Leslie, after his brother's death without issue, being now heir apparent to his father, brought a reduction on the head of death-bed of his father's settlement, concluding particularly against the jointure provided to Violet Johnston. The defence was, that this settlement was ratified by Archibald Leslie, at that time heir-apparent. No 7.

Answered, This ratification was executed also on death-bed.

Replied, That a ratification, granted by an heir apparent, is not one of those deeds that can be challenged upon the head of death-bed; the rule of law is, that a man upon death-bed cannot alienate his estate in prejudice of his heir; but every deed done upon death-bed, whereby a third party happens to be deprived of an expected succession, is not reducible. A man dies, leaving a son and daughter of a first marriage, and a son of a second marriage; if the eldest son die in apparency, the second son will be heir to the estate, yet there is nothing in law to bar the eldest son from making up his titles, even upon death-bed, though, by this step, the second son will be excluded by the sister. In short, the law restrains proprietors from disinheriting their heirs upon death-bed; but bars not any rational deed, such as a ratification of a predecessor's settlement, though the consequence may be to set aside one who would otherways succeed. 2*do*, *Esto* a ratification were a deed of that nature to fall under the law of death-bed, yet one requisite is wanting to found that reduction, which is, that the pursuer must qualify himself to be the defunct's heir in that subject of which he is deprived by the defunct's deed; but the pursuer, though heir to his brother Archibald, who granted the deed challenged, is not heir to him in the subject with regard to which the deed is executed, but is heir to his father in that subject.

'THE LORDS assoilzied from the reduction.'

Rem. Dec. v. 2. No 56. p. 84.

1753. *July* 31.

Mr JOHN GOLDIE *against* The TRUSTEES of MURRAY of Cherrytrees.

No 8.
The Crown's donatar, on a gift of *ultimus hæres*, is entitled to pursue a reduction of a disposition of lands granted by the last possessor, upon the head of death-bed.

MARGARET MORISON, proprietor of the lands of Maison-Dieu, when fifteen years of age, and on death-bed, executed a settlement of her estate in favour of James Murray of Cherrytrees. She died about four weeks after the date of this deed, without heirs.

Mr John Goldie, her uncle by the mother's side, obtained from the Crown a gift of the said lands of Maison-Dieu, as having fallen to his Majesty as *ultimus hæres*.

In consequence of this gift, Mr Goldie raised a declaration of his right, wherein he called Mr Murray of Cherrytrees; and concluded for reduction of the

No 8. deed granted in favour of Mr Murray by Margaret Morison, as being granted during her minority and on death-bed.

Mr Murray died during the dependence; and the process having been transferred against his eldest son, he refused to enter heir or to defend; whereupon decreet was pronounced in favour of Mr Goldie. After which he insisted against the tenants of Maison-Dieu for mails and duties; in which process the Trustees, to whom Mr Murray had disponed his estate for certain uses, compeared, and were admitted to be heard.

It was *pleaded* for the Trustees; That, in this case, there was no place for the King's donatar; because Margaret Morison having executed a disposition of her estate before her death in favour of Mr Murray, the lands thereby belonged to him and not to the Crown; and though the disposition was executed upon death-bed, yet the law of death-bed being introduced singly in favour of heirs, as appears from the statutes Willielmi, cap. 13. and from the deeds being valid if consented to by the heir, and as it is a limitation of that natural right which a man has of disposing upon his property, it is not to be extended in favour of the Crown or its donatar; for the Crown does not succeed as heir, but takes the estate *tanquam bona vacantia* as belonging to nobody. Any difficulty which occurs upon this point, arises from an abuse of words, the King being said to take as *ultimus hæres;* but there is in this case really no succession, but there being none to succeed in the character of heir, the right vests in the Crown *jure coronæ*. That the matter ought to be thus considered, appears from Craig, tit. *de Regalibus*, § 30. And Lord Stair treats of this right not under the head of succession, but in b. 3. t. 3 § 47. under the general title of Confiscation, where he has these words: 'Ultimus hæres may seem to be a succession from 'the dead, and to come in amongst other heirs; yet though it hath the resem- 'blance of an heir, because it hath effect where there is no other heir, and 'makes the heritage liable to pay the defunct's debts, it is only a caduciary 'confiscation of the defunct's estate, with the burden of his debt, but no proper 'succession to him therein.' And therefore to extend the law of death-bed in support of an escheat or caduciary confiscation, or to defeat a settlement of an estate executed by the defunct who had no agnates or lawful heirs, whilst *sanæ mentis* though on death-bed, would be extremely hard, and would be an extension of the law of death-bed, to a case which does not fall within the reason or purview thereof. And though a bastard cannot dispose of his heritage on death-bed in prejudice of the Crown, it will not from thence follow, that another person, who has no heirs, cannot dispose of his; for the reason why a bastard cannot dispone, is because he has not *testamenti factionem ob defectum natalium*; and a disposition on death-bed, even of heritage, is considered as a testament or *donatio mortis causa*.

As to the other reason of reduction, founded on Margaret Morison's minority, this depends on the same principles with the other ground of reduction upon the head of death-bed; and therefore the same answer will suffice; the restraint

upon minors is in favour of their heirs, and he who challenges the deed must be heir, and qualify the lesion; but surely it was no lesion for a minor to dispone her estate to prevent its becoming caduciary or being confiscate. No 8.

Answered for the pursuer; 1*st*, That the law of death-bed was introduced in favour of all sorts of heirs, whether those succeeding *ab intestato*, or those named by the defunct when in health; and there is no reason for denying the benefit of this law to the King, who, though in some particulars he differs from other heirs, not being universally liable for the defunct's debts, yet succeeds, and is considered as heir, Stair, l. 4. tit. 13. Besides, the law of death-bed was not introduced singly in favour of heirs, but likewise in favour of dying persons, that they might be free from undue solicitations; and because they are presumed not to have sufficient firmness of judgment for disposing of their heritage. This is the account given of the matter *Reg. Mag.* l. 2. c. 18. § 9. *Unde presumitur, quod si quis in infirmitate positus, quasi ad mortem, terram suam distribuere cæperit, quod in sanitate facere noluit, hoc potius ex fervore animi, quam ex mentis deliberatione, evenerit:* and by Craig, l. 2. dieg. 1. § 18. With these authors Lord Stair agrees, l. 3. t. 4. § 27. 'The reason of this custom may be 'conjectured, not only from the nature of feudal rights not disposable by testa-'ments, but only by investiture; but also for public utility, because persons 'on death-bed are weak, the mind being easily affected by the trouble of the 'body, and so is easy to be wrought upon by insinuations and importunities to 'do deeds contrary to their interest and former resolutions.' If these authors are right in the account they give of the foundation of this law, it must take place, whoever is to succeed to the heritage; and there appears no reason why persons who have no heirs *jure sanguinis*, should be exposed to disturbance and importunities when dying, more than the rest of his Majesty's subjects.

2*dly*, It is admitted, and is proved by the authority of most of our law-books, that a bastard cannot dispose of his heritage, on death-bed, in prejudice of the Crown. Now the King's succession to a bastard is a species of his succession as *ultimus hæres*; for when a bastard has no issue, he can have no agnates, being *ex incerto patre*, and therefore his estate falls to the Crown; and seeing, in such a case, the law of death-bed takes place, there is no reason why it should not also obtain when the King succeeds as last heir, because the defunct left no heirs of blood. It is not owing to a bastard's not having *testamenti factio* that he cannot dispose of his heritage on death-bed; for this right has no connection with the disposal of heritage; no lawful born subject can dispose of his heritage by testament; nor can a bastard dispose of his heritage on death-bed, though the King has by legitimation granted him the power of testing.

3*dly*, It appears from the tenor of the declarator of the King's right as last heir, that it has been understood, that his right could not be defeated by a death-bed deed; for it calls on all and sundry having or pretending interest, 'to hear and see it found and declared, that all lands and heritages, &c. which 'belonged to the defunct at the time of his decease, *or at the time of contracting*

No 8. ' *the disease whereof he died*, do belong to the donatar,' &c. Stair, l. 4. tit. 13. p. 582, (604.)

The other reason of reduction, founded on the minority of Margaret Morison, is also relevant; for minors are debarred from altering the course of succession to their lands, because they are presumed, during their minority, not to have sufficient stability of judgment for making such an alteration; and this reason takes place whoever be the heir that is prejudged by the alteration.

' The Lords found, that is was competent to the Crown's donatar to object to the disposition granted by the deceased Margaret Morison to James Murray of Cherrytrees, upon the head of death-bed, and sustained the objection.'

Reporter, *Justice-Clerk.* Act. *Advocatus & J. Ferguson.* Alt. *Lockhart.* Clerk, *Justice.*
Fol. Dic. v. 3. *p.* 169. *Fac. Col. No* 86. *p.* 129.

*** This case was appealed:

The House of Lords ' ordered, that the interlocutor complained of be ' affirmed.'

*** Lord Kames reports the same case:

A donatar of *ultimus hæres*, in right of the King, was found entitled to reduce a gratuitous disposition of land as made upon death-bed. It evidently appeared to me, that the Court was here misled by an inaccurate expression. The King is named last heir, not that he is an heir in any proper sense; but only that he has a right *jure coronæ* to all goods which have no proprietor. Yet this expression was the only foundation of the judgment, which bestowed upon the King one of the most extraordinary privileges of an heir.

Sel. Dec. No 51. *p.* 64.

*** *See* case between these parties, *voce* Res inter Alios.

1779. *February* 4. Alexander Grahame *against* Margaret Grahame.

No 9.
A general service to the heir last infeft is not a sufficient title to pursue a reduction *ex capite lecti*; but the Lords found that the right of apparency entitled the pursuer to

Grahame of Hourston executed an entail of his estate on his five sons *seriatim*, and the heirs-male of their bodies respectively, but did not record the entail.—Charles, the eldest son, succeeded his father, and was infeft upon the precept in the disposition of entail.—Upon his death, Henry, his only son, entered into possession of the estate, without making up any titles, and contracted a considerable debt to his sister Margaret, and her husband, Robert Grahame.

Subsequent to this contraction, the entail was recorded; after which, Henry granted a lease of part of the entailed lands to his sister Margaret and her husband for 171 years. Henry possessed the estate for 30 years, as heir apparent,