No 9.

The pursuer is heir apparent to the granter of the deed.—Before the act 1695, there was reason for considering the interjected apparent heir as a stranger. His successor serving to a remoter predecessor was not liable in implement of his debts or deeds. But now he is made, by such service, to represent the interjected heir, who has been three years in possession, as much as any predecessor to whom he serves;—consequently, before he makes up his titles, he is truly and substantially apparent heir to the interjected heir. This is the meaning which the statute itself puts upon the term Apparent Heir. The statute says, that when he is served, 'he shall be liable for the debts and deeds of the person 'interjected, to whom he was apparent heir.'

The COURT found, 'that the pursuer's general service is no sufficient title to pursue this action: But found, that the pursuer's right of apparency, as heir to Charles Grahame, is a sufficient title to carry on the process of reduction on the head of death-bed.' *See* HEIR APPARENT.

Lord Ordinary, *Gardenstone*. Act. *Stewart*. Alt. *Swinton*. Clerk, *Menzies*.

Fol. Dic. v. 3. *p.* 170. *Fac. Col. No* 65. *p.* 122.

1779. *July* 29. WILLIAM FINLAY *against* WILLIELMINA BIRKMIRE.

No 10.
An heir was not barred from pleading death-bed, by the circumstance that a previous deed had been executed in favour of a stranger.

WILLIAM BIRKMIRE was twice married.—By his first wife he had four daughters, and executed several deeds in 1764, settling different parts of his succession on them and their children.—In particular, he disponed some buildings in the town of Paisley to Agnes, his youngest daughter.—This deed contained a power to alter, *even on* death-bed, and a clause dispensing with the delivery.

Soon after Birkmire's second marriage, he cancelled the disposition to Agnes; and, by a writing upon the deed, mentioned the cancelment to have been 30th September 1772. Of the same date he executed a new settlement, disponing the subject to himself in liferent, and the children of the second marriage in fee.

Birkmire died 14th November 1772, leaving an only child of the second marriage, Willielmina Birkmire.—After his death, William Finlay, son and representative of Birkmire's second daughter, brought an action as one of the heirs at law to his grandfather, against this child and her tutor, for setting aside the deed 1772 on the head of death-bed.

Pleaded in bar of this action: The heirs of law have no title to challenge the deed 1772. They were not hurt by it, as their right to the succession was excluded at that time by the previous deed 1764 in favour of Agnes.—It was *jus tertii* to them, whether Agnes should succeed, or any other disponee come in her place. Agnes is the only person who is affected by the new settlement;

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but she is barred from any challenge of it by the reserved faculty contained in the disposition to her.

The cancelment of the deed 1764 does not remove the objection. It is an established point, that an implied revocation of a former deed will not entitle the heir at law to challenge the new deed *ex capite lecti*. An implied revocation has all the effects of an express revocation.—They are substantially the same; and, on this principle, the Court repelled the claim of the heir at law, in a case where the deed contained an express clause revoking the former settlement; Crawford against Crawford, June 16. 1749, *voce* TITLE TO PURSUE.

But, at any rate, the cancelment of the deed in this case cannot be considered as opening the succession to the heir at law.—It only took place at the time the new settlement was executed. They were both parts of the same transaction executed *unico contextu*; and the object of the granter evidently was, to alter one destination of heirs for another; but, in no event, to admit the heirs at law.

Answered for the pursuer; It is not sufficient to bar the heir at law from insisting in a challenge *ex capite lecti*, that a previous deed in favour of a stranger had been executed. The deed must likewise remain during the life of the granter, neither cancelled nor taken out of the way by a subsisting deed of revocation. If either of these take place, the heir at law returns to his right of succession.

It may be admitted, that the same effect will not be given to a revocation merely implied from the terms of the death-bed deed.—In that case, the consequence of setting aside the death-bed-settlement will be, to take away the implied revocation, and open the succession to the disponee in the former deed, who, therefore, has the only right to bring the challenge.—But the effect of cancelment is to destroy the deed altogether, and put the disponee in the same situation as if it had never existed.—The cancelled deed, therefore, can be no bar to the succession of the heirs at law; and, consequently, it is not *jus tertii* in them to challenge the death-bed deed.

The judgment was, 'SUSTAIN the pursuer's title to insist in the present process of reduction of the deed challenged *ex capite lecti*.' See TITLE TO PURSUE.

Lord Ordinary, *Gardenston*. Act. *J. Campbell*. Alt. *Rolland*. Clerk, *Tait*.

Fol. Dic. v. 3. p. 170. *Fac. Col. No* 89. *p.* 173.