

1700. February 14.

WISEMAN *against* LOGIE.

No. 24.

Reduction of
a deed extort-
ed by force
and fear.

The Lords advised the probation betwixt Logies, elder and younger, of Boddom, and James Wiseman, Procurator-fiscal to the northern Justiciary. Young Boddom having wounded Grant of Ballandalloch's brother, he is cited before the Highland district, and, in absence, is denounced fugitive, though the Sheriff, by prevention, had fined him for the riot, before the citation to the Justiciary Court. Wiseman, as Fiscal, without any farther denunciation, citation, or declarator, went with some Highlanders and dragoons, and intromitted with young Boddom's escheat-goods, by casting in the corns, &c. whereupon old Boddom, to prevent any farther destruction, transacts with Wiseman, and gives him a bill on Gordon of Scotshall for 560 merks, and takes an assignation from him to his escheat goods; and thereafter prevails with a quorum of the Commissioners of the Northern district to meet, and give both a relaxation and discharge to young Boddom of their former act of fugitation; and then he raises a reduction of the precept and bill, which Scotshall had accepted, and insisted on these grounds; *1mo*, That it was null, being extorted by force and fear; *2do*, It was *causa data causâ non secutâ*, being given for an assignation, which Wiseman had no power to give; *3tio*, The escheat was discharged by the Commissioners. Answered, to the *1st*, It was *vis legalis*; *2do*, That summary way of execution is the custom and practice in all these Justiciary decrees; *3tio*, As to the discharge, no other quorum could alter or retract the sentence after it was extracted, seeing *par in parem non habet imperium*, and it only discharges Boddom's escheat; whereas this was a bill after innovation and transaction, and so falls to be due *ex nova causa*; and these fines and casualties belong to the pronouncers of the decree, and not to another quorum. There being an act, before answer, the debate, at advising of the probation, resolved into these three points; *1mo*, If his summary intromission with Boddom's escheat on that decree, without declarator, was warrantable; *2do*, *Esto* it were unwarrantable, if the transaction and composition for the fine and escheat, by giving a bill, may not subsist; *3tio*, If the bill did not become void by the Commissioners' discharge, though subsequent to the transaction. As to the *1st*, it was alleged, Though escheat gives no title to intromit without declarator regularly, yet both in the commissions for the Highlands and Borders, some formalities are dispensed with, as appears by the acts 75. & 76. 1587, where summary intromission seems to be allowed, especially where it is only *custodiâ causa*, and that inventory is made of the goods; as to the *2d*, Though the *initium* of his intromission had been vitious, yet you having transacted with me *aliquo remisso*, it validates the deed, yet, on the other hand, *vis et metus* are grounds whereupon wives have been reponed against renunciations they had given of their jointures; 9th January, 1623, Marshal *contra* Marshal, No. 7. p. 16482.; and transactions do not redintegrate null invalid deeds, 4th December, 1671, Macintosh *contra* Spalding and Farquharson, No. 13. p. 16485. and 10th January, 1677, Stuart *against* Whitefoord, No. 17. p. 16489. where a

- No. 24. son's bond to liberate his father, unwarrantably detained, was found null. Yet Grotius, Lib. 2. De jure belli et pacis, Cap. 11. asserts, that he who pactions to pay a sum to liberate his friend from unjust bonds *tenetur, quia tu a paciscente coactus non es*. The Lords found Wiseman's intromission unwarrantable; and therefore reduced the bill given by Boddom to him, not only as extorted, but likewise in respect of the subsequent discharge and relaxation of the escheat by a quorum of the Commissioners of Justiciary; and assoilzied from the debt.

Fountainhall, v. 2. p. 89.

1700. July 18. DUNDAS against HARDIE.

No. 25.

A Sheriff-depute having fined an heritor for divers absences from head-courts, and having summarily poinded the tenants for the amerciament, the Lords thought that this procedure was precipitant, being without a previous decree of poinding; and without deciding whether these unlaws were *debita fundi*, they found the poinding illegal, and the bond granted to stop it null, and reponed the master and tenants to their defences.

Fountainhall.

* * This case is No. 16. p. 6860. *voce* INDUCIÆ LEGALES.

1706. June 28. HAY against CUMMING.

No. 26.

A wife having subscribed consent to a disposition granted by her husband of a subject life-rented by her, the want of a judicial ratification was not sustained as a reason of reduction thereof, since neither force nor *justus metus* were pretended in the case.

Jean Hay being infeft by James Skeen, merchant in Aberdeen, her husband, in the life-rent of a house and some acres, her husband's affairs obliged him to dispoise the said lands, in 1666, to one Forbes, for 2000 merks, from whom Robert Cumming of Birnies now derives right; and in that disposition the said Jean is a consenter for any right of life-rent she had, but she never judicially ratified the same upon oath. After her husband's decease, she revokes her consent, and raises a reduction, on this ground, that, by this consent, she had denuded herself of all she had in the world, which was a lesion with a witness, and being a donation in favours of her husband, and for his conveniency, though made to a third party, it was revocable, *ne mutuo amore se spolient*, especially since it was never judicially ratified, law presuming it to be through importunity, and for fear *et ob reverentiam maritalem*, as was found, 9th January, 1623, Marshall, No. 7. p. 16482.; 4th February, 1623, Guild, No. 77. p. 6521.; and 19th June, 1629, Gray, (see APPENDIX); where wives were allowed to quarrel their renunciations, if not judicially ratified, because presumed illicit; and the later decisions go the same way, 17th July, 1677, Paterson *contra* Maclean, No. 97. p. 10284. Yea, further, on the 15th February, 1678, Gordon *contra* Maxwell, No. 353.