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when he was in his *liege poustie*, and not in *lecto ægritudinis*, unless it had been so expressed.

*Fol. Dic. v.* 1. *p.* 215. *Gosford, MS. No* 64. *p.* 23.

*** The like was found in the case Douglas against Douglas, *voce* Adultery, No 6. p. 329.

1676. *December* 9. Ker *against* Ker.

No 64.
A deed not delivered till the party be *in lecto* is reducible.

Janet Ker as heir to John Ker her grand-sire, pursues reduction of a disposition granted by the said John in favours of Ninian Ker, son to Patrick Ker his second son, of a tenement in Rothsay, on this reason, that albeit the disposition bear date several years before the disponer's death, yet it was no delivered evident, till the disponer was on death-bed, and doth not contain a clause to be valid, though not delivered during the disponer's life, or *liege poustie*. This reason being found relevant, and admitted to probation, there were only two witnesses which knew any thing, the one Gilchrist a notary, who depones, that two or three days before the defunct's death, he delivered to him this dispositon, and desired him to draw two disposition of the same tenor of the equal halves of the tenement, the one in favours of Patrick Ker his son, father to Ninian, the other in favours of Janet Ker, daughter to his eldest son deceast: And for that effect he subscribed two blanks, which were filled up after the defunct's death, and delivered to John Kelburn by his order; which two dispositions are also produced. John Kelburn depones, that John Ker delivered to him the disposition to Ninian seven years before his death, and that three days before his death he called for the same, which Kelburn having put in a chest of the defunct's, some days before, took it out thereof, and brought it to the defunct, who delivered it to Gilchrist the notary, to frame other two dispositions by it. There is also produced an act in a process of exhibition before the Bailie of Rothsay, bearing, that Kelburn being pursued to exhibit the disposition to Ninian, did depone that he had received it from John Ker, for the behoof of Ninian his oye. At the advising of this cause, it was *alleged*, that the reason was sufficiently proven, two witnesses concurring, that Ninian's disposition was in the disponer's hands on death-bed, and one of them only deponing, that it was delivered to him of before. It was *answered*, 1*mo*, That this being a disposition in favours of an oye, it is valid without delivery, the good-sire's custody being the oye's custody. 2*do*, That this writ was only delivered on deathbed, is not proven, because Kelburn one of the two witnesses depones it was delivered to him before. The pursuer further *alleged*; that suppose it were proven that the disposition was delivered to Kelburn in *liege poustie*, yet Kelburne did not depone in this process, on what terms it was delivered to him; and therefore *quod est verisimilius præsumitur*, that John Ker gave him

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the disposition in keeping, not to incapacitate himself to recall it, otherwise he would have given it to his son Patrick, Ninian's father, which is further confirmed, Kelburn giving it back at John Ker's desire, which had been a breach of his trust, if it had been delivered to him in place of Ninian, to make it an irrevocable right, which cannot be presumed. And as for the act of Rothesay, it was by collusion, and it does not appear that Kelburn subscribed his oath, but before the Lords, though it was most proper to the purpose, neither doth it express what was said to him by John Ker, when he gave him the disposition, and the deponing that it was to Ninian's behoof, may be his conjecture. It was *answered* for the defender; that writs in favours of children, require no delivery; and though this be a grand-child, and not of the family, yet any delivery is sufficient, unless it had been expressly qualified on these terms, to be re-delivered to the disponer at any time in his life, and even in that case death-bed excluded any alteration, the law having presumed that defuncts are then weak, and therefore disabled them to do any deed, not only in prejudice of the heir, but of the wife and bairns. 3*tio*, There is no alteration made, but the subscribing of blank papers, in which nothing was written, till after the defunct's death. 4*to*, Ninian's disposition is not simply recalled, but *qualificata et ad specialem effectum*, viz. to divide the right betwixt Patrick and the pursuer Janet, who therefore can only claim right to the half.

THE LORDS found that it was not proven that this disposition remained an undelivered evident, till the disponer was on death-bed; but found that the issue depended upon the terms of the delivery to Kelburn, that if the deliverer exprest that it should be at his call, he might recall it even on death-bed, not being in prejudice of his heir, his wife's third, or bairns part; and therefore ordained Kelburn to be re-examined in their presence, whether John Ker delivered to him the disposition, without saying any thing; or whether he exprest that it was be keeped for, and delivered to Ninian, which they found relevant to make it a valid right in favours of Ninian; but if a power to recall were exprest, reserved to themselves to consider, whether the revocation being in favours of Patrick and Janet, their rights would thereby stand; or, if nothing were exprest, whether the terms were to be presumed, that the disposition should be in the disponer's power to recall it during his life, or it should be irrevocable, as simply delivered.

*January* 25. 1677.

A deed not delivered is in the absolute power of the granter, and therefore cannot prevent him from executing contrary deeds on death-bed.

In the competition betwixt these parties, wherein there is an interlocutor observed before upon the 9th of December 1676; John Ker having disponed a tenement first in favour of Ninian Ker his oye, by Patrick Ker his second son, and having delivered the disposition to John Kelburn, and nothing appearing upon what terms, or what he had exprest when he delivered the disposition, nor any time thereafter till he was on death-bed, at which time he called for the disposition from John Kelburn, which he brought to him, and he did then deliver the same to M'Gilchrist a notary, and subscribed two blank papers, and ordered him to fill up both dispositions according to the first disposition, the

No 64. one in favours of Patrick the son, of the one half of the tenement formerly disponed to Ninian, and the other in favours of Janet, only daughter to umquhile John his eldest son; this being the matter of fact appearing by probation;

THE LORDS found, that the delivery of a gratuitous disposition, not being delivered to the party in whose favour it was granted, or to his father, or to any other whose custody might be held as the custody of Ninian who was a pupil, but being delivered to Kelburn a stranger, without expressing that it was to the behoof of Ninian, or to be keeped for him, or delivered to him when he came to age; neither yet being delivered to Kelburn on these express terms, till it were called for by the disponer, that therefore the condition and terms implyed and presumed by the delivery, as aforesaid, did not so far complete Ninian's right, as that the disponer might not recal his disposition, but that the dispositor's trust was presumed to be, to re-deliver the disposition to the disponer, if during his life he called for it, and if not, to deliver it to Ninian after his death; and therefore found that the disponer might, and had recalled it, and that if he had recalled it simply, the new disposition on death-bed would not have been effectual against Janet his heir, but having recalled it *specificate*, and *ad qualificatum effectum*, to give Janet the heir the half, and Patrick the other half, they therefore sustained the two dispositions, though subscribed *in lecto*, seeing the heir, the wife and bairns are secured by the law *de lecto*, but a disposition revocable to any other person might be recalled effectually *in lecto*, neither could the heir quarrel the qualified revocation, but behoved either to accept of it *in toto*, as it was, or to reject it *in toto*, and thereby get nothing, the first disposition remaining effectual, which being in *liege poustie*, did absolutely exclude the heir.

*Fol. Dic. v. 1. p. 215. Stair, v. 2. p. 474. & 499.*

*** Gosford reports the same case:

IN a reduction pursued by the said Jean Ker, as heir, served and retoured to her good-father John Ker of Rosyth, of a disposition made by the said John to Ninian Ker his oye by a second son, on this reason, that it was never a delivered evident by the good-father until he was on death-bed, at which time he could do no deed in prejudice of his heir;—it was *answered* for the defender, that the disposition of the tenement of lands and acres therein contained was subscribed by the good-father, in his favours, five years before his decease or sickness, and being now in his possession could not be taken away but by his oath or writ. Likeas she offered him to prove that the same was a true delivered evident by the father to John Kelburn, and accordingly he had the same ay and while he did recover it by a decreet obtained before the Sheriff; and so in law it is presumed, that the granter not having given it up upon any conditions that he might be master thereof during his lifetime; it was truly

delivered for the defender's use, and so kept by John Kelburn. It was *replied*, that it was offered to be proven that it was in the father's chest and custody the time of his decease, during which time he did call for the said disposition, which was brought to him, and did order a writer to draw up two new dispositions, one in favours of the defender's father, Patrick Ker, and the other in favour of the suspender, for the equal half of the said tenement and lands, which was a clear evidence that he was still master of the first disposition; and as to these dispositions being truly made and subscribed on death-bed, they could not prejudge the pursuer who was heir. THE LORDS ordained the said John Kelburn, and the writer, and witnesses of the new disposition to be examined, and finding that Kelburn did prevaricate in his deposition, and did not make a direct answer if the first disposition was truly delivered to him for the behoof of the defender, but that he keeped the same in his custody until the disponer called for it upon deathbed, and delivered it to him, after which he ordered the two new dispositions to be drawn, and subscribed them, and that he immediately delivered the same back to him; as likeways finding by the depositions of the writer and witnesses, that the two new dispositions were filled up after they were subscribed and left by the father; they did thereupon long debate the said case before decision, and at last found, that the first disposition, being a clear right in favour of his grandchild, by a second, which would have given him an undoubted right, if it had not been recalled; yet the said disposition, bearing an absolute right of the whole lands, without so much as reserving the goodfather's own liferent; and being put in the hands of Kelburn only upon that reason, if he himself had retained it till his death, and had then delivered it, it would have been *ipso jure* null;—that therefore in law it ought to be presumed, that it was only delivered to be kept until such time as he might deliberate whether to alter the same or not; which he having done by two new dispositions, taking away from his apparent heir only the half of the lands, she being a woman who might marry a stranger, and giving the other half to his second son, and the defender, his oye, that it might remain with the name; therefore they decerned that the first could not be looked upon as a delivered evident for the oye Ninian, who had only recovered it after the goodsir's decease, from Kelburn; and so having exercised his power to alter, albeit upon death-bed, that the said two new dispositions should take effect, and the estate divide accordingly, albeit made upon death-bed, which was hard.

*Gosford, MS. No 946. p. 624.*

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1685. *December.* BROWN *against* CONGLETOUN.

No 65.
A person having tailzied his estate to a stranger,

GEORGE COCKBURN of Pilton as principal, and Sir Robert Hepburn of Keith as cautioner, having granted bond to Thomas Brown, stationer in Edinburgh, for 2000 merks; and he having pursued Robert Congletoun, for payment, as