The Lords did prefer neither party in the probation, but granted a joint probation by witnesses, above exception, for proving the manner of the tutor's abode at the house of Towie, and the manner of subscribing of the disposition. No. 16.

Stair, v. 2. p. 268.

1677. *January* 10. STUARTS *against* WHITEFOORD and The DUKE of HAMILTON.

No. 17.
A disposition of lands granted *in privato carcere* reducible; and it is no defence, that there was a prior obligation to execute the deed.

James Stuart, younger of Minto, being infeft in fee of the £.5 land of Coats, disponed the same to Sir John Whitefoord, for a discharge of some debts, and for an annuity of 400 merks yearly, during his lifetime: Thereafter, he disponed the same lands to Castlemilk upon that narrative, that Sir John Whitefoord's disposition was extorted from him: Whereupon Castlemilk raised a reduction; but thereafter Duke Hamilton enters in another agreement with Sir John Whitefoord, and the said James Stuart, and takes a right to Sir John's disposition, and becomes obliged to pay Sir John Whitefoord 10,000 merks for his interest, and James Stuart 15,000 merks for his. Castlemilk insists in his reduction *ex vi et metu* which by the libel is qualified thus; that Sir John Whitefoord, without any order, or warrant of law, did apprehend the said James Stuart, and did keep him two days prisoner in his own house of Milnetoun, and thereafter brought a messenger with a caption, at the instance of one Stuart, upon a decreet obtained before Sir John himself as Sheriff-depute of Lanark, to his own behoof, and therewith carried him to Lanark, but did not imprison him, but sent two officers, who carried him from place to place in the night, till he obtained this disposition from him, in which condition he was detained without the knowledge or access of any of his friends, and for many days. In this process compearance was made for Sir John Whitefoord, and the Duke of Hamilton, who produced his infeftment, and was admitted for his interest, for whom it was alleged, 1*mo*, That the libel is not relevant, because law doth require, that in extortion, the act must be unjust, and such violence used, which may infer a fear, as being the true cause of the deed done, and which must be such a fear that may befall a constant man, as being the threatenings of death, mutilation, or the like, which are not alleged in this case, where a caption was only used, and the party carried towards Edinburgh; and though he was detained some days, it was a favour done to him, and can import no force. 2*do*, Though force had been used, it is not relevant, unless there had been damage inferred thereby, as is clear by the 12 and 14 laws, *D. Quod metus causa*, and here there was no damage, because it was offered to be proved, that there was a prior minute, whereby James Stuart disponed to Milnetoun the lands in question, and the disposition now quarrelled is in the same terms with the minute, and has nothing added, but a procuratory of resignation; likeas the minute at the subscribing of the disposition was called for by James Stuart, who tore his name therefrom. 3*tio*, No way granting, that any force was used, it was offered to be proved, that James Stuart was 4 hours at full freedom, and subscribed most cheerfully. 4*to*, There are produced discharges of James Stuart's, posterior to the alleged

No. 17. force, whereby he receives the annuity of 400 merks, which being a voluntary deed, homologates the disposition, and takes off any pretence of force. *5to*, The deeds libelled are altogether denied; but suppose they were true and relevant, Sir John Whitefoord is punishable for them, but the punishment cannot be to annul his disposition, for thereby his resignation and the Duke's infeftment will fall; and that there was an antecedent minute, it is offered to be proved by the same witnesses, by which Castlemilk shall prove the force; and likewise the freedom shall be proved by the same witnesses, which cannot be quarrelled by Castlemilk to use the witnesses he uses himself; but whatever may be said against Sir J. Whitefoord, yet Duke Hamilton cannot be prejudged, who has bought it for a very great price, out of respect to James Stuart his lady's relation, and whereby he has much better terms than Castlemilk has given; for thereby he hath only £.16,000 for the land and coal, deducting his own expenses, upon his own word, and freeing all encumbrances, which can never be done; because the lands are burdened with several infeftments, and warrandice, which can never be purged, yet with the burden thereof Duke Hamilton hath accepted it. The pursuer answered, 1*mo*, That his libel is most relevant, and the true and just cause of annulling deeds procured by force, is, that they proceed not from the free choice and will of the party; but the true cause and motive is, fear, which is to be accounted according to the condition of the party; for a small means will be sufficient to fear a woman, and it is evident and notour, that James Stuart was a weak and simple person, and the deeds libelled, are more than sufficient to show, that the true motive of his subscription was fear; and as to the first defence, that there was no damage, there being an antecedent minute; though that were true, as it is altogether denied, yet it is most improbable, that any man would use force, where he had an easy and legal remedy. 2*do*, It cannot be imagined, that if such a minute had been, Milnetoun would have suffered it to have been destroyed, it bearing date two years before the disposition, and was a surety for all intervening deeds; 3*tio*, Supposing the force to be proved, as libelled, it was obvious to every man of common sense, that the disposition might be called in question on that head, and therefore it would have expressly related to the minute: So that it is but a contrivance betwixt Sir John, and the said James Stuart, whom he hath now so far abused, as to marry him to his daughter, who was carried away, if not actually married to another mean person: And it is evident by the cancelled paper produced, that there are only two witnesses, who were Sir John's own servants, whereof one is dead, and James' name being totally torn away, neither witnesses nor comparison of writ can be made use of to redargue it; and therefore seeing there is nothing to instruct such a minute, but a cancelled paper, though Sir John used the legal way to prove the tenor of it, it could not be sustained without adminicles in writ relating to it; but there are none either produced or alleged, for this disposition quarrelled can be no adminicle, seeing it does not relate to the minute: And it were an unreasonable circle to sustain the disposition, because of the minute, and much more unreasonable to allow those who were partakers of the force, to prove the existence, or tenor of the minute; for albeit witnesses may prove without adminicles the tearing of any

writ by force, yet here the force was done to James Stuart, and not by him; and whatever the Lords might do in pity *et ex gratia* to repone either party *contra damnum emergens*, yet there is no pretence in this case where there is only *lucrum cessans*, for neither Duke Hamilton nor Milneton will loss a groat of their just interest by annulling of this disposition, only they will not make profit against so weak a person, by so unwarrantable means; but suppose the minute were produced, and entire, it is no way relevant; for by the 13th law of the same title, *nemo potest sibi jus dicere*, and therefore, if he extort that which is due, he falls from his right; but the Roman law not being obligatory with us, we only follow it for its equity, and expedience, and not for its authority; so that it is not sufficient to call out particular responses of their jurisprudence, whereof there are many contrary congested in the Digests, and therefore we are not bound to use the expedients introduced by that law, and should not make use of either extreme, to make a man loss his perfected right, because he used force, but only to annul what was extorted by force, according to the 13th law, neither to exclude the force, but to sustain the act, if the same act might have been procured by law, which would be the foundation of thousands of inconveniences; for then every heritor, when he hath warned his tenants, might thrust him out by violence, without decreet of removing, and every man who thought he had a better right, might thrust himself in possession, and no man needed horning or poinding for his debt, but carry his debtor prisoner till he paid him; for when he were quarrelled, it would be a sufficient defence *nihil tibi deest*: And though the party may be punished, yet the deed is valid, which were a horrible preparative to proceed from a Court of Justice, and it is a groundless subtility, that there is a difference betwixt *expulsiva et compulsiva*, the reason in justice militating alike in both, so that seeing the constant course of law is, that no man can pretend right *in spolio*, but *spoliatus est ante omnia restituendus*, which being sufficient for a man's cloke, should be much more sufficient for his whole estate; neither is this reduction a restitution *in integrum*, as in the case of minority, but it is the annulling of the deed procured by force, wherein the perpetual edict, which is the substance of the text *Quod metus causa* bears expressly, *quod vi metuve factum est ratum non habebo*, so that *quod non est ratum est irritum*, and this is a more palpable nullity than a deed done by a minor, having curators without their consent. As to the other defence of liberty, it is directly opposite to the libel, and therefore the pursuer ought to be preferred to the probation, especially seeing he can make use of no witnesses, but the complices of the force, who only knew the works of darkness, in carrying the party in the night, from place to place; and as to the third defence, upon homologation by the discharge of the annuity, it is after the interdiction, and publication thereof produced, and seeing that deed of homologation would alienate the estate, and not the prior disposition obtained by force, it is unquestionably null by the interdiction: As to the last defence, Duke Hamilton can have no advantage as singular successor, 1*mo*, Because violence is *vitium reale et transit cum re*, against all singular successors, and is not as fraud, which only affects *participes fraudis*; 2*do*, The matter was litigious, and this process intented before the Duke's right.

No. 17.

No. 17. The Lords considering the notour weakness of the party, found the libel relevant, and repelled the defence upon the antecedent minute, and found, that though it were entire, seeing it wants a procuratory of resignation, the obtaining of this disposition containing a procuratory by force, doth annul the disposition and infeftment following thereon. And as to the defence of liberty; the Lords allowed either party to adduce witnesses, for proving in what condition James Stuart was in two days before he was brought from Milneton to Lanark, and in what condition he was till the subscribing of the disposition; but declared that if force were once proved to have begun, they would not admit the Sheriff-Officers, and Sir John's servants, who were accessory to the force, to prove the freedom, but allowed them to be adduced for the pursuer, as necessary witnesses, and repelled the remanent defences, in respect of the replies.

Stair, v. 2. p. 489.

*** Dirleton reports this case:

Sir Archibald Stewart of Castlemilk, having pursued a reduction of a disposition of the lands of Coats, made by James Stewart of Minto, in favours of Sir John Whitefoord, *ex capite metus;* in so far as, the said Sir John Whitefoord had taken the said James and kept him *in privato carcere* for some time; and thereafter, having a caption against him, had detained him prisoner; and had caused transport and convey him in that condition, from diverse places in the night season; and by his servants had threatened him with long imprisonment; and in end had prevailed with him to dispone to him the said lands, being eight chalders victual of rent, and where there was a coal of £.100. Sterling of rent; upon an obligation only to pay him an yearly annuity of 400 merks; in which process, the said Sir John, and Duke Hamilton, who had thereafter acquired the said lands from the said Sir John, did compear, and propone the defences following, 1*mo*, That the foresaid qualifications of force were not relevant to import *metus, qui potest cadere in constantem virum*, being neither *mortis* nor *cruciatus*; nor so circumstantiate, as is required of the law, for founding the said action; and 2*do*, That albeit *metus* were relevantly qualified, the foresaid deed cannot be questioned upon pretence of the same, unless the said James Stuart had been lesed or damnified by the same; seeing it appears by the title, *Quod metus causa*, &c. a reduction and restitution upon that head is not competent, *ubi non est damnum, et nihil abest*; as is clear by divers texts, in the case of a creditor using force to get what is unquestionably due to him; and in this case the said James had no prejudice, in respect he was obliged by an antecedent minute to dispone the said lands; so that the said disposition was but for implement of the said minute, which the said Sir John did give back to be cancelled by Minto, when he got the said disposition; and 3*tio*, it was offered to be proved, that, after the said James was at liberty, the said disposition was granted by him.

The Lords found, That the libel and qualifications of *metus* and force were relevant; and yet, in respect the defenders were so positive as to their allegeance,

that the disponer was at liberty when he granted the said right; they allowed a conjunct probation concerning the said qualification of force, and the condition the disponer was in for the time, and the way of granting the said right; whether he was under restraint and the impression of fear, or in freedom? Or whether the samen was granted by him freely and voluntarily? No. 17.

As to the said other defence, that there was no *damnum*, the Lords repelled the same; and would not allow that point of fact to be tried, whether or not there were a former minute, for implement of which the said right was granted? And whether it was given back for, and the time of the granting of the said disposition?

Some of the Lords were of the opinion, that the qualifications libelled were not relevant to import such a force and *metus*, as could be the ground of a reduction of the said right, *ex eo capite*; though they were convinced that the practice foresaid is most unwarantable and *dolosa*; and that thereupon the right may be questioned as to Sir John himself, but not as to a singular successor; and that there is a difference betwixt a reduction *ex capite metus*, which is competent against singular successors; and a reduction *ex capite doli*, which is not competent against a singular successor, who *bona fide* has acquired a right for an onerous cause.

But divers of the Lords were of opinion, that the defence foresaid, that there was no *damnum*, was most relevant, for these reasons; viz. All restitutions upon what *mediums* soever, whether *metus or dolus*, or *lubricum ætatis*, are against *damnum* and prejudice; for *frustra* should restitution be craved, if there be no *damnum*. *2do*, It is evident by divers laws, and the title foresaid, *Quod metus*, &c. that ex edicto Quod metus causa, &c. non datur actio si nihil absit; et succurritur only captis et læsis; *3tio*, By the civil law, there were divers remedies competent to those who had been forced to do any deed: viz. a civil action *ex edicto prætoris*, and a criminal action *ex lege julia*; and a penal remedy *ex decreto Divi Marci*, that a creditor by force, extorting what is truly due, *amittit jus crediti*: And our reductions *ex capite metus* are but civil actions, as that *ex edicto*: And the said other remedies being penal, by the municipal law of the Romans, cannot be introduced by the Lords of Session being civil Judges, without an act of Parliament; *4to*, All restitutions should repone both parties *in integrum*; and it were unjust, that if it were constant, and the Lords were convinced upon their own certain knowledge, that there had been an antecedent minute, and that the same had been cancelled upon the granting of the said disposition, that Minto should be restored, and not the said Sir John; that now *res non est integra*, seeing the antecedent minute is not extant; and though it were extant, it would be ineffectual, in respect Minto has disponed the foresaid lands to this pursuer who is infeft; and, having the first infeftment, would be preferable, whether the minute were extant or not. *5to*, As to the pretence that was so much urged, that it would be of dangerous consequence, that such deeds extorted by force should be sustained upon the pretext of *non damnum*; and that it would tend to encourage such practices, the same is of no weight; seeing the deed, being just upon the matter, may and ought to be sustain-

No. 18. ed, and yet the way of procuring the same may be severely punished; *6to*, As to the difficulty of probation, there being no adminicles in writ, that there were such a minute, it is not considerable; seeing *multa permittuntur causative*, which cannot be done directly; and that though the result of probation by witnesses, may be the making up or taking away of writs, which cannot be done directly, but by writ; yet when that which is to be proved is in fact, it may be proved by witnesses; as in the same case, that the disposition in question was extorted, it may be proved by witnesses, to take away the said disposition: And if a person should be forced to grant a disposition of lands of 20 chalders of victual of rent, and in exchange should get a disposition at the same time of other lands of the half value, it were a good defence and proveable by witnesses, that the pursuer did get, the time of the granting the disposition of lands, worth 20 chalder victual, a disposition of less value; and *contingentia causæ* and of a transaction and circumstances of the same, ought not to be divided; but may and ought to be entirely proved by witnesses, as well for the defender as the pursuer.

Act. *Lockhart & Sinclair.* Alt. *Cunningham & Mackenzie.* Clerk, *Mr. John Hay.* *In præsentia.*

Dirleton, No. 419. *p.* 207.

1680. *February* 18. BURNET *against* EWEN.

No. 18.
Homologation of a debt not inferred by the debtor granting a bond in prison.

An abatement given, infers a transaction, which will be presumed to have been entered into freely.

Mr. Andrew Burnet pursues John Ewen for reduction of a bond of £.7,000, upon this reason, that it was extorted by unwarrantable force, Mr. Andrew having been arrested and imprisoned at London by a bill of Middlesex, at the instance of Ewen, arresting him to find caution for £.2,000 Sterling, or go to prison; and he being a stranger, and not able to find caution for such a sum, was detained nine weeks in prison, and forced to grant this bond to get out, without any antecedent debt. The defender alleged *absolvitor* from this irrelevant reason, because the bill of Middlesex is a legal execution, which never infers extortion or force; and though it be peculiar to that place, yet there is an ordinary remeid whereby the party in prison may have the debt determined within three court-days, and gets great damages, if the arrestment be found unwarrantable; and by the law and mutual correspondence of all nations, legal executions, many of them are never sustained as extortion, either in the same or any other nation; and to sustain this execution as an illegal force, would ruin the commerce of Scots merchants in London, who would never get any thing there on trust. The pursuer answered, That he being a stranger, unacquainted with the laws and customs of England, albeit he through ignorance did not discuss Ewen's claim in England, yet both being Scotsmen, Ewen cannot decline to discuss it in Scotland; by which it will be evident, that it was a most unwarrantable arrestment for £.2000 Sterling, without any ground of debt. The defender replied, That there was an antecedent debt, and produces Burnet's letter, desiring Ewen to honour the bills of Thomas Burnet