

1732.

FERGUSSON  
v.  
MAITLAND,  
&c.

WILLIAM FERGUSSON, Esq. of Auchinblane, - - - - - } *Appellant* ;  
MR. WILLIAM MAITLAND, Minister, JAMES ROB, Merchant in Edinburgh, and ISABEL, his Wife, } *Respondents*.

*5th April, 1732.*

**FRAUD**—A deed reduced upon the head of fraud and circumvention, which were chiefly inferred from the facility of the granter, in conjunction with the very disadvantageous terms of the transaction.

**Costs**—L.60 given to respondents.

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[Fol. Dict. Vol. I. p. 337. Mor. Dict. p. 4956.]

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FERGUSSON obtained decree against John Colville, surgeon in Mauchline, as cautioner for a debt of 2000 merks. Upon this decree Colville was charged on letters of horning, and a caption executed against him. Thereafter, he assigned over to Fergusson, several heritable debts, amounting in all to 4000 merks, (which, however, according to the statement of Fergusson, were very much incumbered with prior claims and arrestments.) Fergusson gave a back bond, declaring these assignments to be only in security of the debt sued on.

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He next arrested, in the hands of Maitland, (the respondent) some funds belonging to Colville, and raised an action of forthcoming, in which, by a decree arbitral, Maitland was directed to pay to

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him, 1700 merks, of which 1000 were shortly afterwards paid.

Of this date, he obtained from Colville an absolute disposition of the above debts, &c. and at the same time he executed a back bond, declaring that this disposition was only granted in security of a debt of L.236, 7s. 5d. sterling, due by Colville to him, for which sum Colville also granted his bond.

Afterwards Colville was reduced to great straits for the means of subsistence, of which Fergusson took advantage to obtain from him a discharge of the above-mentioned back bond; by which deed he discharged all claims which he might have against Fergusson, and further bound and obliged himself “to assign and dispone to the said W. Fergusson any debts or sums of money that he can discover to be due to my said father, by whatsoever person or persons, not exceeding the sum of one thousand merks, for which I have instantly received a full value, renouncing all exceptions to the contrary,” &c.

At the time of giving this discharge, no account was made up between them nor any money paid, but Fergusson gave him the following note: “I promise to pay to John Colville, surgeon in Mauchline, the sum of four hundred merks Scots money, at the term of Martinmas next to come, *secluding assigns, and only payable to himself on life*, for value received of him, and notwithstanding of the term of payment, to advance him of the aforesaid sum, what is necessary for out-rigging him to go abroad to the army.”

Colville died in great penury, but before his death, he executed a general disposition, subject to revocation, in favour of Maitland his uncle, and Isobel Campbell his sister, of all debts, sums of money, &c. which might be owing him at his death, and particularly assigning the above back bond.

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In virtue of this disposition, these parties raised an action for reducing the foresaid discharge on the head of fraud and circumvention, which they inferred from the situation in which Colville was at the time when the several transactions between him and Fergusson were entered into, and from the nature of the securities which were given to Colville in consideration of them.

A condescendence having been given in, the Feb. 1727.

Lord Ordinary “found the reasons of reduction “not relevant, and assoilzied,” &c. But upon a petition to the whole court, their Lordships “be- July 21.

“fore answer, allowed a proof of the several alle-  
“gations, and granted commission to examine  
“witnesses in the country upon interrogatories  
“given in for the pursuers.” The proof having  
been led and advised, their Lordships “reduced Feb. 13, 1729.  
“the discharge, and found that both parties are in  
“the same state they were in before granting  
“thereof.

This interlocutor was afterwards adhered to, and it was further “found that the bond of  
“L.230, 7s. narrated in the cancelled back bond,  
“dated in January, 1725, is to be held as a good  
“and subsisting bond, though it doth not now ap-  
“pear, and also that the cancelled back bond is to

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“ be held as a valid deed ; reserving all objections  
“ against the debt in the bond as accords.”

Thereafter, by sundry interlocutors, the de-  
fender was ordained “ to give in a condescence  
“ how and in what manner the sum of L.236, 7s.  
“ in the bond was furnished to Colville, so as to  
“ become a debt against him ;” and further, “ to  
“ give in an account of his intromissions with Col-  
“ ville’s effects, or of any payments made to him.  
“ since the date of the said bond.”

Entered Jan.  
28, 1730.  
Amended  
April 6, 1731.

The appeal was brought from two interlocutors  
of the 13th February, 1729, and from the interlo-  
cutors of the 3d, 15th, 22d, and 26th July in the  
same year.

*Pleaded for the Appellant* :—There is not the  
least evidence of fraud or circumvention, without  
which a bargain, however disadvantageous, cannot  
be voided. Neither is there any proof of such  
weakness on the part of Colville, as should incapa-  
citate him to transact with the appellant, as he  
was in the habit of doing with other persons.  
Moreover, even were facility proved, it is not *per*  
*se* a ground for reducing a contract without some  
evidence of circumvention.

*Pleaded for the Respondents* :—Generally, that  
the fraud and lesion were abundantly proved by  
the circumstances of the case, as well as the facility  
of Colville by the evidence of several witnesses.

Judgment  
April 5, 1732.

After hearing counsel, “ it is ordered and ad-  
“ judged, &c. that the appeal be dismissed, and  
“ that the several interlocutors therein complained  
“ of, be affirmed ; and it is further ordered, that  
“ the appellant do pay, or cause to be paid to the

“respondents, the sum of L.60, for their costs in  
“respect of the said appeal.”

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HENDERSON.

For Appellant, *Dun. Forbes*, and *C. Talbot*.  
For Respondents, *P. Yorke*, and *A. Hume  
Campbell*.

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DAVID, VISCOUNT OF STORMONT, *Appellant*;  
JOHN HENDERSON, *et alii*, kindly } *Respondents*.  
tenants of Lochmaben, - - - }

20th April 1732.

TACK—KINDLY TENANT—In a question between the crown’s kindly tenants of Lochmaben, and the heritable keeper of the castle, it was found that the tenants, although having neither charter nor sasine, had yet such a right of property in the lands that they could not be removed, and might assign their rights.

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[Fol. Dict. II. p. 419. Mor. Dict. p. 15195.]

By a charter from the crown, the lands of the four towns of Smalholm, Hitae, Hek, and Greenhill, and other lands of Lochmaben, with the hereditary custody of the castle of Lochmaben, and the office of steward of Annandale, and all right, title, and interest, which his majesty or his predecessors had or might have to the said premises, were granted (under the burden of certain annual payments) to the Earl of Annandale.

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1610.