

No. 17. "The Lords found the petition not competent; and therefore dismissed the same; reserving to the petitioners to insist against the respondent in a declarator or reduction; and reserving to the respondent his defences against the same, as accords."

Act. *Lockhart.*

Alt. *M<sup>c</sup>Queen.*

*Fol. Dic. v. 4. p. 310. Fac. Coll. No. 142. p. 332.*

1764. *August 3.*

THOMAS FRAZER of Gortuleg, *against* JOHN SPOTTISWOOD and Others, TRUSTEES of the Deceased THOMAS FRAZER, Writer in Edinburgh.

No. 18.

A summary application to have words in a deed on record declared injurious, found incompetent.

Thomas Frazer of Gortuleg applied to the Court by petition, setting forth, That, at opening the repositories of Thomas Frazer, who had died some weeks before, there was found a settlement executed by him in 1758, by which he vests his effects, amounting to about £.2500 Sterling, for the uses therein mentioned, in certain persons as trustees, or, failing of them by death or non-acceptance, to the Magistrates of Edinburgh, and their successors in office.

That this settlement was extremely whimsical in many particulars, and most injurious to the petitioner; for, after mortifying £.800 Sterling, the interest whereof to be applied towards the education of two boys of the name of Frazer, to law, physic, or divinity, at the College of Edinburgh, upon a competition among four of that name, the following clause is adjected: "Secluding always from the fore-said competition, and from any benefit arising from this deed, the children and descendants of Thomas Frazer of Gortuleg, in Stratherick; and Hugh Frazer, now of Dunballoch, in the Aird; Simeon and Levi, brethren in iniquity." The cause of this seclusion is known to the world, and, more particularly, to the distressed family of Lovat, and likewise to the family of Culloden.

That the deed had been recorded in the books of Session, and extracts taken out by different people interested in it.

That the insinuations in the above clause were equally malicious and groundless, as would appear from a certificate by two of Thomas Frazer's trustees, and a variety of letters and papers annexed, from which the petitioner's friendship and fidelity to the family of Lovat was clearly evinced.

That death had secured the author of the calumny from being brought to justice; and it was doubted, whether action lay at common law against his heirs for reparation; but, as the writing had been recorded in the books of Session, which are immediately under the eye and direction of the Court, the petitioner had been advised to lay the case in this manner before your Lordships.

That the petitioner did not insist, that any material clause in the deed should be altered or expunged; or that the seclusion of him and his from the benefit of the mortification should be set aside, but only that the injurious expressions should be delete, or some other remedy granted. The petitioner therefore prayed their

Lordships, to grant warrant for serving it on the trustees of Thomas Frazer and the Magistrates of Edinburgh; and, upon their failing to support the injurious expressions complained of, to appoint these expressions to be expunged from the deed and from the record, or grant such relief as to their Lordships should seem most competent and proper; and, in the mean time, to recall the extracts already given out, and prohibit the clerks to give out others, till their Lordships should determine the case.

The Court ordered this petition to be served on the trustees; and answers were put in for all of them, except the two who granted the above mentioned certificate.

The scope of the answers was, to vindicate Thomas Frazer and his settlement from several reflections thrown upon both, in the petition; for, as to Gortuleg's desire to have certain expressions delete, the respondents said, they were in the dark as to the import of these expressions, but thought it their duty to refuse their consent to any erasure or deletion, by which the deed might be weakened, especially as the stile of the petition was such as rendered it improper for the trustees and friends of Thomas Frazer to consent to any thing craved by that petition; and they submitted, without any argument, whether the Court could, *ex nobili officio*, do an act, which, if done by a private person, would be deemed a vitiation of the records.

When the petition and answers came to be advised, the counsel for Gortuleg declared, they did not insist, that any part of the deed should be expunged, as that would be a dangerous precedent, but only that the Court should find and declare the expressions to be injurious.

This restriction was ordered to be minuted; and then it was observed from the Bench, that the conclusions concerning the record had alone rendered the petition competent; but now that they were passed from, it was evidently not so.

“The Lords found the petition not competent.”

*N. B.*—An action of declarator was afterwards brought, and the Lord Coalston Ordinary having found the expressions in the deed groundless and injurious, the trustees who appeared in defence acquiesced in the judgment.

For the petitioner, *Advocatus Lockhart & Ilay Campbell*. For the respondents, *D. Dalrymple*.  
*J. M.* *Fol. Dic. v. 4. p. 311. Fac. Coll. No. 144. p. 341.*

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1765. August 10.

ROBERT SYME, Writer to the Signet, against JAMES STEEL, Merchant in Edinburgh.

Robert Syme, writer to the signet, as trustee for the creditors of James Steel, merchant in Edinburgh, insisted in a summons against him, narrating various acts of fraudulent bankruptcy, and concluding, That Steel should be declared infamous, incapable of public office, and otherwise punished, as also for £.50 Sterling of damages.

No. 19.  
A process with penal conclusions against a bankrupt, at the instance