SECT. II.

Delivery for behoof of a Third Party.

1663. *January* 30. The LADY CARNEGY *against* The LORD CRANBURN.

No 11.
Property may be transferred without the knowledge of the disponee; and upon this footing recognition was sustained upon an infeftment granted to an infant out of the country, without necessity to allege there was any mandate to accept of the infeftment.

LADY ANN HAMILTON, and the Lord Carnegy, her husband, as having obtained a gift of recognition from the King, of the barony of Innerwick, and being thereupon infeft, pursues the Lord Cranburn, to whom the same was disponed, by the Earl of Dirleton, grandfather to both, for declaring the recognition, and the donatrix' right, in so far as James Maxwell, late Earl of Dirleton, holding the said lands of his Majesty's ward and relief, had, without his Majesty's consent, alienated and disponed the same to James Cecile, his oye, then second son to the Lord Cranburn, procreated betwixt him and the Earl of Dirleton's second daughter. It was *alleged* for the defender absolvitor; because, where there was no infeftment, there could be no alienation nor recognition; and there could be no infeftment without the same were granted to the disponer, or his procurator, to the accepter or his procurator; but here there was no accepter nor procurator, because Cranburn being then a child, and in England, had granted no mandate to take this sasine, and therefore had raised reduction thereof, as done without his warrant; and as to the procuratory expede in the Chancellary, constituting an attorney to the said James Cecile, the expeding thereof was without his knowledge or warrant, and therefore the sasine being taken without his warrant, was null, and made no alienation nor recognition; as if any heritor disponing ward lands, and giving a precept of sasine, if any third party should accidently find, or steal away that precept, and take sasine, the same would be found null, as without warrant, and would infer no recognition. 2*dly*, Absolvitor, because the disposition to the defender bears expressly, that Dirleton dispones, failing heirs-male of his body; so that it being conditional, and the sasine being *actus legitimus qui nec recipit diem nec conditionem*, the same is null; for if Dirleton had an heir-male of his own body, he would have excluded James Cecile, not by way of reversion or retrocession, there being none such in the disposition; therefore it behoved to be a suspensive condition. 3*dly*, Absolvitor, Because though the sasine had been accepted warrantably, yet the accepter was minor, and thereupon leased, and ought to be restored and the sasine annulled, and consequently the recognition. The pursuer *answered* to the *first*, *non relevat*, for albeit there had been no attorney out of the Chancellary, the sasine would have been valid, because there needs no other procuratory for taking of sasine, but only the precept of sasine, which is an express mandate of the disponer, and the having thereof in the attorney's hand, is a

sufficient evidence of the warrant or mandate to be attorney for the receiver, which proves sufficiently his warrant, neither was there ever any more required to a sasine in Scotland; and if more were required, all sasines would be null, it being ordinary to give sasines to infants, or absents out of the country; but the delivery of the precept by the disponer, to any person in name of the accepter, is a sufficient mandate or attorney for the accepter, especially here, where a grandfather gives infeftment to his oye, he might well give a warrant to an attorney, for him to accept. To the *second*, albeit the disposition bears, failing heirs male of the disponer's body, yet the precept is directed to give present state and sasine without delay, whereby it is clear that the disponer's meaning was not, that this condition should be suspensive, to impede the infeftment; and therefore all it could operate is, to have the effect of a resolutive condition, that if any heir-male should be supervenient, he might upon that condition pursue James Cecile to renounce the right, or to declare it null; neither is a sasine *actus legitimus*, and though it were, and were incapable of a day or condition, yet that would not annul the act, but annul the condition or day, as *aditio hæreditatis* is *actus legitimus*; yet if any man enter heir for a time, or under condition, he is heir simply, and the time and condition is void, but not the entry itself. To the *third*, albeit *regulariter* minors leased may be restored, yet that hath its exceptions, as a minor being denounced rebel, and his escheat fallen, or thereafter his liferent, or bearing in non-entry, either simply, or through a wrong or informal infeftment, he would never be restored against these casualties, so neither against the taking of sasine, in so far as may infer recognition. 2*dly*, There could be by the sasine no lesion at that time, Cranburn being then but his mother's second son, and not *alioqui successurus*, to the half of the estate, as now he is, neither is ever lesion interpreted by the prejudice of any part of a deed, unless there were lesion of the whole; as if lands were disponed to a minor, with the burden of debts, he could not reduce the burden of debts as to his lesion, unless thereby the whole disposition were to his lesion.

No 11.

THE LORDS repelled these three defences.—*See* MINOR—RECOGNITION.

Fol. Dic. v. 1. *p.* 511. *Stair, v.* 1. *p.* 166.

*** Gilmour reports this case:

1663. *February.*—THE Lady Carnegie, eldest daughter and heir of provision to William Duke of Hamilton, and having right to an infeftment and gift of recognition of the barony of Innerwick, pursues a declarator against the Lord Cranburn, to whom the Earl of Dirleton his grandfather had given an infeftment, to be holden of the Prince not confirmed, the lands being tax-ward lands. It was *alleged*, 1*mo*, Recognition has only place *in feudo recto et proprio*, viz. simple ward, whereas a taxed ward is of the nature of a feu. 2*do*, In recognitions, *probabilis ignorantia, et error, excusat a pœna et damno*. The Earl of Dirleton had probable reason to think that there was no hazard; and certainly he

No 11. was far from the thought of any contempt of his superior, to whom he owed his honour and fortune, and this error is excusable, being such a one as most of lawyers might have fallen into. *3tio*, Contempt cannot be alleged in this case where the lands are disponed to be holden of the superior, which signifies clearly his mind, that he was to seek the superior's consent, and that without it the infeftment should be null. *4to*, Such an infeftment is null before confimation, and therefore can operate neither good nor evil. *5to*, The sasine is given, not by a warrant from Cranburn, but by an attorney out of the chancellary, which Cranburn disowns, and whereof also he has a reduction depending upon minority. *6to*, Dirleton's infeftment is given to heirs and assignees, which consequently gives him power to dispone *quibus vult*. *Answered*, To the *first*, taxed ward and simple ward differ not, except only that taxed ward values the marriage, and dispones the rent during minority, at a rate as if they were set at that rate. The *reddendo* bears always *servitia debita et consueta, &c.* *2do*, *Ignorantia juris non excusat*. And if this were, then there never was, nor could be any recognition in the world. To the *third*, Neglect of that duty which the vassal owes to his superior, which is, before tradition by sasine, to seek and obtain his consent, infers recognition. And the taking of sasine by anticipation, makes a contempt. To the *fourth*, The vassal, granter of the infeftment, cannot obtrude the nullity of it, nor can the receiver, nor is it null *ad omnem effectum*; for by it the receiver *inducitur in possessionem*, and may possess without the superior's consent; by it he may pursue the tenants for mails and duties, &c. By it the vassal *facit quod in se est* to obtrude an other vassal to the superior; and it is not as an unregistrated sasine, because the vassal and the receiver of the alienation, by suffering the sasine to be unregistrated, they declare their mind, that the receiver is not validly seased till they obtain the superior's consent; whereas a sasine registrated upon a charter holden of the superior, wants no solemnity; it is not in itself null, but only till the charter be confirmed, although it be in many cases ineffectual. To the *fifth*, though the sasine had been given to an infant, and without an attorney; yet seeing the vassal delivers the precept of sasine, that sasine may follow, his deed and fault making recognition, and not the deed of the receivers, who as to his interest is in the same case as if the deed had not been made to him; and yet the doing of it by the vassal making him to forefault his interest, and making the right of the estate return to the superior. To the *sixth*, Heirs and assignees import no more against the superior, but that it may be lawful to the vassal, to dispone or assign his right, doing the same always legally *et debito modo*, which is with the superior's consent. *2do*, The word assignees is not to be extended nor can it carry that liberty which is alleged against the law of ward-holdings, unless it had been *per expressum* so declared by the superior; whereas the word will, and doth otherways allow an interpretation convenient to, and not destructive of the law, viz. that the vassal may assign the rents of his lands, not only for years bygone, but for many years to come, may set tacks and rentals

thereof, even without the master's consent. And the word assignation properly and commonly taken, doth not signify an alienation of lands with sasine or tradition following thereupon, which ordinarily is in the words, *dare, concedere, alienare, disponere,* not *assignare,* which is ordinarily used in sums of money, tacks, rentals, and writs, or rights of lands, not of lands themselves. 3*tio.* It is the *stilus* of writers to say, *hæredibus et assignatis*; which especially *in cartis regiis* cannot prejudge the superior; the King cannot be said to dispone such a considerable interest of superiority, except he do it expressly; and if there were any thing in it, yet being the fault of the officers of state to suffer such a thing to pass, it cannot prejudge his Majesty. No 11.

Many arguments were adduced *pro et contra* from the feudal law and civil law, custom, and *Craig de feudis*; which the LORDS having fully heard *in præsentia*, and carefully considered, they repelled the whole allegeances, nor did they regard that the infeftment was given by Dirleton to his own oye, because he was not *alioquin successurus*. *In præsentia.*

Gilmour, No 80. *p.* 60.

1686. *January* 20.

COLONEL BORTHWICK *against* THOMAS LAURIE, Merchant in Edinburgh.

No 12.

THE LORDS sustained the delivery of a paper, though not to the party, but to another for his behoof, though he knew nothing of it, and so could not accept it.

Fol. Dic. v. 1. *p.* 511. *Fountainhall, v.* 1. *p.* 394.

1714. *December* 8.

The LORD LINDORES *against* JOHN STEWART of Innernytie.

No 13.
The maker of a tailzie containing irritant clauses upon himself, and all the substitutes, has right to call for the deed as his proper evident, to be cancelled or not at his pleasure.

THE deceased and present Lord Lindores made a tailzie of their estate in favours of certain heirs, reserving a faculty to this Lord Lindores, who was fiar, to alter, innovate, and dispose of the estate at his pleasure.

The said present Lord Lindores did, in anno 1706, grant a procuratory for resigning the foresaid estate in favours of himself and the heirs of his body; which failing, to John Stewart of Innernytie, and other heirs therein mentioned, under prohibitory and irritant clauses, as well upon my Lord, the granter of the procuratory, as upon the other heirs of tailzie.

Upon this bond no resignation followed, nor was it registered in the register of tailzies; but both the two tailzies were put in the hands of Oliphant of Carpew, with a doquet on the paper wherein they were wrapped, written by my