

1703. *January 27.* JOHN BALFOUR of BROADMEADOWS *against* ALEXANDER FORBES of BALLOGY and ALEXANDER FORBES, Goldsmith.

ON report of the Lord Haleraig, the Lords decided the cause betwixt John Balfour of Broadmeadows and Alexander Forbes of Ballogy and Alexander Forbes, goldsmith in Edinburgh. Broadmeadows having obtained a decret against Mr George Forbes, late minister at Traquair, for £2310 Scots, as the balance of his tutory-accounts, and having arrested his stipends in the parishioners' hands, the same was loosed on Ballogy and Alexander Forbes's becoming cautioners in the loosing. And Broadmeadows thereafter obtaining a decret of forthcoming, wherein the parishioners were assoilyied, in regard they had *bona fide* made payment by virtue of the loosing, he now pursues the foresaid two cautioners; who repeat a reduction and suspension of the decret of forthcoming, on thir grounds:

*1mo*, That it was null; Because, a sight of the process having been demanded by Mr George's procurators,—the commissary of Peebles, before whom the pursuit was, did refuse the same.

ANSWERED,—Mr George was only called *pro interesse*; and, though out of the kingdom, yet no mandate was produced for him; and the decret bears he was appointed a sight of the process.

REPLIED,—The debtor in a forthcoming has an interest to compear, and propone defences if he please; and a mandate was produced at the second diet; and though the judge allowed him a sight, yet the clerk refused the same; which he durst not have done, had it not been by the commissary's connivance; and his refusal is instructed by an instrument of requisition taken against the clerk.

The Lords found this no nullity, in regard he should have complained, to the judge, of the clerk's contumacy; which he did not.

*2do*, ALLEGED,—The decret is still null; because pronounced on the 5th of August, in vacance-time, and does not bear a dispensation.

ANSWERED,—All the interlocutors and probation were in session-time; and there is nothing done in vacance-time but only the advising their oaths; and, by the custom, they need no dispensation till the 20th of August, as appears by the deliverances commonly given by the Lords on their dispensation-bills.

The Lords also repelled this nullity.

*3tio*, ALLEGED,—The commissary committed iniquity in assoilyieing the defenders, in whose hands the arrestments were laid on, upon their oaths asserting they had paid, without producing the parties' discharges.

ANSWERED,—The debtors' oaths are the habile means of probation, in order to recourse against the cautioners in the loosing; as was found by the Lords, *22d of February 1627*, Lord Balmerino *against Lochinvar*; and Stair is of the same opinion, *lib. 1. tit. 17. sec. 8.*

*4to*, ALLEGED,—The decret was still null in sustaining debts against the cautioners, which were not due at the time of laying on the arrestments, which was in March, and so could reach and affect nothing but the current term to Whitsunday 1691, and yet the Martinmas thereafter is decerned for; which term

could not fall under an arrestment laid on in March before,—it not being then begun, much less current.

ANSWERED,—The letters bore warrant to loose all arrestments laid, or to be laid, on Mr George Forbes's goods or debts ; which was warrant enough for the commissary's decerniture.

The Lords sustained the nullity, and turned the decret to a libel.

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1703. February 3. ANNA FORBES against THOMAS LESLIE of COLPNAYSHIELS.

THOMAS Leslie of Colpnayshiels designing to marry Anna Forbes, daughter to the Laird of Leslie ; and falling into some melancholy damps, and apprehending himself impotent and unfit for marriage, he deserted the bargain : whereon her friends resenting the affront, they craved reparation ; and he, for satisfying them, did grant her a bond for 4000 merks : whereupon she having charged him, he suspended, on the complex reasons of concussion, circumvention, and melancholy ; in so far as he being subject to that melancholic distemper, advantage was taken of it, and he threatened by her two brothers-in-law, Pittachy and Kinnaldy, to crop his ears, and shoot him, if he did not repair her honour ; and being struck at that crisis, he gave the bond to redeem himself from that panic terror, where chimeras appear to such a weak person as terrible realities ; and so the bond being without any onerous cause, and impetrated by concussion, fear, and threats, and in a very unwarrantable, unaccountable manner, it ought to be annulled.

ANSWERED,—Clear liquid bonds are not to be taken away by such imaginary stories ; and, unless he confidently say he was *non compos mentis* at the granting, he cannot be heard : neither does he pretend that the violence or threats were used by the lady ; and they are not such a *metus* as *cadere potest in constantem virum* ; and it being signed at Count Leslie's house, it cannot be presumed that any hardship could have been offered to him there, but he might easily have got it prevented or redressed ; but truly it was a most free and voluntary act ; and he both injures himself and the gentlewoman now to quarrel it by an ignominious fiction of his own insufficiency.

REPLIED,—That the resisting those degrees of fear which a solid firm man will reject, is not to be required in one who is known to be habitually weak, and susceptible of the least impressions ; melancholy heightening all objects, and making a thing of no fear become very formidable, and having no strength to resist his lesed imagination ; under which discomposure he then laboured, and which was much inflamed by their menacing insinuations if he did not give the bond ; and which must be understood to contain this tacit condition, in case marriage followed, without which it must be reputed to be elicited *per dolum et metum*, and to be *ex turpi causa*, or *sine causa, contra bonos mores et libertatem matrimonii, et causa data causa non secuta* ; so that this circumstantiate case has an accumulate concatenation of reasons for repudiating this bond.

The vote was stated,—Try, before answer, the granter of the bond his condition at that time, and what threats were used ; or, Repel the defences in respect of the clear liquid bond ? and it carried, by a scrimp plurality, to repel the rea-