No 47.

THE COURT were clear, that the disposition did not include the documents of debt or money; 14th May 1795, Earl of Fife against M'Kenzie and Fraser, *infra, h. t.*; and so far the petition was refused without answers.

But it was thought the pursuers were entitled to the watch and trinkets; and the petition, as to this point, was, of consent of the defenders, remitted to the Lord Ordinary.

Lord Ordinary, *Methven.* For the Petitioners, *Solicitor-General Blair, Hagart, Connell.* Alt. *H. Erskine, D. Douglas.* Clerk, *Sinclair.*

D. Douglas. *Fac. Col. No 29. p. 68.*

SECT. VI.

Right of Electing, with Advice and Consent.—Discharge of all Claims against a Predecessor's Estate.—The term *Heirs Female.*—Provision to Children in full of all Claims.—The term *Children* in a Testament.

1739. *December* 4.

MAGISTRATES of LINLITHGOW, *against* The KIRK SESSION thereof.

No 48.
A right to elect to an office, with the *advice* and *consent* of another, was found to imply a negative; and that an election without the consent, was ineffectual.

THE right of elecsion of the precentor of Linlithgow, by an old deed between the kirk session and the town, being in the kirk session, with *advice* and *consent* of the magistrates and town council, the question was as to the import of giving advice and consent, whether, in case of their dissenting, the kirk session had power to judge in the first instance of the cause of their dissent, leaving to the magistrates to seek redress by suspension or reduction? or if thereby the magistrates had in effect a negative, so that in case of their refusing their consent, there is no election?

THE LORDS were of opinion, That the magistrates had a discretionary power to consent to, or to dissent from, the election, as they should see cause; and that, without their consent, there could be no election: And therefore 'suspended the election of the precentor made contrary to the opinion of the magistrates; reserving to the kirk session to sue for redress as accords.'

Fol. Dic. v. 3. p. 123. Kilkerran, (ADVICE and CONSENT.) *No 1. p. 20.*

1744. *December* 15. IRVINE *against* IRVINES.

No 49.
A son having granted a discharge of all claims

PATRICK IRVINE, eldest son of Patrick Irvine, merchant in Prestonpans, in his contract of marriage, in consideration of the settlements by his father therein

No 49.
against his father's estate, it was found that he was not prevented from bringing a reduction of a deed granted by his father on death-bed.

upon him, accepted thereof, 'in full contentation and satisfaction of all, or any 'thing, or claim, or interest that he could any ways ask or pretend from his 'said father, by virtue of his mother's contract of marriage, or any other man-'ner of way, and in full of all interest, claim or pretence he could pretend to, 'or claim of his said father's estate, personal or real after his death, excepting 'his said father's good will; and discharged his said father for ever, excepting 'as said was.' Old Patrick, on death-bed, disponed his real subjects to his younger children; and, by his testament of the same date, left his son 800 merks, on the condition of his own surviving the deed 60 days, and no otherwise.

Patrick the son raised a reduction on the head of death-bed; in which the LORDS, 6th November 1744, 'Sustained the defence founded on the pursuer's contract of marriage; and therefore repelled the reason of reduction, and found, by reason of the said clause, that the pursuer had no right to heirship moveables.

Pleaded in a reclaiming bill, The law of death-bed, either introduced or confirmed by statute, *W.* I. *cap.* 13. which is noticed in *Reg. Maj. l.* 2. *c.* 18. § 7. *et* 9. has hitherto been held so strong as to get the better of rational provisions to children, Durie, p. 847. 1st July 1637, Cranston against Richardson, *voce* DEATH-BED; and Rem. Dec. v. 1. p. 59. July 1721, Sir James Fowlis against his Sisters, IBIDEM: But as the interlocutor complained against refers to, and is founded on, the clause in the pursuer's contract of marriage, he contends that this clause cannot support it, because there is a great difference betwixt this case, and where a person dispones lands, reserving power to himself to burden upon death-bed; for there the disponee having accepted the estate, with the quality, cannot reprobate it: And besides, as he is not heir, he does not fall under the law of death-bed.

The clause would not have hindered the pursuer's legal succession to his father's heritage; and on death-bed, no deed can be granted in prejudice of theheir.

It does not bear to be a consent to a disposal on death-bed; and if it did, such consent has been found to be of no avail, 4th December 1733, Inglis against Hamilton; and in a case precisely parallel to the present, 13th November 1728, Reids against Campbell, both cited, *voce* DEATH-BED.

Answered, The law of death-bed does not strike against deeds for true, just, and necessary causes; the *Reg. Maj.* generally makes use of the word *donare*; and hence this law does not strike against deeds in implement of a prior obligation, 19th July 1706, Edmonston against Edmonston; nor does it import whether it be a civil or merely natural obligation; for Craig says, *L.* 1. *Dieg.* 13. *In lecto ægritudinis potest quis uxori usumfructum constituere*; and so it was found, 23d February 1665, Jack against Pollock; 21st January 1668, Shaw against Calderwood; and the Lady against the Laird of Dunlop, marked by Hope, title TEINDS; and 25th July 1672, Gray against Gray; and 16th June 1676, Mitchell against Littlejohn;* and this doctrine will support the deeds in question, being

* *See* All these cases *voce* DEATH-BED.

No 49. only a provision to younger children, when the elder was formerly provided for.

But, 2*do*, Supposing the deeds reducible of their own nature, they must be supported from the pursuer's consent. The moment a man is on death-bed, there arise three several interests, which he cannot hurt, that of the heir, of the children, and of the relict: Now it has been many times determined, the relict and children's renunciation will bar them; and why ought not the heir's to have the same effect? There can no difference be conceived betwixt this case, and that of lands disponed to an heir, with a reserved faculty: The accepting of a provision in full of all pretensions, and then quarrelling this deed, is equally approbating and reprobating; and it cannot be denied to be a prejudice to the heir, to take that under a burden, which, had it not been for the deed on death-bed, he would have taken free.

It was disputed whether Patrick Irvine had heirship moveables, being only infeft in houses in Prestonpans.

The Lords, 4th December, sustained the reasons of reduction; and therefore reduced the dispositions libelled, and found the defunct had heirship moveables, and that the pursuer had a right to them: And this day they refused a reclaiming bill and adhered. *See* Heirship Moveables.

Act. *A. Macdowal.* Alt. *G. Bown.* Clerk, *Gibson.*

Fol. Dic. v. 3. *p.* 123. *D. Falconer, v.* 1. *p.* 27.

1743. *June* 15.

Competition, Creditors of Redhouse with Thomas Glass, &c.

No 50.
A man entailed his estate to heirs-male, making a provision to *daughters and heirs female.* Having a son, it was contended a daughter had no claim, not being heir-female. Found, that *heir-female* meant only *daughter.*

Captain Hamilton of Redhouse tailzied his estate to ——— Hamilton his son, and his heirs-male, &c.; and, by a clause in the deed, he provided, 'That 'in case there shall be daughters, and heirs-female procreate of his body, alive 'at the time of his decease, then, and in that case, he obliged his heirs-male 'and tailzie therein specified, to pay the said daughters and heirs-female, ane 'or mae, 10,000 merks, to be equally divided amongst them after his decease.' The Captain died leaving one son, and a daughter named Helen, who was married to Mr Adam Glass. In the ranking of the creditors on this estate, Helen's children claimed to be ranked for this 10,000 merks provided by the foresaid bond of tailzie, to be paid to the daughter, or heir-female, procreate or to be procreate of Captain Hamilton's body.

Objected for the Creditors, That the provision of 10,000 merks did obviously appear, from the scope of the deed of entail, to have been allenarly intended to take place in favour of such daughter as was vested with the character of heir-female of Captain Hamilton's body, which could never apply to Helen Hamilton, the Captain's daughter, as there was one son procreate of the Captain's body, who survived his father: and that it was only meant to be effectual, in