less it were condescended and instructed that she had heritable sums, not falling within the *jus mariti* wherewith this right was acquired. It was *duplied*, That this was but a naked conjecture and presumption, which is sufficiently taken off by the husband's giving sasine as a Bailie. It was *answered*, That this was *actus officii*, which he could not refuse, but he knew that the infeftment in favours of his wife, would accresce to himself. No 53.

THE LORDS repelled the reasons of suspension and reply, in respect of the answer and duply, and found that the fee of the land belonged to the wife and her daughter, and that there was no lesion in giving bond therefor.

Fol. Dic. v. 1. *p.* 380. *Stair, v.* 1. *p.* 516.

1703. *February* 25. Lady ROSEHAUGH.

No 54.
Parties interested in accounts, subscribed as witnesses to the subscription of the account. Found not to infer approbation.

THE Lady Rosehaugh being nominated both tutor and curatrix by Sir George Mackenzie, her husband, to her son, she pursues an exoneration; wherein it was *objected*, That, by her husband's testament, she was to act by the sight, advice, and approbation of five friends he named, and *ita est* they had not approved the accounts. *Answered*, They had done the equivalent, in so far as they had gone through the whole accounts of charge and discharge, and signed witnesses to her subscription; they scrupling a formal consent, lest it might infer a gestion of protutory upon them. *Replied*, The signing witness can never import a consent, seeing witnesses seldom know the contents of the paper, though it has been otherwise decided in the case of Ascog *contra* Arnholme, No 51. p. 5674, in a special case of an apparent heir's signing witness to his father's assignation on death-bed. *Duplied*, To fortify their subscription here, it was offered to be proved, the friends had revised and perused the accounts before they signed as witnesses. THE LORDS refused to sustain their subscription as witnesses to imply a consent, but allowed them yet to object against any article of the account; and referred to my Lord Tillicoultry to hear them; and in case he found all the articles sufficiently instructed, then to decern in the lady's exoneration.

Fol. Dic. v. 1. *p.* 380. *Fountainhall, v.* 2. *p.* 182.

1704. *January* 13. JAMES DALLAS of St Martin's *against* WILLIAM PAUL.

No 55.
Found that the apparent heir signing as a witness, ought not to import a consent, whether he knew the

MR JAMES DALLAS of St Martin's being creditor to Alexander Paul, merchant in Elgin, and the said Alexander's father having disponed some acres and tenements in favour of William Paul, his second son, St Martin's having adjudged the apparent heir's right of succession, pursues a reduction of that disposition *ex capite lecti*, and it being so taken out of the way, the right accresces to the eld-

No 55. contents of the writ or not. The Lords resolved to observe this as a rule in future; and declared, that the former decisions were in circumstantiate cases and made no general rule.

est son, his debtor. *Alleged* for William Paul, receiver of the disposition, That *esto* it were on death-bed, you cannot quarrel, because you have no right but as come in place of the apparent heir; but so it is, he will never be heard to impugn or reduce it, because he has consented thereto by signing witness, which homologates his father's deed, as was found, Stewart of Ascog *contra* Stewart of Arnholm, No 51. p. 5674. Stair; and Haliburton *contra* Haliburton, No 52. p. 5675. where an apparent heir's subscribing as witness to his predecessor's deed on death-bed was found to import a consent. *Answered* for St Martin's, He not only insisted on the head of deathbed, but likewise that this disposition being signed by two notaries, because of his sickness, it does not bear that he touched the pen, as our acts of parliament expressly require, viz. act 29. 1555, and act 5. 1681, and so his subscription is null. *Replied*, That the first act speaks only of reversions; and though the second act relates to all writs, yet it does not require that the notary's attestation should expressly bear the same; for it requires the witnesses not to subscribe, under the pain of forgery, unless they either hear or see the party give a mandate or command to the notaries to subscribe for him, and in evidence thereof he touch the pen; so that the expressing that they subscribe *ex mandato* comprehends all; and law presumes all to be legally and solemnly done in that case, unless the quarreller offer to prove the pen was not offered nor touched: and though sundry attestations bear both *ex mandato, et calamum tangens*, yet that is only *exuberantia styli, et omnia præsumuntur solenniter acta*, and included in the general mandate; and as many want it; and to find it a nullity might be of dangerous consequence, and cast all those who want it, which preparative ought to be prevented. *Duplied*, The last act is most express, and ought not to be dispensed with; and a general expression ought not to supply defects of solemnities; even as the Lords have found, where a messenger's execution says he has lawfully denounced and inhibited, and it was urged this included the three oyesses and blast of the horn, yet they found this omission did not supply the nullity, and the word *legally* did not include them, yea, that *the* oyesses did not import *three oyesses*, seeing the plural *duorum numero contentus est*, though it wanted only the letter *r* to make it three; so nice are the Lords on these formalities. And as to the hearing the mandate given, there might be much fraud and knavery, if that were found sufficient; for one might speak out of the bed where the curtains are drawn, and personate the testator, as Julius Clarus tells us was actually done in Milan by a wife (when her husband was dead), putting another in the bed to speak like him, *ad tit. de testamentis, quæst.* 59. And some could be named for using the same tricks in Scotland. So nothing can ascertain the witnesses' knowledge so much as to see the party giving the mandate likewise touch the pen, and thereby move his hand as an evidence that he is yet alive. The Lords would not find the notary's not adjecting of these words, 'that he touched the pen,' a nullity of the disposition, but found it included in these words, *ex mandato*, unless the party-reducer would offer to prove by the witnesses present and in-

No 55.

sert, that the pen was not offered him; otherwise it was to be presumed. Then the Lords fell on the second point, How far the apparent heir's subscribing as a witness can be construed to be a consent, and it was thought to be impossible to make a general rule to meet all cases; for as to the decisions cited, one of them seemed to go on this ground, that the right he signed witness to was read to him, and so he could not be ignorant of its contents; and the other gives this reason, that the heir knowing his predecessor's condition to be probably *in lecto*, he should have considered if it was prejudicial to him, and if it was to keep up his hands; and if he did it not, *sibi imputet*. On the other hand, an apparent heir, for fear of displeasing, may subscribe, thinking it will not cut him off, and to shun his father's resentment for his refusal, in case his father happen to recover of that sickness. The Lords thought the determination of the import of such a subscription of consequence to the lieges; and therefore ordained it to be heard in their own presence. See Stair, *lib.* 1. *tit.* 10. § 11. who tells, that there may be sundry cases, wherein subscribing as witness will not import consent; but this depends on the pregnancy of their knowing the contents and other circumstances, as if the party be a purchaser for onerous causes, and the heir signing as witness would quarrel it, I think he would be excluded *personali exceptione de dolo malo*; but in general, his subscribing as witness cannot validate the disponer's power over the subject disponed, and legitimate that where the law has declared him incapable, as it does in the case of disponing heritage on deathbed, especially where the deed is gratuitous, and that the reducer is a creditor of the defunct's, and not only of the apparent heir. To this head belongs that rule both in the civil and canon law, *Qui tacet consentire videtur*, *l.* 142. *D. de reg. jur. ibique commentar.* And on the canon law, *Dynus Decius aliique*, *ad l.* 43. *et* 44. *de regulis juris*, *in* § 6. *Decretalium*, who lay down this ground, That taciturnity imports consent in him, *qui contradicendo poterat actum impedire*, and without whose consent it could not be validly done.

This point being fully heard on the 19th of January 1704, the LORDS found the apparent heir's signing as witness ought not to import a consent, whether he knew the contents of the writ he subscribed as witness or not, and resolved to follow this as a fixed rule in time coming; and found the former decisions were in special circumstantiate cases, and made no general rule. *See* WRIT.

Fol. Dic. v. 1. *p.* 380. *Fountainhall, v.* 2. *p.* 211.

*** Dalrymple reports the same case:

JAMES DALLAS, as adjudger from the apparent heir of Alexander Paul, pursues a reduction of a disposition made by the said Alexander, in favours of William Paul his second son, *ex capite lecti*; and insists on this ground, that the disponer was then so weak, that he could not sign by himself, but signed by notaries, and the attestations of the notaries were null, in so far as they did not bear, that the disponer touched the pen; as is expressly required by the 5th

No 55. act Parl. 1681, bearing, that no witness shall subscribe as witness to a notary's attestation, unless he saw or heard the party give warrant to a notary or notaries to subscribe for him, and, in evidence thereof, touch the notary's pen; which being a necessary formality, ought to be expressed in the notary's attestation.

It was *answered*: The law does indeed precisely require, that the party touch the pen, as an evidence of his warrant to the notary to sign for him; but does not bear, that the attestation shall express the same; and the title and design of the law was to direct witnesses in probative writs, that they might know what was their duty when they adhibited their subscriptions, and what was the hazard, if they transgressed; and therefore a witness is bound to see the party touch the pen, before he sign as witness to a notary's attestation. And, if it can be proved in this, or any other case, that the pen was not touched, the attestation will be null; but *omnia præsumuntur solemniter acta;* and it was not designed by that act of Parliament in the least to alter the forms of attestations; and though many attestations do bear, that the party touched the pen, yet many also do not bear it; and there being no positive law, nor uniform custom in the contrary, it were of bad consequence to annul such instruments as do not express that formality.

'THE LORDS sustained the attestation.'

In this process the apparent heir was a signing witness to the disposition; and the defender *alleged*, That his subscription was equivalent to a consent; and therefore there was no place for a reduction *ex capite lecti;* and cited two practiques, one in the 25th June 1663, Stuart against Stuart, No 51. p. 5674.; and another, Halyburton against Halyburton, No 52. p. 5675.; where the Lords found, 'that theheir's subscription as witness, excludes the allegeance of death-bed.'

The pursuer *answered*, That there were specialities in the two cases determined; and that it was not agreeable to the analogy of law, the witnesses being only adhibited to attest the verity of the subscription; nor was it reasonable to oblige apparent heirs to enquire narrowly into what their dying parents or predecessors were doing, or to be under a necessity, either to contradict them, or prejudge themselves, which would be uneasy in their sickness, and offensive in case of their recovery.

'THE LORDS were generally of opinion, That the apparent heir's signing as witness, did not hinder him or his creditors from quarrelling the deed; but, seeing there had been contrary decisions, though the former were circumstantiate, yet they appointed the parties to be heard in their own presence, that the decision might be a rule in time coming.'

January 19.—THIS cause being heard, and fully debate *in presentia*, 'THE LORDS found, that the apparent heir's signing witness to his predecessor's deed on death-bed, did not import his consent or approbation of the deed; and the LORDS did consider the former practiques, both observed by my Lord Stair, the first also observed by Sir John Gilmore, and the last by Sir John Nisbet, which

did proceed upon this ground, that the apparent heir signing witness to his predecessor's deeds, in such circumstances, as death-bed appeared to be approaching, was presumed to understand the contents, and, in the last case, it was positively alleged, that the writ was read in presence of the apparent heir, so that the apparent heir, knowing the contents and signing, was by these decisions reckoned as a consenter; in this case also the defunct appeared to be in extremity; and therefore the LORDS considered the general case, upon the supposition that the apparent heir did truly know the contents, and did determine upon that supposition, which was also expressed in the interlocutor; and did resolve to determine in the same manner in all cases of the like nature, conceiving that it was more agreeable to the analogy of law, that witnesses should be understood to be adhibited to attest the verity of the deed; and, if any speciality were intended, in that case it was thought more reasonable that the apparent heir should be expressly insert as a consenter; and that an apparent heir should not be put under any necessity to disquiet his predecessor, if he were in a dying condition, and in extremity, or disoblige him, if he were in such a condition, as it were uncertain whether he might die or recover.' *See* WRIT. No 55.

Dalrymple, *No* 46. & 47. *p.* 59.

1728. *December* 20. RIDDELL *against* SCOT.

A HUSBAND being writer, and subscribing witness to a disposition made by his wife of her lands, found to be a sufficient consent so as to validate the disposition. See APPENDIX. No 56.

Fol. Dic. v. 1. *p.* 380.

SECT. VI.

Consent not presumed, when the Deed can be ascribed to another Cause.

1626. *March* 30. GRIEVE *against* CANT.

IN an action betwixt Grieve and Cant, for payment of the sum of 1000 merks, wherein the defender was obliged, by virtue of a contract of marriage, as promised for tocher, it being *alleged*, That the contract was only subscribed by one notary for him, who was obliged in that sum; and so being a matter of importance, could not be sustained to produce action thereupon, in respect of the act of Parliament. This allegeance was repelled, in respect that marriage followed betwixt the parties, according to the contract; which the LORDS found to supply that defect. No 57.

Act. *Oliphant*. Alt. ——. Clerk, *Hay*.

Fol. Dic. v. 1. *p.* 381. *Durie*, *p.* 201.