No 8. ' *the disease whereof he died*, do belong to the donatar,' &c. Stair, l. 4. tit. 13. p. 582, (604.)

The other reason of reduction, founded on the minority of Margaret Morison, is also relevant; for minors are debarred from altering the course of succession to their lands, because they are presumed, during their minority, not to have sufficient stability of judgment for making such an alteration; and this reason takes place whoever be the heir that is prejudged by the alteration.

' The Lords found, that is was competent to the Crown's donatar to object to the disposition granted by the deceased Margaret Morison to James Murray of Cherrytrees, upon the head of death-bed, and sustained the objection.'

Reporter, *Justice-Clerk.* Act. *Advocatus & J. Ferguson.* Alt. *Lockhart.* Clerk, *Justice.*
Fol. Dic. v. 3. *p.* 169. *Fac. Col. No* 86. *p.* 129.

*** This case was appealed:

The House of Lords ' ordered, that the interlocutor complained of be ' affirmed.'

*** Lord Kames reports the same case:

A donatar of *ultimus hæres*, in right of the King, was found entitled to reduce a gratuitous disposition of land as made upon death-bed. It evidently appeared to me, that the Court was here misled by an inaccurate expression. The King is named last heir, not that he is an heir in any proper sense; but only that he has a right *jure coronæ* to all goods which have no proprietor. Yet this expression was the only foundation of the judgment, which bestowed upon the King one of the most extraordinary privileges of an heir.

Sel. Dec. No 51. *p.* 64.

*** *See* case between these parties, *voce* Res inter Alios.

1779. *February* 4. Alexander Grahame *against* Margaret Grahame.

No 9.
A general service to the heir last infeft is not a sufficient title to pursue a reduction *ex capite lecti*; but the Lords found that the right of apparency entitled the pursuer to

Grahame of Hourston executed an entail of his estate on his five sons *seriatim*, and the heirs-male of their bodies respectively, but did not record the entail.—Charles, the eldest son, succeeded his father, and was infeft upon the precept in the disposition of entail.—Upon his death, Henry, his only son, entered into possession of the estate, without making up any titles, and contracted a considerable debt to his sister Margaret, and her husband, Robert Grahame.

Subsequent to this contraction, the entail was recorded; after which, Henry granted a lease of part of the entailed lands to his sister Margaret and her husband for 171 years. Henry possessed the estate for 30 years, as heir apparent,

No 9.
carry on his action, tho' it was objected, that he was not natural heir, or of line, but heir of provision, viz. a substitute in an entail.

and died without issue; upon which the succession opened to his uncle Alexander Grahame, youngest son of the entailer.

Alexander made up a title, by a general service, as heir of tailzie to his brother Charles, the heir last infeft; and, on this title, brought a reduction of the above-mentioned tack by Henry Grahame to his sister, and a removing from the lands, on various grounds; among others, that the lease was granted on death-bed.

Objected by the defender to the pursuer's title; The property of the lands leased to the defender is still *in hæreditate jacente* of Charles Grahame, the heir last infeft, and cannot be taken up by the pursuer without a special service to Charles.—The pursuer's general service establishes his propinquity, but does not vest in him the right of property in the lands. He has therefore no other title to carry on this action but his right of apparency.

A lease of lands, clothed with possession, is a real right in the lands for the time; and, therefore, according to the general principle, cannot be challenged by the heir while the lands are *in hæreditate jacente*.

An exception is admitted in the case of a reduction on the head of death-bed, brought by an apparent heir of line; but it has been found, that this privilege, given to the *natural* heir, does not extend to the heir of provision; Edmonstone *contra* Edmonstone, March 16. 1637, *voce* TITLE TO PURSUE.

But further;—The pursuer is not the apparent heir of Henry Grahame, the granter of the deed, nor can make up any titles to him as his predecessor in the lands.—It is only by serving heir in special to Charles Grahame, the heir last infeft, that he can vest himself in the property of this estate. He is, therefore, in the proper and legal sense of the words, the apparent heir of Charles Grahame, and has no connection with Henry Grahame, while the lands are *in hæreditate jacente*.

The pursuer avoids making up his titles to Charles, that he may not be subjected to the debts and deeds of the interjected heir, Henry Grahame, upon the statute 1695.—His conduct, therefore, is *in fraudem* of the statute; and the pursuer ought not to have the benefit of challenging the deeds of Henry Grahame, while, by lying out unentered, he does not become liable for his debts and deeds, as the statute justly requires.

Answered for the pursuer; That, by his general service, he is ascertained to be the heir entitled to take up the succession to this subject; but, without that service, he has sufficient title, as heir apparent, to carry on the present action. —The law has given the privilege of reduction *ex capite lecti* to heirs of provision and tailzie, as well as to the heirs of line.—Consequently there is no room for any solid distinction betwixt the heirs apparent of the one kind and of the other. Both are accordingly now considered as equally entitled to challenge deeds on death-bed granted to their prejudice, though anciently the law might be different in this respect; *vide* Erskine, b. 3. t. 8. § 100.

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;