SECT. VIII.

Whether a Death-bed Deed will infer recognition against the Heir.—Blank filled up on Death-bed.—Nomination of Tutors.

1669. *July* 20. BARCLAY *against* BARCLAY.

No 57.
The law of death-bed protects the heir, not only against alienation, but it was found effectual against the superior insisting in a declarator of recognition, upon an alienation made upon death-bed.

THE Laird of Towy having only one daughter, Elizabeth Barclay, and his lands being provided to heirs-male, dispones his estate to his daughter: In which disposition, there being not only a procuratory of resignation, but a precept of sasine, the said Elizabeth was infeft upon the precept, and being an infant, her friends thinking it might infer recognition, took a gift of the recognition, and now pursue declarator thereon, against the tutor of Towy, heir-male, and Captain Barclay, as pretending right by disposition to the estate. It was *alleged* for the defenders, absolvitor, Because the disposition granted by umquhile Towy to the pursuer, his daughter, was granted on death-bed, at the least it was retained by the defunct, and never delivered till he was on death-bed, and thereby it is null, and cannot infer recognition, because the law, upon just consideration, that parties are presumed to be weak in their minds, and easily wrought upon, after contracting of the disease of which they died, has incapacitate them then to dispone their heritage, or to take it any way from their nearest heirs. *2dly*, Albeit the disposition had been subscribed, and delivered in *liege poustie*, yet the sasine not being taken till the defunct was on death-bed, recognition cannot be incurred, because it is not the disposition, but the sasine that alienates the fee, and infers recognition. The pursuer *answered; First*, That death-bed is only introduced in favours of heirs against other persons getting right, but hath no effect against the superior, who is not to consider whether the vassal was sick or whole, but whether he hath endeavoured to withdraw himself, and his heirs in the investiture, from their superior. *2dly*, Death-bed is never competent by way of exception, but by way of reduction. *3dly*, The disposition being in favours of the disponer's only daughter, reserving his liferent, albeit it wants a clause dispensing with the delivery, it being subscribed in *liege poustie*, it is as valid as if it had been then delivered; and if need be, offers to prove that it was delivered in *liege poustie* to the Lord Frazer for the pursuer's use; so that albeit sasine had been taken when the disponer was on death-bed, recognition must be incurred, because the vassal should not have granted a precept of sasine, and delivered the same without reservation; and the having of the precept of sasine being always accounted a sufficient warrant for taking of sasine, and that the warrant was given at the delivery of the precept, albeit the sasine was taken when the disponer was on death-bed,

No 57. yet the warrant was granted when he was in *liege poustie*, by the precept, which bears in itself to be an irrevocable power and warrant to take sasine; so that the vassal had in his *liege poustie* done *quantum in se fuit*, to alienate this ward-fee.

THE LORDS found, That if the disposition, containing the precept, was delivered to the vassal without reservation in the disponer's *liege poustie*, it would infer recognition, though the sasine was taken after his sickness; and found, that if the disposition and sasine were on death-bed, it would exclude recognition by way of exception, recognition not being a possessory, but a petitory, or declaratory judgment; but, seeing it was alleged that the disposition was delivered to the Lord Frazer, the LORDS, before answer, ordained the Lord Frazer to depone from whom, and when, he received the said disposition; and whether he had any direction to take sasine thereupon, or any direction to the contrary, and also that the bailie, attorney, notary, and witnesses in the sasine should depone by what warrant they did proceed therein.

Fol. Dic. v. 1. *p.* 215. *Stair, v.* 1. *p.* 641.

1678. *June* 22. BIRNIES *against* The LAIRD of POLMAISE and BROWNS.

No 58.
A disposition executed in *liege poustie*, but blank as to the disponer's name, was found reducible, as upon death-bed, as the disponee's name was filled up upon death-bed.

UMQUHILE James Short having married Polmaise's daughter without his consent, or tocher, or contract of marriage; during the marriage, James did provide his wife to the liferent of a tenement in Stirling, and some acres thereabout, and to the stock of 10,000 merks due by Tillibarden, with the burden of his mother's liferent of the tenement and sum; but thereafter he revoked this disposition, as a donation betwixt man and wife *stante matrimonio*, and disponed the same to his mother, who transferred the right thereof to her oyes Sir Andrew Birnie's children by James Short's sister; whereupon they pursue reduction against Polmaise, as having now right by progress to the 10,000 merks, as being a donation betwixt husband and wife revocable, and revoked. The defender having *alleged* that there being no contract of marriage, this provision was in place thereof, and therefore was not revocable, especially seeing that it was but a rational provision by a burgess to a gentlewoman's daughter, who had induced him to marry her without her father's consent;—the pursuer *answered*, That the law had sufficiently provided wives by a terce and third, and any further provision after the marriage was a donation revocable, and so revoked. THE LORDS, before answer, did ordain either party to adduce probation what was the estate of James Short the time of this provision; and by the probation it appeared, that he had a tenement worth 10,000 merks, burdened with the mother's liferent, and this 10,000 merks, so likewise burdened; that his mother was a woman near 70 years, and died shortly after; and that the acres about Stirling were worth two chalders of victual un-liferented by his mother, but that his wife liferented the whole, and that he had 11,000 merks of