

whereby she nominates Charles Dalrymple, her brother's son, her executor, and universal legatar, upon this reason, that in the time of the making that testament she was not *compos mentis*, but fatuous and insensible.

No 81.  
state of mind  
of a testator.

THE LORDS having appointed the witnesses of the testament, and other witnesses, to be examined thereanent, the witnesses in the testament, and writer thereof, being examined, deponed, That she was in her right mind, and gave order for drawing of the testament; and gave order to subscribe it; the other witnesses deponed, That about that time, for several weeks before, and some time after, the defunct was fatuous, and not in a right mind, and to every question proposed to her, she answered always yea, yea, and some words of ravery, which she frequently spoke.

THE LORDS having also caused re-examine the testamentary witnesses, that it might appear whether she did only answer to interrogatories, as when it was answered, whether she would have Charles Dalrymple her executor, and universal legatar, and whether she said yea, yea, and whether she gave direction without a foregoing question by words that might signify her sensibility; and having considered the whole testimonies, they found that probation most pregnant, that she was fatuous, and insensible at the time of the making the testament; and therefore reduced, albeit the witnesses were extraneous that proved, and were not present at making the testament, at which time a lucid interval of a person distempered by disease, not constantly fatuous, might have been sufficient.

This was stopped till it were further heard.

*Stair, v. 1. p. 539.*

1669. January 9. WALLACE of Galrigs against M'KERNEL.

UMQUHILE Wallace of Galrigs being alleged to have given a sasine *propriis manibus*, to his second wife, of two chalders of victual;

THE LORDS sustained the sasine without any other adminicle, but that the wife had quited her former liferent by a former husband, in favour of Galrigs, whereupon Galrigs offered to improve the sasine by the witnesses inserted, which being four, two deponed positively that they were never witnesses to a sasine given by Galrig's to his wife, and the third deponed, that he remembered not that he was witness; the fourth deponed, that he was witness, but said that this sasine was in summer, whereas it bore to be in winter; the notary abode by the sasine, but was not examined.

THE LORDS found the sasine improved, but would not examine the notary, nor any other person, mainly in consideration that the sasine was *propriis manibus*, without any other adminicle; otherways the notary and one witness

No 82.  
Witnesses examined relative to the delivery of sasine *propriis manibus*.

No 82. affirming, the LORDS would have examined the notary or any other persons or evidences for astructing the verity of the sasine.

*Stair, v. 1. p. 580.*

1669. June 19.

SCOT against LANGTON.

No 83.

The oaths of a superior and of the witnesses inserted in a gift of liferent, taken to ascertain that the gift was antedated and simulate.

JOHN GRAHAM of Gillesby having wadset certain lands to James Langtoun, he did thereafter (with consent of Earl Annandale, superior) eik 1200 merks to the reversion, and the Earl ratified the former wadset; and Graham, with his consent, of new disponed again the lands for the sums in the first wadset and eik, and added some other clauses; the first wadset was before the act between debtor and creditor, and by virtue thereof the wadsetter was in possession; the second wadset was after the said act; the superior consented only to the second wadset, and of the same date gave a gift of Graham's liferent to Robert Scot, whereupon Robert, having obtained general declarator, pursues now special declarator for the mails and duties of the wadset lands, as falling under the liferent of Graham, the granter of the wadset. It was *alleged* for Langtoun the wadsetter, That he ought to be preferred to the donatar, not only for the first wadset, which was constituted before the rebellion, but for the second wadset, comprehending the eik, because the superior by his consent to the second wadset, without any reservation, had communicated all right in his person, and consequently the liferent escheat of Graham, the granter of the wadset, in the same manner as if he had given the wadsetter a gift thereof, and so no gift, not being anterior to the other, could prejudice the wadsetter. It was *answered* for Scot the donatar, That the allegiance is no way relevant to exclude his gift, unless the wadsetter could allege a deed denuding the superior anterior to the pursuer's gift; but here the superior's consent is not anterior, but of the same day's date, and may be posterior, and therefore the gift, which is the *habilis modus*, must be preferred unto the superior's consent to the wadset, which is but indirect, and consequential to infer the right of liferent; at least both must be conjoined, and have equal right, as done *simul et semel*. It was *answered* for the wadsetter, That the superior's gift must not be preferred to the consent, though of the same date, because he was then in possession of the wadset lands, and needed no declarator; and the gift is but imperfect, until a general declarator, which is the intimation thereof, no declarator being requisite to the consent of the superior to the wadsetter, and so is preferable.

THE LORDS preferred the wadsetter.

It was further *alleged* for the donatar, That the wadsetter must restrict himself to his annualrent, and be countable to him for the surplus, seeing now he makes an offer to find the wadsetter caution, and so he must either quit his