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rellable *ex capite lecti*, at the instance of the granter's heir; though it was *alleged*, that at the time of subscribing, the disponer declared he intended the disposition in favours of the person whose name was therein filled up in the blank; and that this was equivalent to a reservation to do it *in lecto*.

Harcarse, (Lectus Ægritudinis.) *No* 658. *p.* 184.

1714. *January* 28.

James Watson of Saughton *against* Robert Watson of Muirhouse, and Others.

No 60.
A tutor named in a testament, with this quality, that he should only be liable for actual intromission, was not found to have the benefit of this quality, from the act 1696, unless the testament was made in *liege poustie*.

In an action of count and reckoning at the instance of James Watson of Saughtoun against Robert Watson of Muirhouse, as representing his father, alleged to have been one of the tutors nominate to the pursuer, upon this ground, that he had accepted the office, by signing the inventories of the pupil's estate, and judicially producing them by a procurator;

Answered for the defender; His father's signing the inventories cannot import his acceptance, Scrimzeour *contra* Wedderburn, *voce* Tutor and Pupil, that being only a preliminary step to discover the pupil's condition, and hazard of the office, before the tutors submit to the burden thereof, and no deed of administration; as making inventories by an executor, without a subsequent confirmation, doth not make him liable *qua talis*. Muirhouse might have signed those inventories, with a protestation, that his so doing should not import his acceptance, *ergo e contra* his signing should not bind him unless he had thereupon accepted. Again, the act of Parliament 1696 enjoins the acceptance of tutory, in the terms thereof, after the making of inventories. Farther, if an heir's making up and signing inventories, in order to enter *cum beneficio*, is not reckoned a sufficient indication of his *animus adeundi*, nor doth infer a behaviour; much less will a tutor's signing of inventories be constructed an act of administration. *2do*, The tutors, by a clause in the father's nomination, are declared liable only for their actual intromissions, and not for omissions, in the terms of the act 1696; now the defender's father had no intromissions, and therefore he the defender ought to be assoilzied.

Replied for the pursuer; A tutor accepting, if he would act legally, and shun the penalties of law, must indeed make inventories, in the terms of the act of Parliament 1672; but his making inventories, according to that statute, is one of the best evidences that can be given of his voluntary acceptance. For when law finds a tutor doing what it requires specially of him in that character, it concludes that he acts as such. The case of Scrimzeour and Wedderburn is perfectly different; for there *non constat* that inventories were signed or judicially exhibited, and it was before the act of Parliament 1672 appointing judicial inventories. As to the parallel betwixt inventories which heirs are allowed

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to make up to entitle them to *beneficium inventarii*, it hath not yet been determined how far an heir's subscribing inventories to such an end would infer a passive title; but, at the same time, there is no contingency betwixt this and that case, where the making of inventories is in order to entering heir, which may not be said to be done till the service. For, after giving in of subscribed inventories upon the nomination of tutors, nothing remains to complete the nomination; the subsequent acts of administration are the duty of a tutor established in his office, by giving up the subscribed inventory. *2do*, The defender's father could not have the benefit of the qualities in the nomination, from the act of Parliament 1696, in respect the testament, wherein he was named tutor, was made upon death-bed.

Duplied for the defender; Muirhouse being named one of the tutors, with this quality, that he should not be liable for omissions, he must be understood to accept with the same quality; and the pursuer having homologated the nomination as his title, in this process of counting, he must take it as it stands, without dividing the clause, as was found Binning and Alexander, *voce* HOMOLOGATION. Besides, a nomination, before the act 1696, making tutors liable only for their intromissions, was effectual, both by the civil law, and by our practice. And the statute 1696 is not correctory, but explanatory, of the former law. It doth not alter the case, that *nemo cavere potest ne leges in suo testamento habeant locum;* for that rule hath many exceptions with us, as appears from the brocard, *provisio hominis tollit provisionem legis*, and the approved stile of writs dispensing with the special statutes, and the maxim *cuilibet licet renunciare juri pro se introducto*. Again, making of inventories was expressly required of tutors by the civil law; yet all lawyers of any note agree, that it could be dispensed with in testament. Law requires the delivery of writs, but the granter may, by a clause therein, dispense with the not-delivery.

Triplied for the pursuer; When law says that a father may by his deed, in *liege poustie*, make a nomination with such qualities, it clearly follows, that such a qualified nomination, on death-bed, will stand good as to the nomination, but not as to the quality, which doth not at all quadrate with the ordinary case of approbating and reprobating. There is a grand difference betwixt that and the *confectio inventarii* in the civil law; the latter not being absolutely requisite, but only introduced *ad melius esse*, whereas diligence in a tutor is the very essence of his office. Again, without entering into the debate, how far before the act 1696 a nomination of curators could be thus qualified? after the statute it could not be, in regard law determines in what case and manner the privilege shall take place. The brocard *nemo potest cavere* holds in all cases that concern public utility, as tutory doth; and no man can provide, by any writ, that he shall have liberty to dispose of his heritage on death-bed in prejudice of the heir. The maxim *unusquisque potest renunciare, &c.* concerns only private rights and privileges.

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THE LORDS found, That Muirhouse's signing the inventories, and judicially producing them by a procurator, doth sufficiently infer his acceptance of the tutory; and found, that he cannot have the benefit of the qualities in the nomination from the act of Parliament 1696, unless the testament was made in *liege poustie.*

Fol. Dic. v. 1. *p.* 215. *Forbes, MS. p.* 18.

SECT. IX.

Reserved Faculties whether reducible upon Death-bed.

1662. *June* 28. Dame MARGARET HAY *against* GEORGE SEATON of Barnes,

No 61.
A man disponed his estate to his heir with a reserved faculty to burden it with a certain sum. The burden was sustained against the heir, though the faculty was exercised upon death-bed.

UMQUHILE Sir John Seaton of Barnes, having provided George Seaton his son, by his contract of marriage, to his lands of Barnes, some differences rose amongst them, upon fulfilling of some conditions in the contract: For settling thereof, there was a minute extended by a decreet of the Judges, in *anno* 1658, by which the said Dame Margaret Hay, second wife to the said Sir John, was provided to L. 100 Sterling in liferent; and it was provided, that Sir John might burden the estate with 10,000 merks to any person he pleased, to which George his son did consent, and obliged himself to be a principal disponer. Sir John assigned that clause, and destinated that provision, for Henry Seaton his son in fee, and for the said Dame Margaret Hay in liferent; whereupon she obtained decreet before the Lords, the last session. George suspends the decreet, and raises reduction, on this reason, that the foresaid clause gave only power to Sir John to burden the estate with 10,000 merks, in which case George was to consent and dispone, which can only be understood of a valid, legal, and effectual burden thereof; but this assignation is no such burden, because it is done in *lecto ægritudinis*, and so cannot prejudge George, who is heir, at least apparent heir, to his father. The charger *answered*, That the reason was no way relevant, 1*st*, because this provision was in favours of the defunct's wife and children, and so is not a voluntary deed, but an implement of the natural obligation of providing these. 2*dly*, This provision, as to the substance of it, is made in the minute, and extended contract, in the father's health; and there is nothing done on death-bed but the designation of the person, which is nothing else than if a parent should, in his lifetime, give out sums payable to his bairns, leaving their names blank, and should on death-bed fill up their names. The suspender *answered*, That he opponed the clause, not bearing *de presenti* a burden of the land, but a power to his father to burden; neither hav-