

## S E C T. XI.

Taking advantage of Facility, Imbecility, or Drunkenness.

1679. December 10. SWINTOUN *against* HAY.

No 58.  
A bond was granted to a husband in liferent, and to his wife and her heirs in fee. Altho' the husband was facile, and the wife managed his affairs, fraud was not inferred.

HAY of Woodcockdale having granted a bond to umquhile Mr John Bruce minister, and Isobel Ker his spouse, bearing to him only in liferent, and to her and her heirs in fee, she did assign the same to Mr Mark Ker and Mr Alexander Swinton, who thereupon obtained decree against Woodcockdale; who raises suspension of double poinding against them, and against John Elphingston, as nearest of kin to Mr John Bruce; for whom it was *alleged*, that the conception of this bond was most fraudulent, because it is offered to be proven, that Isobel Ker did manage all the affairs of her husband, who was a simple person; and the taking of the bond in these terms was most unwarrantable, to make the woman faior of her husband's money; and it was desired that the debtor, writer, and witnesses inserted in the bond, might be examined *ex officio*, whether the husband gave warrant to draw it thus, or if it was read to him, or signed when he was present. It was *answered*, That though all these were proven as is desired, though they might infer facility and weakness, yet no fraud; and it would be of evil example, if, upon such circumstances, solemn writs should be altered; and this bond being granted long before the husband's death, it cannot be supposed that he was ignorant all his life, but that he allowed it of knowledge, seeing he had no children, and the means he had was chiefly by his wife and her industry, and that he gave her a posterior disposition of all his means; and albeit the Lords *ex nobili officio* may dispense with forms, or the manner of probation, yet the points proposed here, though proven, could not be relevant, and so cannot be admitted to probation even *ex officio*.

THE LORDS found these points proposed are not relevant, and therefore refused to examine witnesses thereon. There was another point in relation to an interdiction to the wife, which came not to be advised.

*Stair, v. 2. p. 719.*

\* \* \* Fountainhall mentions the same case :

1678. December 12.

MR William Gairden, minister at Edinburgh, and Mr John Frank, writer there, &c. pursue Mr Mark Ker for payment of legacies left them by Isobel Ker. He defended on a posterior simple disposition, against which it was contended, that it was elicited from her by a cheat in filling her drunk; and that Mr Mark, after he had agreed with Mr Alexander Swinton advocate, who had also got another disposition from that simple woman, boasted that he had circumvened her, and that it was never delivered to him by her, but caused the writer of it convey it privately to him under the table. THE LORDS, upon a bill,

ordained Mr Mark to be confronted as to these expressions, with Mr A. Swinton; and being called in this day, Mr A. Swinton averred it in his face; and, by the Paesident's order, for refreshing Mr Mark's memory, rehearsed the matter of fact; which Mr Mark denied. However, he agreed with the pursuers at last, and gave them a part of their legacies.. *Vid.* 10th Dec. 1679.

No 58.

1679. December 10.—In the action Mr William Gairden, Mr John Frank, and other legatars of Isobel Ker, relict of Mr Robert Bruce, against Elphingston of Quarrel, as being nearest of kin to the husband, 'The LORDS having heard Lord Newton's report, they found the grounds of fraud condescended upon by Quarrel not relevant, viz. that Mr Robert Bruce the husband had interdicted himself to the said Isobel his wife, and so she could not, being an interdictor, take a disposition or assignation from him, and that she renewed her husband's bonds, and lent out his monies in her own name in fee, he not being present, and the bonds not being read to him; and therefore they preferred Mr Alexander Swinton and the rest of the legatars, and found the letters orderly proceeded against Hay of Woodcockdale the debtor.' These acts of circumvention seem very pregnant; only there were two exceptions against the interdiction: 1st, That it does not hinder the free disposal of moveables, as these sums were. Only it is *alleged*, that if a man's whole estate consist in moveable sums, (as Mr Bruce's sums were), shall not the law permit an interdiction to secure that to him, as it doth heritage to another? But there is no law nor practice for this. 2do, The interdiction seemed to be null, being of a husband, (who in law is *dominus et caput familie*), to his wife. This were to invert the order of nature; besides, he permitted her to manage his affairs, lift his monys, renew his bonds, &c. and he gave her right thereto; all which, though they were deeds of much facility and weakness, yet they were acts lawful in themselves. I hear that, in the year 1662, the Lords found, in the case of the Laird and Lady Milton, that a man could not be legally interdicted to his wife, but the power of administration recurred back to his person again by virtue of his *jus mariti*. See HUSBAND AND WIFE.

*Fountainhall*, v. i. p. 29, & 68.

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1752. November 24. BARBARA MACKIE and Husband *against* MAXWELL, &c.

JEAN MACKIE, heiress of Maidland, being quite abandoned to drunkenness, which made her an easy prey to sharpers, and having thereby involved herself in much debt, was persuaded to divest herself of her lands in favours of her younger sister Barbara, who was the next heir, upon condition of undertaking the burden of her debts, and securing her in an yearly annuity. Barbara, reckoning that by this transaction she had paid the full value of the lands, brought a reduction against several persons, mostly innkeepers in Wigton, of

No 59.  
A disposition  
of land was  
reduced, up-  
on the disso-  
luteness and  
profligacy of  
the disposer,  
and upon the  
great inequa-  
lity in the  
bargain, tho'  
there was  
neither fraud  
nor circum-  
vention.