No 22.
the debtor's apparent heir, although by means of his mother's funds, found to fall under the act of Parliament, by which apprisings acquired by apparent heirs are redeemable by creditors.

count, the Lady his mother, and Bogney her present husband, (which Bogney stood infeft upon an expired comprising deduced at Gregory's instance upon the estate of Frendraught, and who had given a back-bond declaring that his name was in the comprising for security of what sums he had or should advance, and for the Lady's security of her jointure, and for the fee of the estate to belong to this Viscount, in implement of the contract of marriage betwixt the deceased Viscount and the Lady), craving that the comprising in Bogney's person, might be declared liable to this Viscount's grandfather's debt, in regard the comprising was acquired by the deceased Viscount his means, and was blank in his possesion, and so was redeemable upon payment of the sums of money truly paid, conform to the act of Parliament 1661. It was *alleged* for the Lady and the Viscount, That the comprising was not acquired by his father's means, but by a sum which was secured by an heritable security standing in his mother's person; and that his father was only a liferenter, and that he would succeed as heir to his mother thereto. The Lords found, That this right in Bogney's person, albeit acquired by his mother's means, fell under the act of Parliament, and therefore declared the remainder of the estate liable over and above Bogney's satisfaction, the Lady's jointure, and 20 chalders of victual; which the Lords did allow to the Viscount for the foresaid heritable securities which stood in the mother's person, and was uplifted and applied for acquisition of the said comprising.

P. Falconer, No 20. *p.* 10.

1708. *July* 27. Alexander Ragg *against* Isobel Brown, Lady Hartside.

No 23.
One having disponed to another all right he might happen to have to a woman's estate, to whom he, the disponer, was presumptive heir, with a procuratory to serve him heir, in case she died without heirs of her own body; the procuratory though granted in her lifetime, was sustained as a sufficient warrant to serve the granter, who was out

At expeding before the macers, the service of Alexander Ragg, who was out of the kingdom, as heir to Margaret Williamson of Barnhill, by virtue of a procuratory granted by him for that effect, to David Smith, uncle to the Laird of Methven; it was *objected* by Isobel Brown, That the procuratory produced is null, being granted by Ragg long before Margaret Williamson died, or the succession devolved to him as apparent heir; and could not revive by her death, according to the rule *quod ab initio vitiosum est, &c.*

Answered for David Smith; 1*mo*, It is *jus tertii* to Isobel Brown, who has no interest to make such an objection. 2*do*, He produced a disposition to him by Alexander Ragg, conveying all right he had to Margaret Williamson's estate, in case she died without heirs of her body, and the succession fell to him; and containing a procuratory to David, in that event to serve and retour the disponer as heir to Williamson, which procuratory is now good, when the condition is purified. For what more ordinary, than resignations by apparent heirs, whose supervening service renders the same effectual? And *mandatum post mortem exequendum* subsists after the mandant's death, both by the civil law, and by ours, Jan. 18. 1678, Gray *contra* Ballegerno, *voce* Tutor and Pupil. But whatever

might be pretended, if the procuratory were solely *in rem mandantis*, this *in rem mandatarii*, is valid unquestionably.

No 23. of the kingdom, heir to her, when the succession fell due to him by her death.

Answered for Isobel Brown; She had good interest to make the objection, being the next heir of line to the defunct, and presumed to be so, till a nearer appear, or a valid procuratory from him. *2do*, It is against law and good manners, for a presumptive heir, to grant warrant to serve him, when the event of his succession should happen, by the death of a person, at the time not out of hopes of children; which pactions *de hæreditate viventis*, as *Vota captandæ mortis alienæ*, are reprobated in law.

Duplied for David Smith; The Roman subtlety against *pactum de hæreditate viventis*, was peculiar to that jealous people; contrary to the rule of nature, by which every interest present or future, is the subject of agreement; and rejected by the universal custom of Europe, particularly of Scotland, July 6. 1630, Aikenhead *contra* Bothwell, *voce* PACTUM ILLICITUM. *2do*, It is plainly *jus tertii* for Isobel Brown, who proves not her claim, to object against the service, which proceeds upon what is instantly verified; and, by the act 113. Parl. 9. Ja. I., no exceptions are to be proponed against the brieve of inquest, as if it were a brieve of plea, if it have the ordinary forms of execution therein mentioned.

THE LORDS sustained the procuratory.

Forbes, p. 276.

1712. *January* 3.
ROBERT FERGUSSON Writer in Edinburgh, *against* THOMAS IRVING of Gribton.

No 24. A person served heir, and infeft in general terms, was not presumed to be heir of line, but heir male, conform to his predecessor's charter produced, without the sasine.

WILLIAM LORD HERRIES having disponed the lands of Gribton to Sir William Maxwell his son, and to his heirs-male, as appeared by a charter of confirmation granted by the Sovereign to Sir William in the year 1609; which Thomas Irvine apprized the lands from John Maxwell, who was served *legitimus et propinquior hæres* to Sir William his father, and infeft, and upon this apprising Thomas Irvine got possession. Robert Fergusson, adjudger of the same lands from James Charters, as charged to enter heir to John Maxwell, his mother's father, pursued mails and duties. Thomas Irvine compeared and objected against the pursuer's title, That his adjudication is null, being led against the heir of line; whereas it appeared from the charter 1609, and a precept of sasine thereon in the same year, that the lands were tailzied to heirs-male.

Alleged for the pursuer; John Maxwell being served heir, and infeft in general terms, is presumed heir of line, as the most natural title of succession; unless it could be proved, that Sir William was infeft upon the precept and charter in favour of heirs-male. Consequently John's service and infeftment was a sufficient warrant for the pursuer to adjudge from his heir of line; seeing an adjudger, (who cannot know the private conveyances of his debtor's estate,) is