1688. *June.* WHYTFOORD of Blanquhan *against* PROVOST MUIR.

No. 20.

Ratification of a decreet, and a corroboration granted to the assignee by the person decerned, when he was under caption, found no homologation of the decreet.

Harcarse, No. 508. *p.* 142.

1685. *February* 4, 5, 6, & 7.

GRAY *against* The EARL of LAUDERDALE.

No. 21.
Instance in which the Court discouraged the attempt of a man in power to obtain advantages, in consequence of his situation, over his poorer and less powerful neighbours.

All these days are consumed in debating *in præsentia* that famous reduction raised by the Earl of Lauderdale against the Earl of Aberdeen, late Chancellor, of the decree of the Mint, mentioned 19th January, 1685 *, and of the transaction and homologation he had made thereof, by granting him a security for £.100,000 Scots; in which debate there were more gross reflections, both among the parties and advocates, than had been licenced in any cause before.

Aberdeen's defences were, 1*mo*, It was *res transacta; 2do, Res judicata*, and so was unquarrellable now. Answered, That both the sentence and transaction flowed on *vis, metus*, and concussion. Aberdeen's lawyers shunned to dip on the decree; and therefore, they ran to these two generals to exclude reduction, viz. *res judicata et transacta;* that the Lords' sentences are irreversible, as was found on the 22d of June, 1676, Irvine against Irvine, No. 218. p. 12112.; and this very Session, between Falconer and Kinnier; 2*do*, That it is called *improba postulatio*, to crave transactions to be rescinded, in L. 10, 19, & 20. C. De transact. And it is the most sacred, binding, and inviolable of all contracts, and is derived from *trans adigere*, to rivet and drive a nail to the head, and is called *exceptio privilegiata et impeditiva litis ingressus.* Answered, There are several cases wherein transactions may be quarrelled, as if they be elicited by dole, force, fear, or concussion; or where there is *læsio enormis*, as appears from L. 65. § 1. D. De condict. indeb. L. penult. et ult. C. De his quæ vi metusve causa fiunt. et L. 3. C. De dolo. Replied, *Potentia sola* is nowise a relevant ground of reduction, per L. 6. C. De his quæ vi metusve causa fiunt; ubi sola dignitas Senatoria non sufficit; 2*do*, Pinellus ad L. 2. C. De Resc. vendit.; and the solidest lawyers are clear, that *læsio enormis in eventu* is not enough to reduce a transaction; whereof we have a famous instance in L. 78. § ult. D. Ad S. C. Trebell. And though *res judicata* be not a subject proper for transaction, but only *res dubia, et lis necdum finita;* yet where *sententia nodum transiit in rem judicatam, per lapsum decendii sine appellatione interposita*, so that there is *metus litis*, (which is Aberdeen's case), such

* This was an investigation relative to the coinage which had been carried on before the Privy Council.

No. 21. a case, in the confession of lawyers, is a subject capable of transaction; *3tio*, As to concussion, which differs nothing from *metus*, but that the last is done by a private person, and the first by one in power and authority; replied, *1mo*, It must be *metus ex injusta causa; 2do*, It must be such as *cadit in constantem virum.*—That concussion was inferred by a decree of the Usurpers, see Stair, 24th July 1661, Jack and Fiddes, No. 19. p. 5633.

Aberdeen further alleged, The promise of impunity given to Sir John Falconer, to depone as a witness against Lauderdale, was not contrary to law; seeing Farinacius, Quæst. 67. De corrupti testis pæna, et probatione, allows it *in criminibus occultis.* —But certainly to give witnesses *spem veniæ*, is contrary to all law; for as they will load others for their own exoneration, so how can they purge themselves of partial counsel and receipt of good deed? All which preliminaries for witnesses were omitted to be put to Sir John Falconer.—Only it may be doubted, if Sir John's new testimony is to be credited anent the *spes veniæ* and subornation; and whether the first should not rather stand as *jus quæsitum.*

Against John Falconer the Warden's deposition, Lauderdale objected, *1mo*, That it was but a single testimony, *cui non credendum, licet esset Papa, licet esset Imperator; 2do*, It was *ex incontinenti* retracted by him; the first deposition saying, that, in the first copper journey, there were 17,000 stones of copper; and the second bearing, that, on perusal of his memorials, he found there were only 7000 stone; so he retracts 10,000 stone; by which it is evident, that his testimony is not able to bear the weight of one stone of copper, let be 17,000 stone; which will certainly crush it to annihilation; *3tio*, John Falconer being dead before intenting the civil process, his oath, which was taken on the precognition and inquiry before the Commission, was only repeated, *in modum probationis*, before the Lords of Session; which was no sufficient probation; seeing *acta et probata in judicio summario vix fidem faciunt in plenario:* Which see with its exceptions in Mascard, vol. 1. Conclus, 33. & 34. Aberdeen contended, That John Falconer's first deposition ought to be credited more than the second, yea only; as Claurus teaches in his Criminals, § ult. Quæst. 53. & 54. De exceptionibus contra testes. And whereas it is objected against Aberdeen, that he had an interest in the said Mint decree, *esto* it were, yet he might vote in it; for in Riddel of Haining's case, (who was one of the Border Commissioners), the Lords found he might sit and vote, though he had a gift of the fines of such as were to be condemned; and do not Lords of Regality do the same? And in the case of caped ships, some of the Lords of Session had a share, yet they voted.—But law says, *nemo judex sedeat in causa propria*, and Judges must be like Cæsar's wife, not only chaste, but void of all suspicion, *debent et mentes manusque puras habere.*

Duplied for Lauderdale, That *læsio enormissima* has ever been allowed to rescind transactions; and was so decided in the two most famous judicatories of Europe, viz. the Parliament of Paris, as Papon tells in his Arrests, Lib. 16. Tit. 3. and in the Imperial Chamber of Germany, recorded by Mynsinger. Centur. 1. observ. 33.; *2do*, Maranta in speculo advocatorum seu praxi aurea, part. 6. num. 128. Tit.

Quando sententia transit in rem judicatam, shews, that it is not reputed a sentence where it proceeds *super falsis vel ineptis probationibus; 3tio, Metus* was sufficient here, becsaue it proceeded from him *qui minas suas exequi solitus erat;* as Aberdeen had used concussion against the Earls of Mar, Errol, and Breadalbane:—And though these instances were alleged to be extrinsic to Lauderdale's case, and were merely congested and accumulated to blacken and sully Aberdeen's reputation, and to justify the great men's accusations, by which they had gotten him laid aside, the *perfervidum Scotorum ingenium* not suffering any great man to fall softly; yet, for vindication of the Lords, who suffered these extraneous articles also to be proved, it was remembered, that lawyers draw arguments *a tempore præterito ad præsens et futurum*; and Christ. Crusius, Part. 1. De Indiciis delictorum, has a chapter De indiciis quæ a consuetudine delinquendi proveniunt, quia semel malus semper præsumitur malus in eodem genere malitiæ. No. 21.

But pique and design were very evident in this process; for my Lord Lauderdale and his son Maitland were allowed, in two elaborate discourses, to traduce him at the Bar; and they called in Mr. William Fletcher, one of Aberdeen's advocates, and sharply rebuked and threatened him for using this expression in the debate, that my Lord Aberdeen could justify all the interlocutors he had procured when he sat on the Bench, and that he was neither guilty of injustice nor malversations. Which some thought might have passed well enough in his lawyer's debate for him; but the great men looked upon it as a tacit reflection upon them; and therefore would needs have him retracting it, yea proposed that he should do it publicly. But the moderate party prevailed, that his acknowledgement should be only before the Lords.

The accident of his Majesty's death, before advising of this cause, gave some respite to my Lord Aberdeen; for the King dying on the 7th of February, and the news reaching us on the 10th, and it not being advised till the 17th of February, some of the Lords appeared more freely for Aberdeen, apprehending that his Royal Highness, now King, had not quite forgot the kindness he once had for the Earl of Aberdeen. Six Lords voted for Aberdeen, that the reasons of reduction were not relevant. The interlocutor, when they came to advise it on the 17th February, was: The Lords, before answer, ordain the pursuer's procurators to adduce what probation or evidence they can for instructing the several qualifications of concussion insisted on in the debate; and the defender's procurators to adduce any probation or evidence they can for clearing that the transaction was voluntary, and the defender's unwillingness to accept of this donative of the Mint decree, and any other alleviations alleged in the debate for taking off the qualifications of concussion; and assign the 10th of March next for both parties' procurators to prove, *ut supra.*—Some of the Lords thought, that Lauderdale being *in libello*, he should have got the sole prerogative of probation; but it was carried, that it should be conjunct and mutual.

Then the Lords, on a bill given in by Lauderdale, abridged the day to the 26th

No. 21. of February, and ordained the Earl of Mar to be presently examined on Aberdeen's concussion used against him, because he was going out of the town; and though Aberdeen, in a bill, alleged, that no such extrinsic acts could be tried in Lauderdale's process, but only his own case, yet they allowed all to be examined; but, because he represented, that he had some of his witnesses to bring from the North, they gave him the first diet of the 10th of March for his probation; and appointed him to see Lauderdale's interrogatories to the witnesses.

To add a few remarks farther on this case—I find Menoch. cas. arbitrar. Cap. 135. & 136. makes *metum potentiæ* a sufficient ground whereon to quarrel deeds then extorted; and we have instances and decisions upon it in our law, recorded by Hope, Title, Of Sheriffs, and of decrees-arbitral, between King James V. and Lord Yester, and Tit. Of Restitutions *in integrum*, and reduction *ex capite metûs*, between the Earl of Morton and Queen Mary, where deeds were reduced because of concussion and terror injected by the King himself; and Grotius, De jure bell. et pac. Lib. 2. Cap. 11. is clear, that all laws have allowed remedies, where fear or dole has given rise to the transaction; and Jeremy Taylor, in his Ductor dubitantium, Lib. 4. Cap. 1. is of the same mind.—(See APPENDIX.)

As to the nature of transactions, see Stair, 3d July, 1668, Row against Houston, No. 12. p 16484. That a decree *est quid individuum*, so that if this decree of the Mint be null *quoad* one part, it is absolutely null *in toto*, is clear from L. 27. D. Famil. ercisc.; so that the Lords finding but one nullity in this Mint decree, it casts it all open, and turns it to a libel. And reiteration of acts of transaction imports nothing to infer homologation, or take off concussion, while the impression lasts; and it is never a free and spontaneous act, *donec obligatus pristinam libertatem fuerit adeptus*, and till the cause of the fear ceases, and be removed; and they agree, that *jussus principis cum comminatione junctus* may occasion this *justus metus in constantem virum cadens*. Heraldus, de auctoritate rerum judicat. declaims from Cicero, and others, against those sentences that are procured by corruption of the Judge, biassed *odio, spe vel timore*; and the Greek Judges at Areopagus expressed it by a very significant word *cacotechnia*. For Aberdeen's design, in zealously carrying on the Mint decree, was with an eye and prospect to get the benefit of it to himself; and therefore the Clerk Register then gave Lauderdale a watch-word, to remember they were his enemies whom he should see get the pelf; and that Aberdeen stopped their remission, and caused the Earl of Perth propose to the King, that he might be rewarded out of the fine of the Mint; and he carried on all the trial before the Committee, and wrought up the Lords of Session to comply with his interlocutors therein, &c.

The preparative of these processes may be very useful for the common people, to be some check to deter great men from oppressing them grossly; but the processes are only created and fomented by interest, malice, and passion, to ruin some fallen Courtier, or to incapacitate him from ever rising to avenge himself again; so that I dare say, that these processes against concussion are never designed

mainly to repair the injured parties; though it be some pleasure to the populace and mobility to see their oppressors repaid in their own coin, albeit no material advantage redound to them from thence. No. 21.

1685. *March* 14.—The Earl of Lauderdale, for proving my Lord Aberdeen's concussion, as mentioned 4th February, 1685, adducing sundry of the Lords of Session as witnesses, it was objected, They were Judges, and so could not be used as witnesses. Answered, That, in things transacted within doors, it was very ordinary to prove *per membra curiæ*, and they were like an inquest or assize, who might be both judges and witnesses. This being reported by Carse, the Lords demurred on it.

1686. *November* 18.—The Lord Gray pursues a concussion against the Earl of Lauderdale, upon two heads; 1*mo*, That Lauderdale having pursued an improbation of his rights on Dundee's estate, and he having produced them, Lauderdale took them up, in 1673, and, being in power, would not give them back; 2*do*, That he entered to the possession of the lands before his disposition and right from Gray. Answered, None of the two are relevant; for though it be ordinary to keep up processes, yet it is no concussion, seeing they had a remedy open in law by complaining to the Lords; and if he intruded unwarrantably, he might have pursued him for a riot. Witnesses being ordained to be examined before answer, Gray gave in a general interrogatory, If it was not the common fame of the country that Lauderdale oppressed the creditors of Dundee, and forced them to transact: Answered, This was general, and only *de auditu*, and such a testimony was neither conclusive nor probative. This being reported, the Lords rejected the general interrogatory, unless they would specially qualify it thus, in so far as, &c.—Yet Lauderdale gave in extrinsic grounds of concussion against the Earl of Aberdeen, quod quisque juris in alium statuerit æquum est ut ipse eodem utatur.

1686. *December* 8.—Gray of Crigie's witnesses being brought in to prove his reason of concussion against Lauderdale, mentioned 18th November, 1686, they gave in this interrogatory to them, If they did not believe that Halton oppressed my Lord Gray, and kept him and his Lady whole days waiting on in their outer-rooms for their papers? And this being objected against, as malicious and irrelevant, the Lords appointed them to depone anent the whole interrogatories, reserving to themselves, at advising, to consider what it should operate.

1688. *February* 22.—John Gray of Crigie's action of concussion against the Earl of Lauderdale, mentioned 8th December, 1686, was advised. The qualifications of force and fear were, 1*mo*, He was then a Lord of the Session, and had much power in 1673, when it was made; and had raised an improbation against them; and when they produced their papers, he took them up, and would not

No. 21. give them back; 2*do*, He entered into the possession before he got a disposition; and there was *læsio enormissima*, the lands being worth 50,000 merks, and he gave but 21,000 for them. And though there was little proved, yet Lauderdale having gained some days before his cause against Yester, so that *levatus in uno* may be *gravandus in alio*, and to discourage great men from oppressing when in power, they reduced the transaction, and reponed Crigie and the Lord Gray to the lands, upon their repaying the foresaid sum to my Lord Lauderdale; but shunned to insert the harsh term of concussion, and so did not decern him in restitution of the superplus rents more than the annual-rent of the price paid; though, upon the principles of concussion, one who makes such a transaction can never be *bona fide possessor*.

What partly moved the Lords to decern thus was, that they apprehended that Crigie's rights of the lands of Benvie and Barrady extended to the value, which they did not: But Lauderdale has other rights thereon, by which he will call him to an account, being now each in their own place. Upon the 28th of February, Lauderdale's bill reclaiming against this interlocutor was advised, and refused.

1688. *July* 26.—Gray of Crigie against Lauderdale, mentioned 22d February, 1688. Crigie craving the lands might be purged of an infeftment of £.1000 Sterling, which my Lord Maitland had given forth of it to John Foulis, it was alleged, That Lauderdale was not obliged, because the right he had given his son was redeemable, on giving him lands of the like quantity and quality elsewhere; which clause was in the charter, and he was content to do it. The Lords found he behoved to purge this incumbrance. Then he offered obedience, on payment of the sum and annual-rent. Crigie alleged, He could not pay annual since Whitsunday last, because he then used an order and consigned it. And it being objected, That it was simulate, and no money, at least the whole not actually there, nor numerated, Crigie deponed upon this; and his oath being advised, the Lords decerned him to be free of annual-rent.

Fountainhall, pp. 336, 353, 428, 435, 499, 514.

1698. *December* 9. RUTHERFORD *against* MURRAY.

No. 22.
Effect of *metus carceris*.

Robert Rutherford, as Cashier for the Collectors of the Poll-money, charged Murray, younger, of Hadden, for the sum of £.3083 contained in his bond. He suspends, on this reason, that it appears, both from the bond and a discharge at the time, that the ground of the debt was his being Sub-collector of the Poll for the Shires of Forfar and Kincardine; and this being granted, he offers to prove, that he was threatened with imprisonment by a warrant of the Committee appointed by the Parliament for regulating the Poll, and to avoid it, granted this bond;