

No. 11.

Effect of
deeds granted
while under
caption.

1667. *January 22.* MR. JOHN MAIR *against* STEWART of Shambelly.

Mr. John Mair, Minister of Traquhair, having obtained decret against Shambelly, and the parishioners, to pay him 545 merks, expended for reparation of the manse, and to meet and stent themselves for that effect ; upon which decret, he took Shambelly with caption, whereupon he gave him a bond of £.80 for his part : Shambelly now suspends the bond on this reason, that albeit it bears borrowed money, he offers to prove by the charger's oath, that it was granted for his part of that stent, and that his proportion thereof, casting the sum according to the valuation of the parish, would not exceed 40 merks, and that he granted this bond for fear of imprisonment. It was answered, The reason was not relevant to take away the suspender's bond, being *major. sciens et prudens* ; and there was here no *justus metus*, because the caption was a lawful diligence, so that the giving of the bond was a transaction of the parties, which is a strong obligation. It was answered, That the suspender when he was taken at his house, was sick and unable to travel ; yet the messenger would carry him away, and being at the tolbooth, gave the bond rather than in that case to go to prison, which was an irregular force, and a just cause of fear ; but this addition was not proponed peremptorily.

The Lords repelled the reason of suspension, unless the said addition were also instructed *instanter*, otherwise it could only be reserved by reduction, *ex metus causa*.

Stair, v. 1. p. 429

1668. *July 3.* THOMAS RUE *against* ANDREW HOUSTON.

No. 12.

Same subject.

Andrew Houston and Adam Mushet, being tacksmen of the Excise, did employ Thomas Rue to be their collector, and gave him a salary of £.30 Sterling for a year. Thereafter he pursued Andrew Houston upon his promise, to give him the like salary for the next year, and in absence obtained him to be holden as confessed and decerned ; which being suspended, he obtained protestation, and therefore raised caption, and apprehended Andrew Houston at Wigton, who gave him a bond of 500 merks, and got a discharge ; and being charged upon the bond of 500 merks, he suspends on these reasons, That Thomas Rue had granted a general discharge to Adam Mushet, who was his conjunct and *correus debendi* after the alleged service, which discharged Mushet, and consequently Houston his partner ; *2dly*, The decret was for salary, and it was offered to be proved, that Rue (for his malversation) was by warrant from General Monk, excluded from collection that year, and by the discharge of the decret, and this bond, both of the same date and witnesses, it did appear that this bond was granted for the decret ; and if the decret was reduced, by the reduction thereof depending, the

bond would fall in consequence as granted for the same cause. The charger answered, That he was now not obliged to dispute in relation to the decret; *first*, Because the suspender had homologated the same, by taking a discharge thereof, and giving a bond therefor; *2dly*, There was not only a homologation, but a transaction upon a reference made by the parties to Baldone, conform to his attestation produced; so that that transaction cannot be recalled upon any pretence, but is the most firm obligatory contract of any. The suspender answered, That his payment making, and taking discharge, was no approbation, nor homologation, but that he might reduce the decret, and repeat if he had paid, or had been pointed, and so may retain; especially seeing it was done *metu carceris*, he being taken with caption; and as to the transaction, he denies the same; neither can it be instructed by Baldone's attestation, but by the suspender's oath or writ.

No. 12.

The Lords found that the granting of the bond was no homologation of the decret, but that he might quarrel the same; and that the giving of the bond was no transaction, if he paid or gave bond for the whole sums contained in the decret; but found, that if in consideration of the grounds upon which he might quarrel the same, he had gotten an abatement by arbitration, or otherwise, that he could not quarrel the same, and found it only probable by his oath or writ.

Stair, v. 1. p. 547.

1671. December 4. M^cINTOSH against FARQUHARSON and SPALDING.

In a reduction of a bond granted by Robert, Alexander, and James M^cIntoshes, to Spalding of Ashintully, and assigned by him to Farquharson, upon this reason, that their father John M^cIntosh being taken with caption, and carried to a private house in the Highlands, notwithstanding he had a standing suspension and intimate, the pursuer's sons finding their father kept under guard a close prisoner, did grant this bond for his liberation from the danger he was in by such an illegal execution, not knowing but his life might be in hazard. It was answered, That the father being truly debtor, and under caption, and not having the suspension to show the messenger, he was justly apprehended; and the reason he was not carried to a public prison was his own desire, so that the sons having voluntarily transacted and given their bonds, they could not reduce the same *ob vim et metum*, there being no violence done to them.

No. 13
Effect of de-
tention in a
private house.

The Lords did sustain the reduction, and found that children giving bond to liberate their father from imminent danger, who by the caption could not be lawfully carried away to the Highlands after a suspension intimated, albeit at the dwelling place of the creditor; that therefore the sons being moved out of duty and natural affection to grant a bond for his liberation, it was equivalent to violence and fraud done to themselves.

Gosford MS. p. 209.