1750.

BAYNES, &c. *v.* EARL OF SUTHERLAND.

WALTER BAYNE, Esq. and PENELOPE his Wife, and GEORGE MORRISON, Esq. } *Appellants.*

WILLIAM, Earl of SUTHERLAND, *Respondent.*

13 *Feb.* 1750.

FOREIGN.—TITLE TO PURSUE.—IDIOTRY.—Found that persons appointed in England by the Lord Chancellor to manage the affairs of a lunatic, are not thereby entitled to maintain action in Scotland upon the lunatic's right.

A power of attorney, granted by one who had been judicially declared a lunatic in England, was found a sufficient title to pursue in Scotland for a debt due to him there.

[Elchies, *voce* Idiotry and Furiosity, No. 2; Kilk. 209; Falc.; Mor. Dict. 4595.]

No. 86. MORRISON, a native of England and residing there, lent L.2100, on a bond in the English form, to the Earl of Sutherland. A commission of lunacy having issued against Morrison, his sister Penelope, and Baynes her husband were, upon the verdict of the jury declaring the lunacy, appointed committees for the management of his estate. In this character they raised an action in the Court of Session against Lord Sutherland, for payment of the above bond and interest thereon.

Objected, that the pursuers had produced no title to insist in the action; that the verdict was not competent evidence in Scotland, neither could the commission granted by the Lord Chancellor affect debts or subjects in Scotland, in which country the King was not by law the guardian of lunatics, and where inquisition of lunacy, and the suc-

cession to the estates of lunatics were regulated by different rules from those which prevailed in England. That consequently the pursuers could not grant a proper discharge for the debt.

Answered, that *mobilia sequuntur personam*, and the administration of his personal estate, granted by the proper authority in England where he had been domiciled, must be in all places of equal force as a voluntary assignment by himself; that assignments made under commissions of bankruptcy in England had been held a sufficient title to pursue for and recover money due to the bankrupts in Scotland, and the pursuers, having been duly appointed committees of Morrison's whole estate, were as much entitled to recover all such estates, as the assignees under a bankruptcy would be.

The Lord Ordinary (Elchies,) having reported the case to the Court, the pursuers,* upon a petition to the Lord Chancellor, obtained leave to procure a letter of attorney from Morrison himself, authorising them to carry on the action; by which letter they maintained, without abandoning their former argument, that all doubts of their title were now removed.

It was answered, that Morrison being notoriously a lunatic, as the proceedings respecting him in England (which were set forth in the present summons) amply proved,† the power of attorney was a mere nullity, and being executed by the authority and order of the Lord Chancellor, could not possibly have more weight than the commission pre-

* Having been advised by counsel in England, that an idiot's tutor appointed in Scotland could not, on that title, maintain action in England.—(Elchies.)

† The letter of attorney proceeded on a narrative of his lunacy, and of the access to him given by order of the Chancellor.—(Kilk.)

1750.

BAYNES, &c. v. EARL OF SUTHERLAND.

viously granted; and that if such a proceeding were countenanced, the same method might be practised to draw the estates of all lunatics out of Scotland, not only into England, but into any other country where the lunatic might be confined, subject to order.

The Court (21 June, 1749) found, that "there "was no sufficient title produced to support this "action, and therefore sustained the defence," &c.

Entered 27 Nov. 1749.

The appeal was brought from this interlocutor.

Pleaded for the Appellants:—1. Morrison, a domiciled Englishman, having, by the laws of England, been duly declared a lunatic, and the committeeship of his whole estates been granted under the Great Seal of Great Britain, the Appellants have thereby power to recover all debts due to him, in whatever place, and more particularly in a country governed by the same royal authority, and included under the same name of Great Britain. Therefore, although Scotland still retains her former laws, the title of the appellants must be held sufficient in this action for the recovery of personal property which was lent in England, and ought to have been paid there, but which now can only be sued for in the courts, and according to the laws and forms of that country where the debtor resides.

2. On the supposition that the title of the commissioners to pursue is defective, the objection thence arising to the present action is obviated by the power of attorney executed by Morrison; for if the commission and grant under the Great Seal be of no force or evidence in Scotland, the validity of the power of attorney cannot, with any consistency, be denied. Morrison confessedly has not

been found to be a lunatic by any judicial proceeding in Scotland, and therefore he must be considered as still fully capable of granting such a mandate for carrying on an action in Scotland, and for giving sufficient discharges for debts due to him there.

The power of attorney does not derive its authority from the order of the Lord Chancellor, but as the persons and estates of lunatics in England are by law placed in the custody, and under the protection of the Crown or the Court of Chancery, no letters of attorney or other deed can be taken from the lunatic, except by order of that Court. Such order, however, extends no further than to permit the deed in question to be taken and executed by the lunatic; and therefore in Scotland the letter must have its full effect from the act of Morrison himself, as his valid deed, whether the order of the Lord Chancellor be of any force or not.

Pleaded for the Respondent:—1. The commission granted by the competent authority in England can have no greater force in Scotland than a parallel proceeding in the latter country would have in England. The bond-debt in question is the lunatic's estate in Scotland; and he having heirs in different degrees in both parts of the kingdoms, where the rules of succession *ab intestato* differ materially, it is a matter of importance to his heirs that the law and jurisdiction by which his property is to be governed, be not changed. It is said that a person's being found a lunatic in the place of his residence must ascertain his condition of mind all over the world; but even supposing Morrison as much a lunatic in Scotland as if found so by an inquest there, yet the management, both of person and estate, depending entirely on different rules,

1750.

BAYNES, &c. v. EARL OF SUTHERLAND.

the guardians appointed in one part of the kingdom cannot prejudice those who have a right to the office in the other part.

2. There is no inconsistency in assuming the fact of Morrison's lunacy, as proved by the proceedings in England, and yet denying the right of the English commissioners to sue for money in Scotland. The letter of attorney, therefore, being the act of a lunatic, can have no legal validity, and indeed being granted to the same commissioners, in consequence of the Lord Chancellor's order, is only a different form of attaining the same end for which their previous title was insufficient.

The objection arises upon the showing of the appellants, who ground their action upon the fact of his lunacy, and then produce a letter of attorney, said to have been executed by him. Their own assertion shows that their action cannot be maintained.

The proper way of recovering the debt is very obvious. The lunacy may be found in Scotland, without the person of the lunatic being removed there, and a committee appointed who have a right to sue for and manage his estate in Scotland, under the control of the Court there. At present, the appellants cannot give the respondent a proper discharge for the money, and he might therefore be obliged to pay the money a second time, either by Morrison, were he to recover, or, in the event of his death, by those entitled to the right of succession.

Judgment, 13 Feb. 1750.

After hearing counsel, "It is ordered and adjudged, &c. that the said interlocutor, whereby "the Lords of Council and Session found, 'that "'there was no sufficient title produced to carry on

" ' the action,' commenced by the appellants, and " therefore, ' sustained the defence, and decerned " ' accordingly,' be, and the same is hereby reversed. " And it is declared, that there is a sufficient title " in the appellant, George Morrison, to carry on " this action; and, therefore, it is hereby ordered, " that the said action be sustained at the instance " of the said George Morrison."

For the Appellants, *W. Hamilton, K. Evans.*
For the Respondent, *C. Maitland, W. Murray.*

Lord Elchies says, that " the Chancellor thought the objections to " the first suit well founded, and that a committee in England could " not sue in Scotland, but that yet the lunatic might sue in his own " name; and that though the first suit was brought in name of his " committee as of a lunatic, which they could not do in Scotland, " yet when the suit was afterwards brought in the lunatic's own name, " we could take no notice of his lunacy unless a brieve of furiosity " had issued, and, (I supposed, he added), that he had been found " furious; or if we did take notice of it, it could only be as a lunatic " at large, which could not bar a suit in his name; and that the " union made no difference, for that the law would be the same in " England."

JAMES DAVIDSON, - - *Appellant;*
CAPTAIN HENRY SINCLAIR, *et alii, Respondents.*

14 *February* 1750.

TAILZIE.—A prohibition, with irritant and resolutive clauses, against altering the order of succession, or contracting debts, or doing any deed by which the right of succession may be prejudged in any manner of way, is ineffectual to prevent a sale of the estate.

[Elchies, *voce* Tailzie, No. 36. Mor. Dict. 15382.]

THE entail of the estate of Carlourie contained prohibitory, irritant, and resolutive clauses, not

No. 87.