

* * * Gosford reports the same case :

No 56.

IN a reduction pursued at the instance of David Trinch against Watson, as heir to Margaret Trinch, who had made a disposition in favour of the said Watson, of her whole estate, extending to above L. 3000, upon these two reasons, *1st*, That it was of the same date of her contract of marriage with Watson's nephew, wherein Watson was only bound in tocher for L. 1000, and so was a part of the matrimonial contract, which being dissolved by the death of the said Margaret within year and day, the same ought to be reduced as being granted in contemplation of the marriage ; *2do*, The said disposition was procured by Watson, who was curator to the said Margaret, who was an ignorant simple woman, *ante rationes redditas*, and was null by the law. Both these reasons were found relevant *per se et separatim* ; albeit it was answered, that Watson was not a party contractor in the matrimonial contract, which was dissolved ; and could only respect the provisions made in favour of the husband or wife, but could not dissolve the disposition, which was a deed apart, and did not relate to the contract ; as likewise the said Margaret was major, and not under curatory, and so might dispose of her own as she pleased.

Gosford, MS. No 119. p. 44.

S E C T. X.

Deeds not Read at Subscribing.

1672. December 5. ELIZABETH GALLOWAY against WILLIAM DUFF.

ELIZABETH GALLOWAY having pursued reduction of two dispositions by her to William Duff, one of her part of a tenement in Aberdeen, and another of some bonds, and of all moveables she had, or should have the time of her decease, upon two reasons, *imo*, That these dispositions were elicited from her by fraud and circumvention, in so far as she having taken a bleeding at the nose, which continued for many days, and being out of all hope of life, the said William Duff, who married her sister, presented to her the said dispositions, whereby she is denuded of all she had in the world, without reservation of her own liferent, or so much as an aliment ; which disposition was never read to her, neither did she give order for drawing thereof. *2do*, Albeit the disposition had been sub-

No 57.

A disposition was granted by a woman to her brother-in-law of her effects, not even reserving a liferent. It was reduced on the following grounds ; that the disposer was in a dying condition when

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 she granted
 it, though she
 afterwards
 recovered ;
 that it was
 the disponee
 who employ-
 ed the writer
 to draw the
 deed ; and
 that it was
 not read to
 her at sub-
 scribing.

scribed of certain knowledge, yet being done by a dying person, when hope of life was past, not only in the common opinion, but of physicians, it can only be understood as *donatio mortis causa*, which hath no effect, if the party convalesce and revoke the same.—It was *answered* to the *first* reason, That it comprehends no qualifications of circumvention, unless it had been alleged that there was no purpose nor direction for any writ in favour of the defender, or that instead of one right, another of a different nature had been offered, which cannot be proven ; and all the pursuer's pretence is, that her liferent was not reserved ; which the defender is willing it be inserted and reserved. To the *second* reason it was *answered*, That *donatio mortis causa* was never sustained, except where there is mention of death therein, of which there is no mention in this disposition ; and if it should be sustained, that being dangerously sick should make all gratuitous dispositions ambulatory, it might cancel many rights ; for albeit by the special law of this kingdom, heirs cannot be prejudged by deeds on death-bed, yet that sickness should be a ground to recall dispositions, when the party convalesces, or should put them to the uncertainty of witnesses' conjectures concerning the condition and hazard of the party, it were of very dangerous consequence, and hath neither rule nor example in Scotland, and renders the rights of the people uncertain, contrary to that fundamental principle of law and equity, *quisque est rei suæ moderator et arbiter* ; and though the party hath not acted prudently, yet if they have truly acted, their disposition cannot be quarrelled.—Against both which reasons it was *alleged*, That the pursuer did, several days after this disposition, when she was out of that hazard, renew the same.—The pursuer *replied*, That the reason of circumvention was most relevant ; for upon extreme prejudice of a weak person, fraud is easily inferred by such an act as can have no rational construction to be done by a person in their wits, especially where the writ was neither read nor known to the pursuer, and cannot be thought to have been comprehended by her to be any thing else but a testament, she being a dying person, at which time no disposition, *inter vivos*, could have any effect against her heir ; nor can it be thought, that without any rational consideration she would render herself a miserable beggar. As to the *second*, though there be no mention of death, yet the present and extreme peril of death is equivalent ; and as to the renovation of the disposition, it was but three days after the first, while the pursuer remained in the same condition ; and it was taken up by her father at the very subscription thereof, who declared he would dispose thereof as he thought fit, and did cancel it ; nor did it appear in what terms it was conceived.

THE LORDS having ordained, before answer, witnesses to be examined upon the matter of fact, they were not inclined to meddle with the second reason of *donatio mortis causa*, or to sustain it ; but found the first reason of circumvention relevant and proven, viz. That the woman was in a dying condition ; that Duff gave warrant to draw the writs ; and, by the writer and witnesses inserted, that they were not read to her when she subscribed ; only the writer deponed

he told her the substance of them ; but the two witnesses inserted, deponed that they were not read to her, and that they heard not the tenor of them repeated, but only saw the writer speak something softly in her ear to the pursuer, which they heard not. It was also proven the father took up the second disposition, at the very subscription of it, and said he would dispose of it as he thought fit, and had cancelled it ; and therefore both dispositions were reduced *in toto*.

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Fol. Dic. v. 1. p. 337. Stair, v. 2. p. 125.

* * * Gosford reports the same case :

IN a reduction pursued at the said Elizabeth Galloway's instance against William Duff, who married her sister, of a disposition made to him of the half a tenement of land belonging to her, and the half of her goods and gear whatsoever, upon these reasons, That it was *donatio mortis causa*, she being then extremely sick and without hopes of recovery, and not reserved so much as her liferent ; it was *answered*, That this disposition being absolute, and not bearing any such cause that it was done *intuitu mortis*, and the disponent being now fully recovered, whereby it appears that her sickness was not mortal, by our law such a disposition is not reducible ; neither upon that ground that it is *omnium bonorum* ; but at most it may be quarrelled to evict an aliment for the disponent during lifetime.

THE LORDS having ordained the writer and witnesses to be examined upon the manner of procuring that disposition, who declared that it was never so much as read to the disponent, and that at that time the disponent was looked upon as a dying person ; they did find that the same was elicited by fraud and circumvention, they having taken advantage of the pursuer's weak condition ; and therefore did allow the pursuer to mend the libel, and eik the reason of fraud and circumvention ; but did not think fit to give their interlocutor upon the first two reasons, *donatio mortis causa, vel omnium bonorum*, as relevant *per se* ; which they thought might be of public concernment, and might occasion infinite pleas.

Gosford, MS. No 533. p. 283.