

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.

*Vol. II. Page 619.*

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*;

N n n n n

from which I cannot be debarred, unless, by a new consent subsequent to the building, I had declared that, by a second marriage, I should lose the liferent of that new house ; which I have not done.

ANSWERED,—Though it be built since her contract, yet it is almost built on the same foundation, and near to the ground on which the old house stood ; and so, *fictione juris*, is as much the same as a ship though repaired all with new planks,—*Arg. l. 76 D. de Judic.* ; and as *surrogatum sapit naturam ejus in cujus locum subrogatur*, so the identity of the second house with the first must oblige you to remove.

The Lords found this mansion-house being built on the foundation where the former stood, the lady must remove.

But, as to the parks, it was CONTENTED,—That, at the time of her marriage, the same was of a very small circuit, extent, and bounds ; but that, since, he had inclosed a very considerable piece of ground ; and, therefore, she could remove from no more than what was the park at the time of her contract.

The Lords thought this reasonable, and ordained it to be tried : for what if he had, during the marriage, inclosed a great part of her liferent lands, that clause in her contract could never have afforded action to dispossess her thereof. See 2d February 1672, *Guthrie against Macdougall*. Vol. II. Page 621.

1711. January 6. JAMES MALCOLM of GRANGE *against* JAMES WEYMS of PITKENNY.

JAMES Weyms of Pitkenny grants a bond, blank in the creditor's name, for 750 merks, *in anno* 1686. James Malcolm of Grange, finding this blank bond lying amongst his brother my Lord Lochore's papers, he fills up his own name in it, and charges Pitkenny for payment ; who SUSPENDS on this reason,—That the said bond originally belonged to one Margaret Kinnymond, who lent him the money ; but, her husband being in great debt, she was advised, to prevent his creditors' arrestments, to take it blank, and put it in Mr Alexander Malcolm her advocate's hands, for her use ; and that she afterwards assigned this bond to one Clark, who married her daughter, who recovered a decret against Pitkenny for the sum before the sheriff of Fife ; on which distress he had made payment, and obtained his discharge ; and so could not pay twice.

ANSWERED,—He opposed his clear liquid bond ; which, though blank, yet, being in my Lord Lochore's cabinet, was his evident ; and he, as his nearest of kin, might warrantably fill up his own name therein, and could not be taken away by such extrinsic stories.

The Lords allowed Pitkenny, before answer, to prove, *prout de jure*, that his bond was put in my Lord Lochore's hands for the use and behoof of Margaret Kinnymond, in trust ; and that she had assigned it to Clark, her son-in-law, and who, upon payment, had discharged it.

Upon this, a probation being led, one Hutcheson DEPONES, That he was present when Mistress Kinnymond gave the bond to my Lord Lochore, to prevent its being affected by her husband's creditors ; and that he heard Lochore say, he should give her up the bond whenever she called for it. And one Glassford depones, that he heard Doctor Malcolm, after Lochore's death say, he be-