No 102. To the *second* it was *answered;* In fact, the market cross stands in the market-place, although the magistrates have appointed, for the conveniency of the lieges, other places for selling commodities; at the same time, the area round it is the only place where herbs and fish are sold, and where the merchants keep their exchange. *Lastly*, As to the observation, That it does not appear the Earl was there upon a market-day, it is sufficient to observe, That from some circumstances of the proof, it is probable it was not on a Sunday; and the rest of the week, there is a fish-market and daily exchange held about the Cross.

The Lords repelled the reason of reduction.

C. Home, No 35. p. 66.

SECT. XIII.

Apparent Heir's Consent.

1672. *July* 16. Gray *against* Gray.

No 103. A man, upon death-bed, disponed his estate to his daughter, (apparent heir) and her husband, in conjunct fee, whom failing, to her husband's heir. The daughter and her husband bruiked the subject several years, and never reclaimed, or raised any process against this death-bed deed; yet this possession of the apparent heir being under the influence of her husband, was not found an homologation to debar a posterior apparent heir from quarrelling the same.

Fol. Dic. v. 1. p. 219.

*** *See* This case Sect. 3. *h. t.* No 16. p. 3196.

1685. *January* 9.

No 104. Laurence Pour *against* Bailie Charles Charteris and Agnes Deans.

A deed was in favour of an immediate apparent heir, whom failing, to strangers. The heir died an infant,

The Lords advised the case between Pour and Pour (and Deans.) Laurence Pour is interdicted to sundry persons; his brother *in lecto* makes a disposition of his estate in favours of sundry persons, with a substitution, and some of the substitutes are Laurence's interdictors. Laurence is moved to ratify it, on this

No 104.
soon after his father, and notwithstanding the heir's implied consent, the next heir was found entitled to reduce *ex capite lecti*.

ground, that there is a liferent left to him; and if he refused to ratify, then, to cut off his pretences, he would go to kirk and market, and thereby validate the disposition, and give him nothing. Laurence now raises a reduction of the disposition, on this head, tha this interdictors had impetrated that right to themselves in prejudice of him, their pupil, which is contrary to the fidelity of their office. *Answered*, He was not *alioqui successurus*, there being another brother nearer, and the interdictors are but substitutes, and are but curators upon the matter, *qui magis dantur rei quam personæ;* and their oath is *rem pupilli salvam fore;* and this was not *res pupilli*.——THE LORDS ordained it to be heard in presence.

1694. *July* 17.—THE LORDS, before answer, ordained the Bailie's other interdictors to depone, whether the interdiction was cancelled and retired, and then a ratification taken from him in their own favours; and that being over, then the interdiction was renewed, being for expiscation of a fraud; though some *contended*, that they could not depone *in propriam turpitudinem*, but only on the fact of others, and not on their own: And recalled their former interlocutor, finding they needed not depone, as the interdiction was not registrate; for here the question was not anent the validity of the interdiction, but anent their fraud in putting it out of the way till the ratification was got.

1696. *December* 25.—THE LORDS advised the reduction pursued by Laurence Pour against Agnes Deans, relict of John Pour his brother, Charles Charteris, and others, *ex capite lecti et circumventionis*, of a disposition made by his brother on death-bed to his prejudice, as heir, and of a ratification he gave when interdicted; and some of his interdictors being substituted, they cancelled that first interdiction till he had once ratified, and then renewed the interdiction upon him, which was contended to be manifest fraud. Against which reduction it was *alleged*, 1*mo*, That he had no title to quarrel till he were served heir, not only to his brother John, but to his nephew James. *Answered*, Though the *jus apparentiæ* was sufficient to sustain his process, yet he now produced a retour to both. 2*do*, *Alleged*, That reductions *ex capite lecti* were only allowed to the immediate heir, when prejudged by the disposition; but *ita est*, Laurence at that time was not the immediate heir; but James, son to John the disponer, who is not lesed, because the disposition is to him in the first place; so Laurence being then the remoter heir, though now, by James's death, he falls to succeed to both, yet his contingency at the time of the disposition can only be considered here. *Answered*, The law of death-bed was introduced by us, not only to secure the next immediate heir, but also for the whole heirs indefinitely, and the entire line of succession, else it were very defective; yea, more, if the nearest heir consent to his predecessor's deed on death-bed; and if he die unentered, his next heir will pass by him, and serve to the disponer, and reduce the deed, though the immediate apparent heir at the time consented; and

No 124. though he does not quarrel the institution in this disposition, because it was to his own son, yet he may well enough impugn the substitution to strangers to his prejudice, who was the next heir failing the disponer's son; and this is not *approbare et reprobare* the same deed, because he is not concerned with the institute, and *utile per inutile non vitiatur*.——The Lords considered, if the son, who was institute, had been of age, and entered to the possession, and accepted, there might have been some doubt how far the remoter heir could be permitted to quarrel that right, which had in so far taken effect; but the institute being here an infant, and who outlived his father but a short time, they sustained the remoter heir's interest and title in that case to pursue this reduction. The answer the defenders made to the reason of fraud and circumvention was, that John considered his brother Laurence was a profligate debauchee, who had squandered away his own portion, and would do the like with his estate, if he got it; therefore he told him, if he would not ratify the disposition, (in which he had made him only a liferenter, and substituted sundry friends, as Bailie Charteris, and others, in the fee, failing his son), he would then go to kirk and market, and make it valid without his consent; on which he ratified, and though there was a prior interdiction, yet it was null, being neither published nor registrate; likeas it can only reduce deeds affecting the interdicted person's heritage, but never hinder him to dispone a *spes successionis*, which, though prohibited by the Roman law, repudiating all pactions *de hæreditate viventis*, yet is not so by ours; and, by the same law, their edicts did not reach those *qui nolunt acquirere hæreditatem sibi delatam*, but only discharges them, *ne patrimonium suum diminuant*, *l.* 6. *D. Quæ in fraud. creditor.* *Replied* for the Heir, pursuer, That the ratification was impetrate by plain fraud; for you, who have the benefit of the substitution in the fee after my nephew's death, to my exclusion, saw he was a sickly child, and impossible he could outlive his father long, and who were my interdictors, and should have hindered me from doing so prejudicial a deed as the ratifying that disposition was, yet you persuaded me to it, and, to make it legal, you cancelled the first interdiction, and after I had signed the deed in your favours, you clapped the fetters of a new interdiction on me again, being convinced of my facility and weakness; which contrivance was to make the deed subsist, and is condemned by all lawyers; and though it was not a complete act against third parties, being neither published nor registrate, yet it was sufficient against you who knew it, and who, instead of defending me, led me into the snare.——The Lords having read the probation, found none of the interdictors knew any thing of that first interdiction, but only Bailie Charteris; and that his confession might be *exceptio doli personalis* against himself, to exclude him from reaping any benefit by it, seeing *nemo debet lucrari ex suo dolo*; yet it being only a single testimony, it could not prove against the rest, or extend to reduce their shares and proportions of the fee; fraud not being *vitium reale* as *vis et metus* is, but only personal; therefore they thought it a subject

fit for accommodation, and recommended to some of their number to settle and agree the parties. No 104.

This cause being of new advised, on a bill and answers, the plurality reduced the whole on circumvention, seeing *dolus unius alteri non debet obesse nec prodesse*. Against this sentence they appealed to the Parliament. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 219. *Fountainhall, v.* 1. *p.* 329. 633. & 747.

1728. *November* 13. REIDS *against* CAMPBELL.

No 105.

AN heir portioner, in her contract of marriage, having accepted a provision in lieu of all she could ask or crave through her father's decease, as this did not bar her from succeeding as heir *ab intestato*; so the father having disponed an heritable subject upon death-bed, it was not found to bar her from quarrelling the same, though it was pleaded to be equivalent to a consent to the death-bed deed; for the difference is great betwixt empowering one antecedently to do a deed which the law condemns as wrong, and acquiescing in it after it is done. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 220.

1733. *December* 4. INGLIS *against* HAMILTON, *alias* INGLIS of Murdiston.

No 106.
An heir was found entitled to reduce a death-bed deed, altho' the granter had in *liege poustie* taken from him an obligation not to challenge any deed of his.

A PERSON in *liege poustie* took an obligation in writing from his presumptive heir, not to quarrel or impugn, on the head of death-bed, any deed or settlement which he should make, but, on the contrary, to ratify and approve the same. In a reduction, *ex capite lecti*, at the instance of this presumptive heir, of a death-bed deed, granted by the predecessor in his prejudice, the said obligation was objected to him by way of defence, and the maxim *urged*, *unicuique licet favori pro se introducto renunciare*. It was *answered*, 1*mo*, The law of death-bed was introduced for a protection to dying persons, to guard them from the artifices of cunning men; for, if the heir's interest were only concerned, this consideration would extend to alienations in *liege poustie*, as well as upon death-bed. 2*do*, The heir is not at liberty to refuse his consent in such a case; and, if *metus carceris* be a good ground for avoiding an obligation, *metus exhæreditationis* is much stronger.——THE LORDS repelled the defence, and found this antecedent consent not sufficient to bar the heir from quarrelling the death-bed deed. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 220.