ences; which is expressly prohibited by the Act 1681: and in a late case, betwixt *Walter Abernethy* and *Innes of Dunkinty*, where one was called Robert, his true name being John, the Lords would not allow them to alter it, but found it null. And this contract being exorbitant, giving all to the wife, to the prejudice of his sister, *rapienda est occasio* to rectify it; they being in the precise terms of a nullity introduced by the Acts of Parliament for the public good. And, in a competition betwixt the *Relict and Creditors of Mr Thomas Chalmers of Gogar*, the Lords found a marginal note, giving the wife the liferent of the house and yard, null, because it did bear that the witnesses to the writ were likewise witnesses to the marginal note; and yet that was in a contract of marriage; which are tied to the observation of legal solemnities as well as other writs: and the same cannot be supplied by equivalents or references to other deeds.

The Lords found him sufficiently designed, marriage and cohabitation having followed thereupon; and so repelled the nullity, and sustained the contract.

Vol. II. Page 613.

1710. *December* 30. GEORGE HOME of WEDDERBURN *against* JOSEPH HOME of NYNEWELLS.

MR Joseph Home of Nynewells, holding some lands of George Home of Wedderburn, by a very strict reddendo, *viz.* £80 Scots of yearly feu-duty, under irritances in case of not punctual payment, suit and presence at his three head-courts, astriction to his mill of Hutton, &c. then follows this clause,—"*et prædictus Josephus Home serviet mihi et hæredibus meis tempore proclamationum regiarum, idque suis propriis expensis; sed in aliis meis privatis servitiis, impensis meis, cum ad id requiretur.*" In 1709, the Queen's proclamation requiring all the heritors and freeholders to attend the criminal Lords of Justiciary, at their respective circuit courts, (from which they are now freed by a posterior British Act of Parliament;) Wedderburn did, in May that year, send a letter to Joseph Home of Nynewells, to attend him to Jedburgh, to wait on the Lords of Justiciary there, conform to the tenor of his charter; who did not obey, but went alongst with the shire of Berwick to the said circuit-court: for which contempt and disobedience Wedderburn sent his baron officer to cite Nynewells, his vassal, to compear at his baron-court to be held at Hutton; and, in regard of his absence, he fines him in £50 Scots for his contumacy. Nynewells, being charged on this decreet, suspends on thir reasons: 1*mo*, That it was in absence, and is null, the citation being unwarrantable at his house of Nynewells, which is not within Wedderburn's barony nor jurisdiction, but holds of the Queen, and so is plainly *extra territorium*; and his baron-officer might as well come to Lothian, and cite any of his master's vassals dwelling there; and so *extra territorium jus dicenti impune non paretur.* 2*do*, The sentence being pronounced in his own court, he was both judge and party; *et nemo potest jus sibi dicere.* 3*tio*, Nynewells being the Queen's vassal as well as Wedderburn's, and called out by the proclamation to attend the Sheriff, his duty to the supreme superior superseded and dissolved his obligation to Wedderburn; even as his marriage in ward-holding falls to the Queen, and not to any subaltern superior. Likeas, the demand was contrary to law; which requires all persons to come to courts

in a quiet and sober manner, and to bring no more with them but their daily household and familiars,—Act 82d, 1457; and that they shall be guilty of the convocation of the lieges who do it,—Act 140th, 1584. 4*to*, Though the charter oblige him to attend his superior, yet it has no penalty annexed in case of failyie; so they might as well have fined in £500 as £50: and the most can be acclaimed is damage and interest; which is none at all, but a mere punctilio of honour.

ANSWERED,—That though the citation given him was not within the feu-lands which Nynewells holds of him, yet it was sufficient; because, by his charter, he is bound to attend his courts any where within the shire of Berwick, when required; so it does not import whether he dwelt on the lands holden of Wedderburn or elsewhere.

REPLIED,—That clause only relates to personal suit or presence, and to decern for his feu-duties, but noways for extrinsic services; and as his baron-officer could not legally poind for that fine, except within the ground of the barony, so neither could he cite him, not dwelling on Wedderburn's lands; and the laws of *Regiam Majestatem* discharge any freeman to be called to his over-lord's court, without the King's brief.

Wedderburn ANSWERED to the *second* reason of suspension,—That he may very well judge his vassals by his depute; and our Acts of Parliament declare, that where the principal sheriff, steward, or bailie, is pursuer, they may hold a court and name a depute,—which he did; and he may as well fine him for his contempt as decern him in his feu-duties, the law making no distinction, *nec nos distinguere debemus*. To the *third*,—That Nynewells' duty to his sovereign, and to him as his immediate superior, were very consistent and compatible; for, by attending him to the circuit, he obeyed the Queen's proclamation; and by neglecting the requisition he plainly contravened the clause in his charter. And the Lords, in 1680, decided the parallel case at this same Wedderburn's instance, against *Park of Foulfordlees*, another of his vassals, who being required to wait on him to the King's host at Bothwelbridge, in June 1679, the Lords fined him, though he founded on the 31st Act 1491, that he was only to attend the sheriff or the King's Captain, as is marked by Sir George Mackenzie, in his observations on that act. If a charter bore a clause, that he should follow his superior *contra omnes mortales*, that would be repudiated as contrary to law and the allegeance he owes his prince; but this clause, of going alongst with his superior to the circuit, noways interferes with his duty as a subject.

REPLIED,—That Foulfoordlies was justly fined, for he had no lands holden of the crown, but was solely Wedderburn's vassal; but Nynewells having lands holden of the Queen, he cannot both serve God and mammon; and the 31st Act 1491 imposes only forty shillings Scots for absence from weapon-shawings, and yet he would exact £50.

But in King Charles the Second's reign, I remember absence from the host was fined in a half or third of a year's valued rent of their lands. See Act 82d, 1587. It is true, when the demands of ward superiors were in observance conform to the old feudal law, these services were strictly required; but these rude Longobardic customs are now exceedingly mitigated. Superiorities now are more substantial, and only considered as they afford profit and money; the shadowy part are flown away, feus being no more gratuitous, but acquired for onerous adequate causes, and their slavish dependencies much laid aside, unless

in the Highland clans. And the Lords, in this case, thought Nynewells, in attending the sheriff, did no wrong to Wedderburn, his superior.

However, they decided nothing but the first objection against the execution; and found the baron could not cite *extra territorium*; and therefore found his decreet null, and would not so much as sustain it as a libel, but that he behoved to commence a process of new; whereas in favourable cases they only turn the decreet into a libel, and allow them to debate, *tanquam in libello*, without a new summons or citation. *Vol. II. Page* 617.

1711. *January* 2. WILLIAM FORBES of TOLQUHOUN *against* ALEXANDER FORBES of BALLOGIE.

ALEXANDER Forbes of Ballogie, being deeply engaged in cautionries for the deceased Sir Alexander Forbes of Tolquhoun, and having paid great sums for him, he first, in 1694, gets a bond for £10,000 Scots, and then, in 1697 and 1699, gets irredeemable rights of the lands of Fedderatshives and Loanmay, bearing onerous causes and absolute warrandice. Sir Alexander dying in 1701, and William Forbes, his brother's son, succeeding to the Laird of Tolquhoun, and apprehending that great advantages had been taken of his uncle by Ballogie and Mrs Elspeth Forbes his housekeeper; he raises a reduction, against Ballogie, of all his bonds, debts, and rights, as impetrated by fraud and circumvention, in so far as they were absolute and irredeemable; but he was willing they should subsist for security and relief of his engagements and cautionries, which he offered to pay to the last shilling. The qualifications of fraud insisted on were,—That Tolquhoun his uncle had a free estate of £10,000 Scots by year, besides money; but that, some years before his death, falling tender and infirm, he gave himself wholly up to the management and guiding of these two, Ballogie and Elspeth Forbes; and though he lived narrowly, yet he contracted in that time great debts, and yet disponed away to Ballogie large parcels of his estate without onerous causes, (though their narratives bore the same;) and has scarce left £500 sterling a-year to his heir, and that burdened with 100,000 merks of debt; which could be nothing but the product of circumvention.

ANSWERED for Ballogie,—*Esto* they were gratuitous, the heir can never quarrel them, he being bound to warrant: But the allegeance is false and calumnious, the dispositions bearing onerous causes, and so prove themselves, unless convelled.

Then Tolquhoun insisted on his other qualifications and reasons, that his uncle, at the time of granting these rights to Ballogie, being the last years of his life, was so decayed in his health, judgment, memory, and intellectuals, that no man in his right wits could do the things they prevailed with him to grant. And Ballogie offering to prove that he was as rational and judicious then as at any time before, and conversed civilly and sensibly with all his neighbours about him; the Lords allowed both parties a conjunct probation before answer, as to Tolquhoun's state and condition the time of his signing these deeds in favours of Ballogie. And both parties having adduced a vast number of witnesses, (Tolquhoun twenty-eight and Ballogie twenty-four,) the Lords this day advised both the relevancy and probation together; and Tolquhoun repeated