and it is clearer, if possible, against an heir of tailzie, who would set up that debt to defeat the settlement under which he himself possessed.

3d, No interest on Lady Anne's bond is chargeable on the estate, but from the time it was made so by the entail, which makes it to commence at the Earl's death only.

4th, The power to charge for younger children given to Sir James, was optional and discretionary, whether he would or would not execute it. He did not execute it; nay, he does not appear to have ever taken one step towards executing it, unless it was by getting the whole purchase money into his own hands, and covenanting to lay out only £1000 to the old uses, which he never did. Here are no younger children unprovided for, nor any other ground of equity for the Court to interpose.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *C. Yorke, Alex. Wedderburn.*

For the Respondent, *Al. Forrester, Fred. Campbell.*

[Elchies, vol. ii., p. 159.]

Colonel JAMES ROSS of Balnagowan, . *Appellant;*

ALEXANDER ROSS of Pitcalny, and Others, *Respondents.*

House of Lords, 19th January 1758.

REDUCTION OF DEED—TITLE TO SUE—FRAUD AND INCAPACITY—PROOF—A reduction was brought of settlements on the head of fraud and incapacity. The appellant objected, that the respondent had no title to raise such action, and, therefore, that he ought not to be let into proof of the reasons of reduction. Held him entitled to a proof; proof allowed to both parties.

This was an action of reduction and improbation, brought by the respondent's father, a colateral relation of Ross of Balnagowan, and who, 123 years before, had, by settlement, the estate of Balnagowan limited to him under that settlement, on the ground that the subsequent settlements of 1685,

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1706, 1707, 1711, had been fraudulently obtained upon false suggestions from David Ross, who was a weak man, and incapable of managing his affairs.

It appeared that the estate had been acquired by General Ross, the appellant's ancestor, by advancing to David Ross £5500, being the amount of debts with which it was incumbered, whereby all the parties interested, sold and conveyed the said estate to General Ross and certain other descendants of the General's father, remainder to the respondent's father.

In these circumstances, the defence stated by the appellant was, that the settlement of 1615, under which alone the respondent could claim, had been altered by the three several dispositions of 1630, 1638, and 1647, the charter and infeftment of David Ross of Balnagowan in 1648, and the charter and infeftment of the last David Ross as heir in special to his father; that under these titles, the estate had been possessed for upwards of a century, and as thereby, on the failure of issue male of David Ross, the second, the estate of Balnagowan (supposing the deeds now impugned out of the question), would have reverted to Lord Robert Ross and his heirs and assignees, from whom the appellant acquired them. The respondent, therefore, had no title to carry on the action, and the Court ought not to let him into a proof of the reasons of reduction; that David Ross' weakness and incapacity was a mere fiction; that he had held many public offices, and had sat as a member of Parliament in the House of Commons.

Feb. 9, 1740. The Lords pronounced this interlocutor: "Find the pursuer, Alexander Ross of Pitcalny, as heir male of the said "David Ross of Balnagowan, or as having right to the adjudication led against him, the said Alexander, as charged to "enter heir to the said deceased David Ross, by David Ross, "writer in Edinburgh, has no sufficient title to carry on this "process, in so far as concerned such lands or parts of the "estate of the said David Ross, to which the pursuer could "not succeed as heir male to him, and whereof the succession is devised to a different series of heirs. But find, that by "the charter produced, granted by the Bishop of Ross to the "said David Ross *in anno* 1667, the succession of the lands "and others therein contained, is devised to the said David "Ross his heirs male; and, therefore, sustain the pursuer's "title, in so far as concerns those lands, and repelled the "defence of prescription. But, find that the qualifications of

" fraud and circumvention, and particularly of the facility and " weakness of the said David Ross of Balnagowan condescended upon by the pursuer, are not sufficient for allowing him proof even before answer of the said qualifications " after so great a distance of time, and after the death of " the said David Ross of Balnagowan, and of all the other " parties concerned in the transactions, now quarrelled; and " remit to Lord Dun, Ordinary in the cause, to proceed accordingly."

On reclaiming petition, the Court adhered, the respondent acquiescing in the first part of the interlocutor; and the respondent's father having died, the action went on in his name. Feb. 22, 1740.

The cause then went back to the Lord Ordinary, who ordered condescendence and answers, and when these were given in, the Lord Ordinary pronounced this interlocutor:

" Makes avizandum with the condescendence, informations, Feb. 27, 1756.
" additional condescendence and answers given in for either " party to the Lords, grants diligence at the pursuer's in- " stance against havers, for recovering such further rights " and titles to the estate of *Balnagowan* or any part thereof, " which are devised to heirs male whatever, to be reported the " first sederunt day."

Under this report to the Court, the following interlocutor was pronounced: " The Lords, before answer, allow the pur- July 29, 1756.
" suer, Alexander Ross of Pitcalny, to prove his reasons of " reduction, and all facts and circumstances which may be " material for him in the cause, and allow the defender, " Colonel James Ross, to prove his defence, all facts and cir- " cumstances, which may be material for him in the cause, " and allow both parties a conjunct probation all *prout de* " *jure*."

On reclaiming petition the Court adhered. Aug. 11, 1756.

Against these interlocutors the present appeal was brought to the House of Lords

Pleaded for the Appellant.—It is an established rule in the laws of Scotland as well as in common sense, that a plaintiff seeking relief against a settlement for fraud or any other reason, must show a title in himself, in case that settlement was out of the way. If he fails in this, he is stopped *in limine*, since a plaintiff's saying you have no title, *ergo* I have, is a *non sequitur*, and the letting him into a proof of facts and circumstances, would be but unnecessarily vexing the defendant (appellant), in a question where the plaintiff has no concern.

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Pleaded for the Respondents.—The interlocutors complained of are warranted, not only by the substantial rules of justice, but by the common forms of the Court. It would be repugnant to the ends for which courts are instituted, and to constant experience, if process for producing deeds, or for making proofs, were refused *in limine* to a plaintiff, whose case is properly alleged in point of law; and if the facts be properly alleged, so as to bear legal relevancy on the face of them, the regular practice of the Court warrants the sending parties to proof before answer, because judgment of the Court can be governed only by the facts proved.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Al: Forrester, Alex. Wedderburn.*

For the Respondents, *C. Yorke, Fred. Campbell.*

NOTE.—Lord Elchies has this note in regard to this case:—"The Lords found qualifications condescended on not sufficient, and, therefore, remitted to the Ordinary to hear further. I own I had a good deal of difficulty in the case. I thought much would depend on the last Balnagowan's capacity or degree of his weakness; and as no challenge was brought for nearly thirty years after his death, I thought it dangerous to allow a vague proof at large of his weakness, without condescending on some particular instances of his weakness, and, therefore, voted for the interlocutor."—*Vide* Elchies, vol. ii., p. 159.

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MILLER
v.
ALEXANDER.

JOHN MILLER of Greenock, Tobacconist, *Appellant;*

WM. ALEXANDER, Merchant, Edinburgh, Agent for the Farmers' General in France, *Respondent.*

House of Lords, 19th April 1758.

DAMAGES FOR FRAUDULENT ABSTRACTION. — Circumstances in which the respondent was held liable to damages for abstraction of tobacco.

The appellant was in the habit of importing tobacco from America, and reselling it again for exportation to France;