to which he never received any answer: That the deed of ratification, and power of attorney aforesaid, were tacked together when the deponent first received them, as above, and a large seal appended thereto; but that the deponent separated the ratification from the power of attorney when he sent 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 transacted with Mr Scot, in terms of Mr Simpson's letter, if Mr Scot had been ready so to do; and that the deponent did not understand it to be delivered evident, until such 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. And this is truth, as he shall answer to God.

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VIEW



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

Mr Patrick Home <i>per</i> bond,	-	-	L. 2000	0	0
Interest from 10th July 1765,					
John Douglas <i>per</i> bond,	-	-	270	0	0
Interest due from 8th February 1765,					
Promissory-note by John Coutts and Company, 22d					
September 1765, at 4 <i>per cent.</i>	-	-	100	0	0
Mr Cockburn's claim on the estate of Langtoun, a-					
bout	-	-	100	0	0
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			L. 2470	0	0

## D E D U C T I O N S.

Mr Cockburn, by an obligation in the					
contract of marriage 'twixt George					
Home and Agnes Simpson, his niece,					
is bound to pay her	-	-	L. 200	0	0
And he became bound to pay Eliza-					
beth Simpson, his other niece, the					
like sum, in her contract of marriage					
with Robert Home,			200	0	0
His legacy to Mrs Cockburn, his wi-					
dow,	-	-	100	0	0
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			500	0	0
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			L. 1970	0	0

The interest of said L. 1970, at 5 *per*

*cent.*

-	-	-	L. 98	10	0
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The rent of Grueldykes about	-	-	60	0	0
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			L. 158	10	0

Deduce Mrs Cockburn's annuity,			70	0	0
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Remains			L. 88	10	0