

purge the same, and make him allenary countable to the executor. Which was found relevant by the Lords.

*Advocates' MS. No. 8, folio 71.*

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1670. *February.* SIR THOMAS STUART of Gairntullie *against* SIR WILLIAM STUART.

IN an action betwixt Sir Thomas Stuart of Gairntullie and his brother Sir William, an assignation produced by Sir William, granted to him by his sister, to a bond for 20,000 merks, granted to her for a portion by her father, being quarrelled by Sir Thomas \*, because he offered him to prove *per testes omni exceptione majores*, that their sister, at the time of the making that assignation, a good space before, as also after the same, was furious and mad, and so, during that time, could do no deed that can be valid, or can subsist in law.

Whereunto it was REPLIED, That he offered him to prove that though she took whiles fits of distraction, yet that she had *dilucida intervalla*, and that it was in one of these that she granted the said assignation; and so the same, as done *a sana*, must be sustained.

The Lords ordained them to adduce witnesses *hinc inde*; Sir Thomas for proving the furiosity before and after the assignation, and Sir William for proving the *dilucida intervalla*: Whereupon, witnesses having been led by either side, and the Lords being about to advise the depositions, they desired to hear both parties' procurators; whereupon Sir George Lockhart, being for Thomas, did seriously recommend to the Lords their consideration what truly *dilucidum intervallum* was; and that every remission of that height of madness called by the physicians *rabies furoris* will not amount to make a dilucid interval, but that it must be a full intermission and clear cessation of the fury, and of all the degrees and steps of it; and therefore he confessed that by the depositions of the witnesses adduced by Sir William, it might possibly be proven, that at sometimes she was more calm and quiet, and not so agitated and tossed with the vehemency of the madness as at others: but he humbly conceived that that noways could infer a dilucid interval, which imports a firmness, gravity, and consistency of spirit, to validate an act of such importance as this assignation was, and which was no ways observable in her; and for this his opinion he cited Zacchias his *Quaest. Medico-leg. lib. 2. tit. 1. quaest. 21. versus finem*.

Sir George Mackenzie, being for Sir William, regretted first that Sir Thomas should have been so cruelly unnatural as to have been the publisher of a pitiful infirmity his poor sister had been detained with, whereas the bonds of blood and nature should have made him conceal it rather, and extenuate it. Next he complained, that that ancient and excellent practice in our country of trying of idio-

\* By a prior solemn decision the Lords had found, though in this bond Sir Thomas was substitute to her, yet she remained still in the fee, and might assign the same, as she had done, notwithstanding the said substitution. The information see beside me. Vide infra No. 48. [23d February, 1671,—against Viscount of Oxenford;] where there is something contrary.

try or furiosity by an assise of thirteen sworn men, was now wholly despised and neglected, and no more used. Yet Sir George might have remembered that it has now been long obsolete, as *Dury* observes, *21st February 1632, Alexander against Kinneir. Advocates' MS. No. 9, folio 71.*

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1670. *February.* HEIRS of the LAIRD of CRAWFORDSTON *against* BROWN of Ingliston, and his Children.

ELEISTON his lady, Barnecleuch his lady, and the other two sisters, pursue, as apparent heirs of line to the deceased Laird of Crawfordston, their father, an exhibition of the charter chest, writs, and evidents of the lands, against Brown of Ingliston, and his children, whose mother was one of Crawfordston's daughters; as also of some dispositions made in his and his children's favours by the Laird in his lifetime, of the said estate: likeas to hear and see it found and declared that the said dispositions, bonds, and others, must be reputed and holden to be yet in the defunct's charter kist, and so never delivered evidents in the defunct's lifetime, and so to belong to none; but to be looked upon as if they had never been made, and to be no hindrance to thir pursuers as heirs of line to succeed to their father's whole estate, in so far as the same were lying in the defunct's charter kist undelivered at the time of his decease, and were meddled with by thir defenders, and taken out thereof in great haste immediately thereafter, and transported that night, with the other evidents of the lands, in codwares, to another place.

This being proven, the Lords, in respect of the said precipitate diligence and intromission, found the said dispositions, and others, noways to have been delivered evidents in the maker's lifetime, but that they must be reputed as if they were yet in the charter kist.

Then the defender excepted that, however the Lords might find him bound to exhibit the said dispositions, and others, to be cancelled or declared undelivered evidents, yet that he could not be obliged to exhibit the disposition of such a date to be declared an undelivered evident, because the same bears a clause dispensing with the not delivery thereof.

This being found relevant, the pursuers insisted to have their right, as heirs aforesaid, declared, to any lands belonging to their father which were not contained in that disposition, sustained by their Lordships. This the Lords admitted, and ordained them to condescend; which they did, and named the lands of Stewarton.

ALLEGED by the defender,—That these lands are expressly contained in his disposition.

It was ANSWERED,—It is true they are in the disposition, but that is only the superiority thereof that is disposed: for Crawfordston at the time of the disposition had no other right thereto; and it is offered to be proven that he has, since the said disposition, acquired the heritable right and property thereof; and therefore the right thereof must pertain to thir pursuers.

The Lords repelled the allegiance, in respect of the answer or reply, and as-