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FYFE, &c. *v.* GORDON, &c.

Lieutenant JAS. FYFE, in Edinglassie, and ARCHIBALD YOUNG, Procurator Fiscal of Banff, ... } *Appellants;*

MARGARET WILLIAMSON, Wife of James Gordon, in Haugh of Edinglassie, and the said JAMES GORDON, for his interest, } *Respondents.*

House of Lords, 10th March 1796.

REDUCTION OF WILL—FRAUD AND CIRCUMVENTION—DAMAGES FOR WRONGOUS IMPRISONMENT.—A party had made two several wills, leaving to his relations his whole fortune, upwards of £3000. Six days *before* his death, and while *in extremis*, Lieutenant Fyfe, a mere stranger to him in blood, employed a notary to come to Fyfe's house, to write out a will in his favour. They then went to the house of the deceased, and got it executed. Mr. Fyfe procuring the former will, and burning it without any instructions from the deceased. Held, the will reducible, and reduced accordingly. The sister of the deceased, along with her husband, having resisted Fyfe's attempt to get delivery of the papers and repositories, in consequence of which a warrant of the Sheriff was obtained, and an officer with a party of soldiers appeared, and dragged off her husband to prison. Held, the imprisonment illegal, and damages awarded in consequence.

This was a reduction of a will, raised at the instance of the respondent, Margaret Williamson and husband, against the appellant, on the following grounds:—1. "That the "will of her deceased brother, Alexander Williamson, con- "tained a destination of leases belonging to him, which "being heritable subjects, could not be disponed of by a "testament. 2. That the foresaid will was improperly "elicited, and impetrated by the appellant, James Fyfe, "through gross fraud and circumvention on his part, and "at a time when the granter, the said Alexander William- "son, was incapable of attending to his own affairs." 3. "That Mr. Fyfe took away a prior will, which settled Mr. "Williamson's fortune among his relations and friends; and, "under pretence of getting it subscribed on stamped paper, "Mr. Fyfe did fraudulently cause it to be made out at his "own house, totally different, and devised for his, the de- "fender's own ends, nominating him sole executor and "manager of the deceased's affairs."

After the death of Alexander Williamson, the appellant having applied to the Sheriff for warrant to lock up and seal the deceased's papers and repositories; this was resisted by the respondents, whereupon he applied again to the Sheriff, with concurrence of the Procurator Fiscal, to search for, and take possession of the papers and writings mentioned in an inventory produced, whereupon the Sheriff granted warrant to officers of the Court to search the house and repositories of the said *James Gordon* and *Margaret Williamson*, for the writings mentioned, and granted warrant to apprehend both these parties, to appear before him for examination under this warrant, An officer, with a party of soldiers, apprehended Gordon, and imprisoned him. Under the Sheriff's interlocutor, they were also assessed in £15 damages, and in a fine of £50. Gordon was only enlarged from prison on a bill of suspension, wherein the Lord Ordinary found the procedure irregular, and the fine imposed exorbitant.

Dec. 23, 1791.

In consequence of these proceedings, a summons of reduction was also raised, containing separate conclusions for damages, on account of this illegal procedure and imprisonment, and also a conclusion for reducing the decreet and warrant of the Sheriff of Banffshire.

The appellant was a total stranger to the deceased in blood. The respondent was the deceased's sister, in favour of whom and her mother, a former will had been executed.

A proof being ordered and led, it was proved as to the execution of the will, that the appellant Fyfe had sent for the notary who drew out the will, to his own house, where he dined, and where he got particular instructions from Fyfe. He was ordered to bring stamp paper with him, which he did accordingly; and he was informed that Mr. Williamson wished a settlement made, and that he (Fyfe) was to be his executor. That after dining together, he proceeded to Mr. Williamson's house, where he found Mr. Williamson lying in bed. That the former settlement made by Mr. Williamson was produced, which he read over, after which, he began a scroll of a new settlement. "Every clause, "as the deponent wrote it, was read over *by Mr. Fyfe*, who "*made observations and alterations* as I went on." That after this was done, he transcribed it on stamp, and this he did at Mr. Fyfe's house, partly that night, and partly next day. That Mr. Fyfe and he returned next day to Mr. Williamson's house, and found Mr. Williamson in bed. That he read over

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the will to him. That there were no persons then present, except Mr. Fyfe. That after it was read, James Malcolm came in to witness it. That Mr. Williamson called for some person to assist him to get up and sit in bed to sign the will. James Malcolm did so. Whereupon Williamson signed the will, in presence of the deponent and James Malcolm as witnesses. "That, to the best of his recollection, he is certain "there was one marginal note on the will, and no more. And "being desired to look at the will, and asked how many mar-"ginal notes appear upon it now?" "Depones, he observes two "upon the second page, and the undermost of the two is the "one he recollects, and which is in his hand-writing. Depones, "that after the new will was executed, the former one was "burned in his presence by Mr. Fyfe. He did not hear Mr. "Williamson instruct Mr. Fyfe to burn it. That the upper-"most of the two marginal notes is in the deponent's hand-"writing, and which he wrote at Mr. Fyfe's house, before he "went to Mr Williamson's house. That at the time "the will was executed, Mr. Williamson appeared to be of "sound judgment, and perfectly collected." Malcolm, the other instrumentary witness, swore he was sent for by Mr. Fyfe. That he knew not what was in the deed, and it was not read over to Mr. Williamson in his presence. He was so weak in body as to be unable to rise out of bed.

In regard to the illegal procedure of Mr. Fyfe after the deceased's death, the Lords pronounced this interlocutor:—

Nov. 13, 1793. "Reduce the decree or warrant of the Sheriff of Banffshire, "libelled on, in so far as to assoilzie the pursuers (respon-"dents), from the damages and expenses, and also from the "fine thereby found due; and reduce, decern, and declare "accordingly. Find the defenders, Lieutenant Fyfe and "Archibald Young, Procurator Fiscal for the county of "Banff, conjunctly and severally liable to the pursuers in "the expenses incurred by them before this Court, but not "to those expenses incurred in the Sheriff Court; in conse-"quence of the pursuers' improper conduct. Find the said "defenders, Lieutenant Fyfe and Archibald Young, also "liable to the pursuers in damages, and ordain a conde-"scendence of these to be given in."

With regard to the reduction of the will, the Court pro-

Nov. 30, ——
Dec. 3, —— nounced this interlocutor:—"Sustain the reasons of reduc-"tion of the latter will and settlement, executed by the "deceased Alexander Williamson libelled on, and reduce, "decern, and declare accordingly. Find the defender liable

"to the pursuers (respondents) in expenses, and allow an "account thereof to be given into Court."

On petition the Lords adhered.

Their Lordships thereafter modified the expenses to £130, and decerned against Lieutenant Fyfe for the same.

They afterwards pronounced this interlocutor:—"The "Lords having advised the condescendence of damages, in the "process for wrongous imprisonment and damages against "Lieutenant Fyfe and Archibald Young, with the abstract "liquidating the amount of the said damages, together with "the account of expenses, they modify the whole damages, "in so far as respects the wrongous imprisonment, "to the sum of £50 sterling, including those expenses "charged in the said abstract, as composing part of the "pursuers' damages, and modify the damages respect-"ing the lease to £10 sterling; and also modify the ex-"pense of process to £80 sterling, in full, including agent's "fee, and the account of expenses stated for the pursuer's "agent in the country, and decern against James Fyfe and "Archibald Young, conjunctly and severally, for payment "of the said sums of £50 and £80, amounting to £130, "and against the said James Fyfe, for the other sum of £10."

Dec. 19, 1793.
Jan. 18, 1794.
Jan. 28, 1794.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant Fyfe.—1. The interlocutors appealed from have set aside a will regularly executed by the testator, and disposing of property which he had a right to dispose of as he thought proper, on grounds which, so far as they can be collected from the proofs and proceedings, do not amount to a cause of suspicion. There never certainly was a case in which the plaintiffs' allegations were more inconsistent, and more completely defeated by the evidence adduced. According to the respondents' allegation, the testator's incapacity was of such a nature, that the whole neighbourhood must have known of it; but the whole evidence adduced on this occasion is mere *hearsay*, and no positive evidence is adduced.

On the other hand, the deposition of Stewart the notary, as to the testator's capacity, is direct and positive. He was the party employed to execute the will, and consequently the party most likely to take notice of this, and he swears that he was of sound judgment, and quite collected when he signed the will. On what grounds, therefore, the imputation of fraud can be supported, is nowhere apparent. 2. In regard to the damages of wrongous imprisonment,—as the respondents, by their improper conduct, brought upon

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them the consequences complained of, these interlocutors ought to be altered.

Pleaded for the Respondents.—The deceased had made two prior wills, in favour of his relations, one in Jamaica, and another when he came home, and in the month of April, previous to his death, leaving to them his whole fortune among them; the last of which existed up to within six days of his death, when the appellant, a mere stranger, got the deceased to execute in his favour a new will, and burned the former. The new settlement was made at the suggestion, and by the intervention alone of the appellant. He sent for the writer, got him to his own house, where they were together for sometime, and where the appellant tutored the writer what he was to do, and thereafter carried him to the deceased's house. The deceased was then *in extremis*,—so weak in body as to be unable to rise out of bed,—was much impaired in his mental faculties, and was often delirious from disease, and from quantities of laudanum which he was under the necessity of taking. He had never any quarrel or any cause of displeasure against his own heirs at law. But the manner in which it was executed, shows that it was fabricated. There were certain marginal notes and additions made to the will, after it was signed, which prove this. In the bequest to John Williamson, the testator's natural son, of £300 sterling, there was added upon the margin the words, " of which sum he has received £180 sterling, before this " date." These words are put upon the margin, and it does not appear from the deed by whom they were written. At the bottom of the second page of the will, there are two lines added after the word " appoint," which has originally been the catch-word to the third page, but now there follow on the bottom of the second page, the following words: —" My said executor to pay the above sum from the money " lodged in Mr. Davidson's hands in Huntly." The reading then breaks off in the middle of a line, leaving the remainder of the line blank, and without any catch-word; and, in order to carry on the sense of the original catch-word " appoints," is alterted to " and appoints." Both by the evidence of Stewart, and the admissions of the appellant himself, it is clear that these additions and alterations were made after the will was executed.

2d. In regard to the proceedings before the Sheriff, these were most illegal and oppressive. The appellant, when he demanded the papers alluded to, to be delivered to him, was insisting for what he had no right to demand. He was

not confirmed executor; besides, the Commissary's warrant did not bear that the papers were to be delivered to the appellant. It only directed an inventory to be taken of them. It was therefore wrong in the appellant to present a new petition, charging the respondents with theft, as they did. They appeared before, and declared their readiness to an inventory being taken. But the appellant, choosing to have delivery, it was illegal and oppressive thereafter to obtain a warrant to apprehend and imprison them, by aid of a party of soldiers, and to be treated in the brutal and inhuman manner that was here done. For all which the appellants are answerable in damages.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *Wm. Grant, Tho. Macdonald.*
For Respondents, *Sir J. Scott, W. Adam, W. Tait.*

SIR ROBERT ANSTRUTHER of Balkaskie, Bart. *Appellant;*
SIR JOHN ANSTRUTHER of Anstruther, Bart. *Respondent.*

House of Lords, 18th May 1796.

SUPERIOR AND VASSAL—RIGHT TO THE COAL—PERTINENT—PRESCRIPTIVE POSSESSION.—The respondent was proprietor of the barony of Pittenweem, which included the burgh of Pittenweem, and certain lands called Acredale lands, which had been feued out in small rigs or stripes long before he acquired right to the barony. This right included an express conveyance of the whole coal within the barony. He was also *superior* of the *whole.* Part of those lands, called the Acredale lands, belonged to the appellant. In these Acredale feus, the coal was either excepted, or the right was silent altogether on the subject. Among those, the appellant's right was silent. There was no conveyance of coal to him, and no reservation of it; but he contended that the conveyance of land carries the coal as a pertinent, and that the coal was mentioned as a pertinent in the tenendas of his right. When, therefore, the respondent proceeded to work the Acredale lands for coal, the appellant suspended, and the present declarator was then brought: Held by the Court of Session, and affirmed by the House of Lords, that the respondent had the sole right to the whole coal in the Acredale lands.

The respondent, proprietor of the estate of Newark, in