No. 13. 1750, July 18. SIR KENNETH M'KENZIE *against* SUTHERLAND, &c.

MRS EL. EDWARDS, last Lady Kinminnity, after her husband Kinminnity's death gave a bond for love and favour to her daughter (of a former marriage) for 4000 merks, payable at her marriage, with annualrent from 1723, if she should not be sooner married before that time, but under express condition that if she died unmarried, or if she married without her consent in writing the bond should return to herself. This bond she put in the hands of Sir Patrick Strachan of Glenkindy, her uncle, who at the same time gave another bond for the like sum, payable at marriage, and under condition of her marrying with the Lady's consent in writing. On the death of Kinminnity's son the Lady thought that a marriage betwixt the young Lady and Sutherland of Clyne would be reasonable, and gave encouragement to him; and he came in suit, but she insisted on a tailzie of the estate and certain other conditions wherein they did not agree, and the Lady made a runaway marriage by the advice of some friends. After some months the Lady was so far reconciled as to give and receive visits and to declare her inclinations to be yet kind to them if they would give her the management of the estate; but afterwards she married Sir Kenneth M'Kenzie and made over her claims on Kinminnity's estate, which have since been ascertained, to his heirs, in the ranking of the creditors. But they pleaded compensation on the 4000 merks bond, which we sustained 6th June last, and this day adhered notwithstanding not only there was no consent in writing by the Lady, but pretty strong proof of dissent, *renit*. President, Woodhall, *et me*.

No. 14. 1751, Nov. 8. WILLIAM GRAY *against* SMITH AND BOGLE.

19th September 1671, James Calbarns disponed five acres of land to his wife Johnston in liferent, and to his son Thomas and his issue, whom failing his son James and his issue, whom failing to his own other issue, whom failing to his wife's children of any other marriage, but without any procuratory, and died sometime of that month of September, as appeared by his son Thomas's service in 1692. After his death the wife married Skirvine and by him left a daughter and died 1674; and James Calbarns seems to have had no near relation but one sister. As Thomas was under no limitations, and the disposition could not be executed without assigning and adjudging, Thomas in 1692 served heir on the former investitures, and appears to have been in perfect friendship with Skirvine his stepfather and his daughter Thomas's half-sister, and left him a legacy of 2000 merks to himself, and a valuable part of his personal estate in trust for his daughter and her children, particularly her son William Gray pursuer. In 1702, James Calbarns was served heir on the old investitures to Thomas, and, as he was exceedingly weak, in 1705 interdicted himself to Robert and William Smith and their sons, or either of them; and in 1723 thereafter these interdictors stripped him of every valuable subject and debt owing to him, and which they uplifted in trustees' names; and Robert took a disposition to the five acres and was infeft; and the poor man appeared from the proof, if not quite an idiot the very next degree to it; and in 1743 Robert being dead his son William got a new disposition of these five acres to which the other William consented as interdictor reserving the granter's liferent, and was infeft, and entered into a minute of sale with Bogle. James Calbarns's

disposition 1671 was registered in 1738, and Ann Skirvine, the daughter of Johnston, James Calbarns's wife, served heir of provision to him and conveyed it to her son William Gray, who pursued reduction of these two dispositions to the Smiths, first on incapacity, 2dly on fraud; 3dly, *ex capite interdictionis*. Before the process, William Smith the disponee served heir of investiture to James Calbarns last deceased, being descended of the sister of old James. A proof being allowed before answer, it was this day advised; and the defender objected to Ann Skirvine the pursuer's title as served heir to old Sir James Calbarns, for that by the disposition he was not fiar but his son Thomas;—and we thought the objection good, but that it might be supplied by a new service before extract. 2dly, Objected to the disposition 1671, death-bed, for that it was proved by Thomas's service that he died in that month of September, and though they could not *in re tam antiqua* prove sickness before the disposition, that was the fault of the pursuer who kept it latent all the time, and therefore sickness must be presumed. 2dly, Presumed that the Calbarns would have altered had he known of it; and it was urged as a presumption of death-bed that the deed bore delivery of the writs to the wife, which no man in health need do. Some of us were for sustaining the objection, as Dun and Drummore, but we repelled it, and I observed that in point of fact there was no reason to presume latency or that it was not delivered to Thomas when he came of age, for that he must have been an infant when his mother died in 1674 and had no agent to take care of him; that he must have got his papers before 1692 when he was served heir, and must have got them from his stepfather, who had no reason to keep the disposition 1671 either for fear of death-bed or any other cause, since Thomas could alter at pleasure, and there appeared a strict friendship between them. 3dly, Objected both negative and positive prescriptions, which some of us also inclined to sustain, especially on the authority of a decision quoted from Fountainhall, between the heirs-male and heirs of line of Innes of Achlunhart;* but we also repelled that objection, because that disposition was the proper evident of both Thomas and James Calbarns while they lived, and one of their titles to the lands; and though if it had contained burdens or limitations on them, the possessing 40 years as a fee-simple would free them from those limitations and from the whole entail, which they could not be presumed to have accepted when it was hurtful to them, yet they could not prescribe against themselves and to their own prejudice a right to the lands absolute and in fee-simple; and we had no regard to the argument that Thomas serving heir of the investiture was itself an alteration, which was the shortest and safest way of making up titles.—(N. B. The positive and negative prescriptions were I think both repelled in Dundonald's case.) Then we came to the proof, and agreed that interdiction is no sufficient reason *per se* where the party is capable and the interdictors consent, and some thought that a bare destination or settlement of succession in heritage would be good without the consent, if alterable at pleasure, because no lesion; and yet a minor without his curators cannot alter his succession in heritage. But in this case the majority thought the proof the last James Calbarns's incapacity sufficient; 2dly, If he had been capable, yet it was fraudulent to strip him of the property without any power to alter, and therefore reduced, for were he now alive and pursuer we must have reduced, and therefore so may all his heirs; and we reduced the minute of sale so far as it could affect the lands. 30th June 1752 Adhered.

* DICT. No. 386. p. 11,212.