No 229. and what the defunct did express when he delivered the same, whether that it was for Carruber himself, or for any other end, or whether he said nothing, but delivered it?

The third reason of reduction was, That this disposition being, with Randifoord's other writs, in Carruber's hand, who was his factor and trustee, he ought to prove that it was delivered before Randifoord's sickness, otherwise it were a deed done *in lecto;* and though ordinarily men are not put to prove the delivery of writs in their hand, yet a factor and trustee ought to prove it.

The Lords repelled this reason; but sustained it to be proved, that the writ remained undelivered in his charter-chest, or in his power, till he contracted the sickness whereof he died, and that either by writ, oath of party, or witnesses above exception.

Fol. Dic. v. 2. *p.* 155. *Stair, v.* 2. *p.* 628.

1683. *November.* Buchanan *against* Leny.

No 230.
The designation of a disponee having been inserted in a blank, holograph of the disponer, death-bed was not presumed.

John Buchanan in Stirling having, *in anno* 1682, disponed his estate to his friend and kinsman John Buchanan of and died in the latter end of February 1682. The disposition was recovered after his death from his wife, with the blank designation filled up with these words, of Leny. The defunct's heir raised reduction of the disposition *ex capite lecti*, upon this reason, That no disposition, or any substantial clause in a disposition, filled up on deathbed, can prejudge the heir; and *ita est*, that adjection, of Leny, must be presumed to have been filled up on deathbed, being at best but the defunct's holograph since the date of the disposition, which proves not *datum* against a third party, far less against the heir, who is secure by an express act of Parliament; and the allegeance of deathbed is presumed; and to oblige the heir to prove that the blank was filled up *in lecto*, would render the law of deathbed elusory; because the *moribundus* might do it so privately as might be impossible for the heir to prove when it was done, and therefore it should lie upon the receiver of the right to prove that it was seen filled up *in liege poustie*. And the filling up the words John Buchanan at first doth not alter the case; for notwithstanding thereof *defuncti voluntas* was *collata in personam incertam*, there being several John Buchanans kinsmen to the defunct. And as the deed can operate nothing, had not the blank been filled up, it cannot have any effect unless the filling up *in liege poustie* were proved.

Answered for the defender, That he opponed the disposition filled up in his own name; and it is presumable the blank was filled up about the time of subscribing the right privately, that none of the relations called by the name of John Buchanan might be disobliged by his publicly preferring any one of them; nor is it unusual to subscribe tailzies or assignations in favour of a blank person, and then immediately to fill up the person's name privately.

And if the date of inserting the holograph designation must be proved, many assignations to heritable bonds, left by parents to their children, would be in danger of an overturn, for the children's not being able to prove the time of upfilling, consequently the pursuer ought to prove the reason of deathbed. No 230.

THE LORDS found, That the pursuer ought to prove that the designation of Leny was filled up upon deathbed; and that the filling up upon deathbed is not to be presumed, seeing the disposition bears a date, at which time the pursuer pretends not that the disponer was on deathbed. The like was decided, January 1687, Janet Thomson *contra* James Pennicook, No 59. p. 3243. *voce* DEATHBED.

Fol. Dic. v. 2. *p.* 154. *Harcarse*, (PRESUMPTION.) *No* 652. *p.* 180.

*** Fountainhall reports this case:

February 14. 1684.—IN a case between Buchanan of Leny and Mr Robert Buchanan, advocate, Buchanan of having left a disposition of his lands, John Buchanan, without designing him, or saying any more; and there being three or four of that name and surname, and particularly the apparent heir, John Buchanan of Leny getting this disposition after the disponer's death, he adjects in the blank these two words, 'of Leny.' The apparent heir raised a reduction of it, that the defunct did not mean nor intend Leny; and that those two words were filled up thereafter with a different hand and ink, and *ab initio* it was without them; and at least, the designation was not filled up till the disponer was on deathbed. The question arising, who should prove when it was filled up, whether the apparent heir, that it was done upon deathbed, or Leny, who now produced it, that it was filled up *in liege poustie*; the LORDS burdened the heir to prove that it was so filled up *in lecto*. Which decision stumbled some, because of the presumptions against Leny.

Fol. Dic. v. 2. *p.* 154. *Fountainhall, v.* 1. *p.* 271.

*** Sir P. Home also reports this case:

JOHN BUCHANAN, bailie in Stirling, having granted a disposition of his estate to John Buchanan of Leny, Mr Robert Buchanan, advocate, as having right also by disposition from the said John Buchanan, and from his apparent heir, pursues a reduction of the disposition granted to the said John Buchanan, upon this reason, That it was granted upon deathbed, in prejudice of the defunct's heirs, from whom he had right, and in prejudice of a disposition formerly made by the defunct in favour of Mr Robert. And albeit the dispositton craved to be reduced bear the name of John Buchanan, yet the designation, (of Leny) by which the defender pretends to the benefit of the disposition, was not filled up until the defunct was upon deathbed, without which it could not be appropriate or applied to the defender, especially the defunct having nearer relations of the same name, and particularly John Buchanan, Mr Robert's father,

No. 230. and John Buchanan, husband to the apparent heir; so as the designation of Leny being filled up when the defunct was on deathbed, it is the same case in law as if it had been filled up in the name of John Buchanan indefinitely, and so cannot be applied to the defender, unless it were offered to be proved that the designation was filled up when the defunct was *in liege poustie*; as was decided 15th Jan. 1670, Lady Lucia Hamilton against Creditors of Monkcastle, No 227. p. 11550. where a disposition was reduced *ex capite inhibitionis*, albeit the date of the disposition was before the inhibition, seeing it was not proved by the writer and witnesses inserted in the disposition, and others above exception, that the blank as to the name was filled up before the inhibition; and in the case of the Laird of Barn against the Laird of Polmais, No 58. p. 3242. in the year 1678, where a disposition was reduced *ex capite lecti*, the party's name not being filled up in the blank until the defunct contracted the sickness whereof he died, albeit the writer deponed it was delivered to him to fill up the party's name before the disponer's sickness; and it is evident, by ocular inspection, that the defender's designation (Leny) was filled up with a different hand from the body of the disposition; and being a substantial part thereof, and by which the defender can pretend to appropriate the right to himself, he ought to condescend and prove who is the writer and filler up of the designation, and the time when it was inserted, otherwise law presumes that it has been done upon deathbed; especially seeing the defunct, when he was upon deathbed, about eight days before his decease, writes a letter to Mr Robert, whereby he desires him to come and receive the papers, which are filled up by John Cunningham; and it is offered to be proved by John Cunningham's oath, to whom the letter relates, that he did fill up Mr Robert's name in a disposition of the defunct's heritable estate; and immediately after the defunct's decease the defender did shut his chamber door, where his papers were, and refused access to all persons, and made open the defunct's trunk, cancelled and abstracted writs and papers, and amongst the rest the foresaid disposition granted to Mr Robert; and therefore all persons ought to be examined *ex officio* concerning the way and manner of the defender intromitting with the defunct's papers, and abstracting and cancelling the foresaid disposition made to Mr Robert, and other writs that were lying by the defunct the time of his decease. *Answered*, It was denied that the disposition made in favour of the defender was granted on deathbed; and as to that qualification, that at least the designation (of Leny) was filled up on deathbed, it is not relevant, because the disposition bearing the designation being now in the defender's hands, it cannot be taken from him but by his own oath, or by writ; and there is nothing more ordinary than for parties to cause draw dispositions blank in the name, and thereafter to fill up any party's name they think fit, who, if they were burdened to prove the filling up of the name, and writer thereof, any other way than by producing of the disposition itself, bearing the name to be filled up, it were of dangerous preparative; and a great many of the rights of the

No 230.

most considerable estates in Scotland might be called in question upon that ground, it being ordinary for parties to fill up names in blank writs and settlements of their estates privately, without calling or acquainting any witness; and there is no disposition produced granted by the defunct in favour of Mr Robert, and it was denied the defender did abstract or cancel the same; and if there had been such a disposition, it would certainly bear a power to alter or innovate the same at his pleasure, and if it did not bear that provision, yet, being an undelivered evident, lying by the defunct, he might have altered or cancelled the same at his pleasure; and albeit that disposition were extant, yet the disposition made to the defender being posterior, it did derogate from the former, and alter the same; and the letter written by the defunct to the pursuer cannot be understood of that disposition, but of other assignations of certain particular debts in favour of the pursuer, which were filled up by John Cunningham and are now produced; and it was calumnious to allege that the defender did unwarrantably and clandestinely intromit with the defunct's papers, seeing he recovered the same by a decreet of exhibition. THE LORDS sustained the disposition in favour of the defender, unless the pursuer would prove that the designation in the said disposition was filled up by the defunct when he was *in lecto*.

Sir P. Home, MS. v. 1. No 501.

1746. *June* 13. Mr FRANCIS SINCLAIR *against* SINCLAIR of Ulbster.

No 231.
A deed extended blank in the disponees name, when blank writs were valid, granted to a minor, was presumed to have been filled up of its date.

Mr FRANCIS SINCLAIR, adjudger in trust of the estate of Murkle from the Earl of Caithness his brother, convened George Sinclair of Ulbster in a reduction and improbation of his rights to part of the said estate, who produced for his title a charter under the Great Seal, dated *anno* 1673, in favour of John Campbell of Glenorchy, with sasine thereon, in the same year, proceeding on the resignation of the Earl of Caithness, to which he connected right, and *alleged*, This, with the possession had thereon, gave him a complete title, and excluded the pursuer.

Mr Francis, to get access to his objections to the conveyance, *pleaded*, That the prescription was interrupted, for that the lands had been apprised by Murray of Pennyland *anno* 1655, who was thereupon infeft *anno* 1658, and had brought several processes against the possessors under Glenorchy's charter, which were continued to the year 1685; and this right being conveyed to the present Earl of Caithness *anno* 1692, his minority from that time behoved to be deducted, by which means the prescription was not run.

The case of this conveyance was, that the apprising having come by progress into the person of Dame Jean Stewart, the Earl's grandmother, she made two dispositions thereof to him, one 18th May 1692, and the other 15th October