1722. *July* 13.

SIR JOHN KENNEDY of Culzean, *against* MR HUGH ARBUTHNOT of London, Mariner.

No 22.
The act was extended to a disposition of tailzie, blank only in the substitution; so as to annul that substitution, though afterwards filled up according to the directions of the tailzier.

THE deceased Hugh Kennedy of Balterſan, whilſt on death-bed, made a diſpoſition of his eſtate to his only ſon John, and the heirs of his body; which failing to *blank*. And the diſpoſition appears to have been ſigned with a *blank*, as to the ſubſtitutes. Subjoined to the ſubſcription of parties, there is a doquet, empowering Fergusſon of Auchinblain to fill up the *blank* in the diſpoſition, with the names of John Kennedy younger of Culzean, and his heirs, &c.; and the ſaid *blank* appears now to be filled up accordingly. The words of the doquet are, 'I Hugh Kennedy of Balterſan, do hereby declare, that I give power 'and warrant to William Fergusſon of Auchinblain, to inſert the names of John 'Kennedy younger of Culzean, and his heirs; and failing him, to Sir Archi-'bald Kennedy of Culzean, and his heirs, in the above diſpoſition. I have ſub-'ſcribed thir preſents at Balterſan, 17th February 1701, before theſe witneſſes, 'Mr Alexander Fairweather, miniſter at Maybole, and the ſaid William Fergus-'ſon, writer hereof.' John Kennedy, only ſon to the ſaid Hugh Kennedy, maker of the diſpoſition, dying without iſſue, Hugh Arbuthnot of London took out brieves to ſerve himſelf heir of line to Hugh Kennedy, who died laſt veſt and ſeaſed; the ſervice being before the macers, the Lords named aſſeſſors, and Sir John Kennedy having inſiſted that the lands of Balterſan ſhould be ſtruck out of the claim, both parties agreed to diſpute their rights. And,

It was *objected* for Hugh Arbuthnot againſt the diſpoſition, That the ſame was void as to the ſubſtitution in Sir John's favour, becauſe the deed is after the act anent blank writs, and was blank as to the ſubſtitution at ſigning; ſo that whatever may be ſaid of the other parts of the diſpoſition, what clauſes were *blank* at the ſigning are utterly void.

It was *answered*, That ſince this act 1696 does declare, 'That all writs other-'wiſe ſubſcribed and delivered blank, than is by that act directed, ſhall be null,' it can never concern a blank ſubſtitution in a deed of this kind, becauſe the filling up the ſubſtitute, contrary to the act, can never in ſenſe annul the writ as to the inſtitute; but ſince the certification is, 'that the writ ſhall be null, *not* 'that the filling up of the blank ſhall be null,' the law muſt certainly and only concern thoſe writs, where the ſubſiſtence of the writ depends upon the filling up of the blank; for inſtance, where the creditor's name in a bond is blank, or the firſt inſtitute in a diſpoſition: But ſince the writ cannot be void, where the inſtitute is filled up, although the ſubſtitution be blank; this is *causus omissus* in the law: The filling up of that ſubſtitution is left upon the footing of the former law; and therefore cannot be quarrelled upon pretence of this act. 2*do*, This act can have no relation to a blank filled up by an order in writing of the granter himſelf, where the name of the perſon to be filled up is expreſsly mentioned in the written order, and that order ſigned before witneſſes in the moſt ſolemn

No 22. manner: Here there could be no fraud, nor occaſion to give pleas, to prevent which the act was introduced, more than if the blank had be filled up before ſigning the original deed.

'THE LORDS found the diſpoſition was not filled up in terms of the act 1696, anent blank bonds, &c. and therefore muſt ſtill be looked on as blank in the ſubſtitution.'

It was *pleaded* in the *next* place for Sir John Kennedy, Though the Lords have found the diſpoſition no better than blank as to the ſubſtitution, after which he has no acceſs to ſerve heir of tailzie to Hugh Kennedy, the maker; the doquet is ſtill a legal declaration of the ſaid Hugh Kennedy's intentions that he ſhould be ſubſtitute, and muſt have at leaſt the force of a *fideicommiss.* ſo as to oblige the heirs at law to make the ſubſtitution in Sir John's favour, by granting a direct conveyance.

To which it was *answered*, It is not every declaration of intention that conſtitutes a right or tranſmiſſion, elſe there would be ſoon an end of our ſettled forms and ſolemnities. In conſtituting rights and conveyances, the regular, legal, diſpoſitive, or obligatory words muſt be uſed, before a perſon can be deemed to convey, or bind himſelf; and therefore, though one's intention do appear, if it is not expreſſed in proper words, to convey or oblige, it has no legal effects; and it would doubtleſs be of very dangerous conſequence, to give any colour to the alteration of the ſtyle, by which heritage is ordinarily conveyed. For this reaſon it is, that heritage cannot be conveyed in a teſtament, though made in *liege poustie:* And the Lords in ſuch a caſe would not even find, that the teſtament imported an obligation upon the heir at law to denude: Nor would a ſubſtitution be ſuſtained, if made in a teſtament; becauſe a ſubſtitution is ſtill a diſpoſition of the heritage to the ſubſtitute. Upon the ſame account, a miſſive letter of a defunct, declaring his intention to diſpone his eſtate to a third party, in prejudice of his heir, would neither be good as a diſpoſition, nor import an obligation upon the legal heir to denude.

Replied, As to the great danger of allowing the ſtile of conveyances to be altered, Sir John Kennedy knows no danger at all in it: Beſides, he is inſiſting upon nothing that is contrary to the formal ſtyle of conveyances; for when the heir at law comes to implement the will of the defunct, he will be obliged to implement it by a very formal conveyance: But the law hath not tied down proprietors to a preciſe form, eſpecially in naming of ſubſtitutes; any thing in the world does it, that expreſſes the will of the granter. And indeed it is no abſurdity, that a man ſhould name a ſubſtitute by a miſſive letter, if the date be ſupported, the writer expreſſed, and ſuch formalities adhibited, as will hinder it to be a null deed. It is true, it has been introduced by cuſtom, that no deed concerning heritage can be contained in a teſtament, for which, perhaps, no good reaſon can be aſſigned; but the law hath not prohibited heritage to be diſpoſed of by any other deed; ſo that there is no arguing in this caſe from a teſtament, to any other form of writing.

No 22.

'THE LORDS found, That the doquet imports a ſubſtitution in favours of the perſons therein named.' (Referred to *voce* VIRTUAL, SUBSTITUTION.)

The doquet being ſuſtained as a good nomination of the ſubſtitute, it was *objected* againſt it by Mr Arbuthnot, that it was made on death-bed, and ſo not good againſt him the heir.

It was *answered* for Sir John, That this deed, though done on death-bed, is not reducible, becauſe it was not to the prejudice of him who was apparent heir at the time, he being the inſtitute, and the heirs of his body firſt in the ſubſtitution; and that it was unheard of, that a remoter heir, who came only to be heir at the end of many years, could quarrel a deed as done *in lecto* in his prejudice, if it was not to the prejudice of him who was apparent heir at the time. It is very true, that if a deed be done in prejudice of the immediate apparent heir, and that immediate apparent heir die, without ratifying or homologating the deed, the next in ſucceſſion can quarrel that deed, *ex capite lecti*, not as heir to the granter, but as heir to the apparent heir who is leaſed; and not upon that ground, that the deed was done to the prejudice of him the remoter heir, but becauſe it was *ab initio* in prejudice of the immediate heir. This ſeems to be an undoubted point of law, plainly eſtabliſhed by practice; for ſince the immediate apparent heir, by conſenting to the deed, or homologating, can validate any deed on death-bed, ſo as to exclude every after-heir, yea though the immediate apparent heir ſhould never enter heir; it is a plain proof, that the deed muſt be in prejudice of the immediate heir at the time, otherwiſe not reducible, becauſe he can only conſent for his own intereſt. And in this way falls to be explained the deciſion, 16th July 1672, Gray *contra* Gray. Stair, v. 2. p. 101. *voce* DEATH-BED.

Replied for Mr Arbuthnot, He muſt take the liberty to conteſt the principle, 'That the law of death-bed favours only the immediate and not the remoter 'heirs,' ſince the rule, as it is eſtabliſhed by our law and practice, regards heirs without diſtinction; and the reaſon of the law ſeems to concern the remote, as well as the immediate heir. The intention of this conſtitution, was, doubtleſs, to prevent the importunities of deſigning people, who might take advantage of the weakneſs, or want of judgment of perſons in ſickneſs, to perſuade them to defraud their heirs; and, in proportion as a ſick perſon might be eaſier wrought upon, to diſappoint a remote relation than a nearer, it would have been reaſonable in the law to guard againſt that event more carefully: For example, a dying perſon leaving an infant ſon, and perhaps a ſiſter or ſiſter's children, would be very hardly prevailed upon to diſinherit his infant child, but might more eaſily be perſuaded by importunity, to ſubſtitute ſtrangers to his own ſon, to the clear excluſion of his heirs in blood. And if it ſhall be ſuppoſed, that it was the intention of the law to prevent ſuch abuſes, reaſon demands, that the ſanction of it ſhould ſtrike at that ſort of abuſe, which is more eaſily committed, with the ſame force at leaſt, as againſt that other ſort which is more difficult to be committed. It is no objection to this, that the immediate apparent heir's conſent, does exclude every after-heir from quarrelling; whence it was inferred,

No 22. that death-bed is only competent, when the immediate heir is leaſed; for his conſent has this effect, whether he or any ſubſequent heir ſuffer by the death-bed, in reſpect, 1*mo*, That thereby all ſuſpicion of fraud or impoſition is taken away; and, 2*do*, That the conſent is *fictione brevis manus*, of the ſame import, as if the dying perſon had diſponed to the heir, and the heir in *liege poustie* had conveyed to the ſtranger, which would exclude all poſſibility of challenge, at the inſtance of the remoter heir.

'The Lords found the action of death-bed competent to Mr Arbuthnot, though a remoter heir, notwithſtanding that the neareſt heir was the ſubſtitute.' (Referred to *voce* Death-Bed.)

Fol. Dic. v. 1. *p.* 104. *Rem. Dec. v.* 1. *No* 33. *p.* 65.

1730. *Jan.* 8. Executors of Mr Robert Walkingshaw *againſt* Campbell.

No 23.
A bill drawn payable 'to the bearer,' was conſidered to be null as a blank writ.

John Campbell of Mamore drew a bill upon Ronald Campbell, writer to the ſignet, payable *to the bearer*, which was accepted.

The holder of the bill was Captain Patrick Ronalds, whoſe creditors, the Executors of Walkingſhaw, arreſted the ſum in the hands of the acceptor. In a furthcoming, it was *objected*, That the document was null upon the act 1696, relative to blank writs.

After a variety of procedure, the Court pronounced this interlocutor: 'Having conſidered the petition with anſwers, with the memorial, together with the act of Parliament anent blank bonds and writs, Find the bill in queſtion not obligatory.'

A ſecond petition is introduced in this manner: 'This queſtion has depended before your Lordſhips ſince 1725. It has received ſix different interlocutors; and, by no leſs than four of theſe interlocutors, the bill was found good; by two of which, in preſence, the defence on the act of Parliament was repelled.' This ſecond petition was refuſed without anſwers.—The memorial alluded to in the interlocutor was written by Lord Kames. It was *argued*, That bills may be conſidered as blank writs in two different ſhapes; 1*ſt*, When the name of the drawer is blank; and 2*dly*, When there are both a drawer and acceptor ſubſcribing, but the creditor's name to whom payable is blank. The firſt only, it was contended, was under the eye of the legiſlature in the act 1696. The main deſign of the ſtatute was to obviate a fraud, at that time much in uſe, committed by people *labentes* or *lapsi bonis*, of taking blank obligations from their debtors, which they had the opportunity of conveying privately away, in defraud of their lawful creditors. This object of the act correſponded ill with the nature of bills of exchange, the purpoſe of which is, that they ſhall paſs freely from hand to hand like bags of money. It muſt have been this conſideration which occaſioned the exception of blank indorſations contained in the act: And the intention of the act is as much accompliſhed as it can be with regard to bills, by rendering them null, if