

No. 2. Sterling, being but a penalty for not payment of £.18, which exorbitant penalty in all justice and reason should have been restricted; and as to the new bond, it was granted under trysting, and for fear of prison, and loss of his credit and reputation. It was answered, That the new bond was granted by way of transaction, whereas he might have suspended the decret; and for fear of prison not relevant, where it is not a private force or prison he feared, but *Autore Pratore*, upon a legal sentence, and in execution thereof; transactions in such cases being most lawful, and not to be reduced. Replied, That the suspender being surprised in this case by the act of warding under trysting, there was not only fear upon the part of the suspender, but *dolus malus* in the charger to cause apprehend him when he was under trysting.

The Lords found they would modify the exorbitant penalty, the suspender proving, that they were under trysting the time of the caption or act of warding, or granting of the bond.

Gilmour, No. 120. p. 87.

1686. *March.*

CRICHTON *against* MURRAY.

No. 3. A decree at an assignee's instance for the whole debt against a cautioner, being quarrelled by him in a suspension as *ultra* the pursuer's title, in so far as two of the four cautioners were discharged and excepted from the assignation; answered, *Res est transacta*, the defender having got an abatement of the sum decerned, and the decree discharged; which the Lords found relevant.

Fol. Dic. v. 2. p. 475.

* * * This case is No. 375. p. 12232. *voce* PROCESS.

See APPENDIX.