

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 decret 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 decret into a libel, and allow them to debate, *tanquam in libello*, without a new summons or citation.

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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 disposed 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 allegiance 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

his reasons of reduction and circumvention, *viz.* That he had proven that his uncle, at and before his subscribing these dispositions to Ballogie, was become so unfit and incapable to manage business, that he drunk in groundless prejudices against his best friends and his own brother, and gave himself wholesale up to Ballogie and Elspeth Forbes, that no access could be got to him but by them ; and that his judgment and memory failed to that degree that he would have asked at his best acquaintances who they were ; and he would have craved tenants for their rents, though they had paid him just the day before, and would not be convinced till they showed his own discharge ; and they made him believe they had bought nine oxen for him at a fair, and always presented the same beast nine times over ; and he did not know their old age from youth, neither by their mouth nor teeth ; and suffered many such tricks to be imposed on himself, by his fatuity and weakness ; and that they intercepted and kept up letters coming to him from his friends ; and such as he wrote and intended to send were detained, and never sent ; so that never was a fool, idiot, or infant so treated as he was.

Ballogie ANSWERED,—That this angry and invidious reason was a congestion of calumnies ; neither was there any shadow of probation for it, but by a few mean and obscure tenants, owing him more than they were worth, and so wholly under his influence and impression. Whereas, he opposed his probation, consisting of noblemen, gentlemen, ministers, and physicians, and others of undoubted probity ; who declare, that he conversed and discoursed as rationally with them as ever : and, if he mistook people, it is easy to account for that, he being very short-sighted. And he had always a custom to crave his tenants when he saw them, whether they were owing him or not : and all know he had a peculiar humour of his own ; and if these were marks of a fatuity, a great many persons more than he would be in danger.

3^{tho}, Tolquhoun ALLEGED,—That his uncle never understood the rights he had given Ballogie were absolute, because he had entered into a written contract of wager with Forbes of Waterton, denying he had given any such rights to Ballogie ; and obliging himself to pay £1000 Scots to Waterton if they were irredeemable ; and Waterton was to pay him £1000 Scots if they were found to be only in trust, or for security, as Tolquhoun affirmed they were.

ANSWERED,—This evinces the singularity of his temper, that he could not endure contradiction, and did not desire that Waterton should know what he had done ; and if this be fatuity, then Waterton's contract must fall to the ground, who ensnared him by raising his passion ; and if such transports take away solemn deeds, our rights will be very precarious. But Ballogie is not concerned in thir drunken contests ; his rights stand on their own bottom, and are fully ratified by Tolquhoun posterior to this wager.

Some thought his £10,000 bond, in 1694, behoved to be included in the subsequent rights ; seeing *debitor non præsumitur donare* ; and that it was next to impossible for Ballogie's credit to raise so much money as the price of these purchases and acquisitions from Tolquhoun came to. But the ratifications produced dispelled this mist, bearing they were all separate distinct rights, and were truly granted for onerous causes ; and though there had been antecedent fraud or dole, this was a remitting and purgation thereof.

The Lords considered, that the usual grounds for annulling deeds, are either trust, death-bed, or fraud. As to the first, there was no vestige of it ; besides

that now, by the 25th Act 1696, it is confined and limited to writ or oath. As to the *second*, All the deeds quarrelled are some years before his death; and now, by the 4th Act 1696, death-bed is restricted to sixty days. As to fraud, the probation did not bring it up to any indirect methods used by Ballogie in procuring them. The other legal and natural incapacities to annul deeds are fatuity, furiosity, insensibility, obligations restricting one in contracts of marriage, inhibition, interdiction, &c.; none of which are proven in Tolquhoun's case: for, though every man has not that measure of wisdom and prudence that is in others, yet this does not disable him from disposing on his estate, unless one or other of the foresaid incapacities affect him. Therefore, the Lords generally inclined to repel the reasons of reduction, and sustain the dispositions. But it was started by the President and others, that Tolquhoun, though he had only particular rights on the lands of Shives and Loanmay, &c. yet he had disposed them with absolute warrandice, though the superior universal sovereign rights were in Ballogie's person, at least acquired by him since; which they thought both incongruous and absurd; for he, by that warrandice, might evict the rest of Tolquhoun's estate from his heir. Therefore, though the Lords assoilyied from the reduction, yet they ordained Tolquhoun to be farther heard as to the restricting that warrandice only to fact and deed. Tolquhon urged two decisions, 18th February 1669, *Watson*; and 9th February 1670, *Scot*; where less pregnant acts of fraud and circumvention were sustained to take away bonds, than what Tolquhoun adduces here.

But the Lords did see a danger, if once a door were opened to declare men fools for not understanding things they never studied. This would make too many fools in the world. We will not call a husbandman a fool, because he is ignorant of the acts of parliament, forms of process, and rules of government. Even so, we must not conclude Tolquhon an idiot, for not knowing black cattle's age by their mouth. Folly and insensibility must be instructed by other sorts of circumstances than these.

An appeal was afterwards given in by Tolquhon against this interlocutor.

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1711. *January 4.* The EARL of MURRAY *against* CATHERINE DRUMMOND, Lady Craigton.

CATHERINE Drummond, Lady Craigton, being, on her contract of marriage, infest in certain lands in liferent, together with the house, yards, and parks; but with this quality, that, in case of a second marriage, she should remove from the house, yards, and park; the Earl of Murray, being a creditor to her husband, and being infest on an adjudication, pursues the Lady to remove from the house, yards, &c.; in regard she was now married to a second husband, and so had lost and forfeited her liferent of these.

ALLEGED,—The house I now possess is not the house that was standing at the time of my contract; but my husband, during the marriage, demolished that house, and built a new one; so that there is not one stone standing upon another of that house wherein I was infest, and which is mentioned in my contract; but a new one erected on my liferent lands, and so accresces to me, *et cedit solo*;