ment, are so far in a copartnery that persons furnishing materials to them have a right in the subject preferable to that of any private creditor.

PRESIDENT. I do not see a copartnery here; but, call it what you will, here there was a relation between two people: if one of them had become bankrupt, the creditors would have had recourse against the whole subject.

On the 29th January 1779, "The Lords found that Crooks, &c. are entitled to Porteous's half of the bond, for relief of the debts contracted by them for carrying on the joint adventure;" altering Lord Elliock's interlocutor.

Act. H. Erskine. *Alt.* A. Millar.

Diss. Elliock, Stonefield, Hailes, Braxfield.

1778. *December* 3, and 1779, *February* 4. ALEXANDER GRAHAM *against* MARGARET GRAHAM.

DEATHBED.

[*Faculty Collection, VIII.* 122; *Dict.* 3186.]

BRAXFIELD. There are two reasons of reduction libelled, and they merit different considerations. The petition lays the stress upon this question, being necessarily connected with the removing; but *that* is not to the purpose: if the pursuer has not a right by apparency, what better right has he by his general service? He serves in general as heir of the institute: *this* points him out to be the heir; but, if he has a right in his person, a service is not necessary. The use of a service is to transmit a right from the dead to the living: if the defunct had only a right of action, the general service is proper for transmitting that right of action. Here there is a real right, which he can only carry by a special service, &c. The case of Rowan, (December 1635,) to be sure, says otherwise; but I think that decision erroneous: independent of the plea of deathbed, the pursuer has no title. Deathbed is introduced in favour of the heir of the person who granted the deathbed deed: it is a privilege vested in the apparent heir; but the pursuer is not heir-of-line, nor can he make the challenge as heir to the granter of the tack, for the granter never made up titles.

COVINGTON. The challenge on the head of deathbed is competent to all heirs: the pursuer is heir of provision in the subject.

KAIMES. I am at a loss to see what title has been sustained by the Ordinary, whether the general service or the apparency.

JUSTICE-CLERK. The general service carries nothing; but I cannot get over this ground, that the pursuer is heir of tailyie. A burden is created by the apparent heir, not infeft: if the apparent heir burdens, may not the next apparent heir challenge?

COVINGTON. If Harry Graham had made up titles, the apparent heir might have challenged: is it not strange that his deeds should be less subject to challenge when his titles are not made up than when they are?

KAIMES. Here reason is not wanting, but law: the Act of Parliament has not provided for this case.

BRAXFIELD. How can the pursuer reduce the deed of a person to whom he cannot serve? Let him take up the estate and bring his action.

JUSTICE-CLERK. Before the Act 1695, this tack was good for nothing: then came the act which gives force to the deeds of apparent heirs in possession: Could the act mean to leave the heir of entail without a remedy?

MONBODDO. This is but a tentative process. If the pursuer fails in his reasons of reduction, he will not meddle with the estate. Why should we force him to take up an estate from which, perhaps, he will draw no benefit? This is not altogether a general service: it is what is called *a general special service*, serving *generally*, but as to *particular* lands. This is equal to a disposition.

[Several of the Judges *disclaimed* this opinion, that *a general special service* was equal to a disposition.]

On the 3d December 1778, "The Lords found that the title of apparency was good to found action for reducing, on the head of deathbed;" varying Lord Gardenston's interlocutor.

Act. W. Stewart. *Alt.* — Swinton.

Diss. Kaimes, Alva, Gardenston, Braxfield.

1779. *February* 4. HAILES. If I mistake not the argument of the defender, the result is this,—that an heir of entail, who has been three years in possession without making up titles, may, on deathbed, burden the estate at pleasure; for the heir of line has a *right* to challenge, but has no *interest*, and the heir of entail has an *interest* to challenge, but has no *right*. Now, it is certain that, to authorise a challenge, there must be both *right* and *interest*.

BRAXFIELD. A man that never makes up titles is not at liberty to dilapidate. The heir of entail may make up titles to the person last infeft, and then may challenge the deeds. The pursuer at present is a mere stranger.

KAIMES. The interlocutor is against all principles. The apparent heir, three years in possession, is not proprietor; but his actings, after three years' possession, are effectual.

COVINGTON. It seems very odd that I should be obliged to make up titles in order to challenge, when this very title which I make up shuts my mouth from challenging.

JUSTICE-CLERK. The pursuer is not *apparent heir* to the person last in possession, nor could he, for that person was never infeft: but still he is next in succession; and he is *apparent heir* in the sense of the Act of Parliament quoted. The reason of his not making up titles is, because he does not know whether the estate is worth the taking.

PRESIDENT. Formerly an apparent heir could not reduce unless he made up titles; but this rigour has been mitigated by later practice. The pursuer is not properly an *apparent heir, jure sanguinis;* but he is an apparent heir of investiture. I consider *who* the person is that has an *interest* to pursue. He

might, by the circuit of a trust-bond, have pursued this reduction; and why may he not in the present shape?

BRAXFIELD. By charging a man to enter heir, in consequence of a trust-bond, I carry all right that was in the predecessor.

On the 22d January 1777, "The Lords found that the pursuer's right of apparency, as heir (of investiture) to Charles Graham, is a sufficient title to carry on the process of reduction on the head of deathbed;" adhering to their interlocutor, 3d December 1778.

Act. W. Stewart. *Alt.* J. Swinton.

Diss. Kaimes, Stonefield, Braxfield.

1779. *February 5.* THOMAS DUNLOP and OTHERS *against* ALEXANDER SPEIRS and OTHERS.

RIGHT IN SECURITY.

[*Fac. Coll. VIII.* 124; *Dict.* 14,197.]

JUSTICE-CLERK. If the bill had been protested for not-payment, recourse would have been competent against the drawer and the indorser to the holder, and then the holder might have adjudged for the whole, and, in ranking, would have been entitled to have been ranked for the whole; but *here*, before the bill became payable, a payment was made,—that is, before any debt was constituted against the drawer, the partial payment was made by the acceptor, the primary debtor. It is a new notion, that a partial payment, made by the primary debtor before the bill became due, does not diminish the extent of the debt.

COVINGTON approved altogether of Lord Justice-Clerk's opinion.

BRAXFIELD. When securities are created over different subjects, in favour of creditors, these securities remain until the last sixpence is paid, and the ranking goes against the whole subjects. *This* is the rule as to real subjects, and I think that it is the rule as to personal subjects. The creditors must rank according to the state of the rights when the trust-right was created. What is it that differences this case from the case of payments made by two *correi debendi?* I think that there is a *jus crediti* against a drawer from the very date of the bill. Although the drawer should become bankrupt before the term of payment, I might still adjudge his estate in security.

MONBODDO. He may adjudge; but still this is a conditional debt: and, if payment is made before the condition exists, nothing remains as the subject of the adjudication but the balance.

On the 5th February 1779, "The Lords found that the creditors cannot be ranked for the sums paid before the bill became due, or was protested."

Act. Ilay Campbell. *Alt.* A. Wight.

Reporter, Kennet.