

he has gotten already; and no decret can bar that, if instantly verified; but the truth is, this was *noviter veniens ad notitiam*, and very providentially found by the Major, who had forgot it. And, as to the reduction of it *ob vim et metum*, though she gets a gratis-warrant, yet that should give her no privilege *impune* to wound and bespatter the honour and reputation of the least of her Majesty's subjects, but much less those of the first rank and quality. And they are content to give her a day to prove that it was extorted *viis et modis*; and when she succumbs, what redress gets my Lord?

The difficulty that took off its being a *res judicata* was, that she had extracted before she had confirmed; and yet it was thought, that, by the regulations 1695, that could only open the decret *ad effectum* to supply that nullity only, but all the rest stood good; therefore they reponed the Earl to found on the discharge allenarly, but repelled his reasons of suspension as to all other defences, except that of payment only.

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1710. January 24. CATHARINE CRAIG, Wife of Alexander Short, *against* SIR ANDREW BIRNY, Lord Saline.

THERE being several transactions betwixt Alexander Short, merchant in Stirling, and Sir Andrew Birny of Saline, in 1679; the said Sir Andrew, for certain reasons, by a bond of annuity, settles upon the said Sir Alexander an annuity of £20 Scots, monthly, which extends to £20 sterling per annum, bearing that it shall not be assignable; but, not being paid for several years, he assigns it to Catharine Craig, his wife, who pursues my Lord Saline for payment of the bygone arrears of that annuity.

He *first* ALLEGED that she had no right, being declared not assignable. ANSWERED,—He being a simple man unfit for business, this was inserted to exclude gratuitous assignees, but could not hinder his wife to take a right to it *ad sustinenda onera matrimonii*; the very end for which the bond was granted.

The Lords sustained the assignation.

2do, He ALLEGED it was discharged and renounced by the said Alexander, under his hand, for sundry onerous causes. Mrs Short, in answer, repeated a reduction of this discharge, as impetrated *per vim et metum*, having put him in the tolbooth on the pretence of threatening to shoot him; and, to rescue himself from prison, he had granted him that discharge; whereas all the Doctors make the *metus carceris* a sufficient ground of reponing against any deed so extorted; and, for proving it, adduced an obligation by Alexander to reënter in prison if ever he shall contravene, with a great many *supersederes* under my Lord Saline's hand, where the keepers and turnkeys in the tolbooth are witnesses.

The Lords, on this probation, found the discharge was granted *metu carceris*, and reduced it; and gave decret for £3150 Scots, due for the bygonies of the aliment.

Upon which my Lord, being apprehended, was incarcerated in the tolbooth of Edinburgh; and, after many communings and endeavours, at last he insisted in a suspension and reduction of that decret, and repeated his reasons, 1mo, That the decret was surreptitiously extracted in the end of a Session, on a bill given in, not so much as marked by the clerks, nor signed by any advocate, but

by herself, and proceeded upon a supposition, taken for granted, that the discharge was extorted *metu carceris*, and yet not a syllable of it proven; and the very decret itself wants these words,—that they found it proven,—but allenary bears, The Lords find the allegiance of its being signed in prison relevant, and therefore decern; so the decret is evidently null, as without all manner of probation *quoad* that point: And Providence has overruled the clerks to minute it so, to leave room for oppressed innocence not to be overthrown, and concluded in a decret *in foro*.

ANSWERED for Mrs Short,—That she oppones her decret, wherein all now obruded is either proponed and repelled, or competent and omitted; which are the two great bulwarks and security of the lieges for sopiting pleas, and preventing their eternity. And if this decret be not able to abide the test, they know no sentence can be firm. Though the clerks had by mistake omitted these words, that the Lords found it proven, as well as relevant, yet it is plain, by the whole context, that it was actually and fully proven; and a petition given in by my Lord Saline, alleging, as he does now, that the *metus carceris* was not proven, yet was refused.

REPLIED for my Lord Saline,—That the imprisonment (*esto* it were proven that he was in these circumstances, as truly he was not,) is not relevant to annul a deed; for the most part of transactions are entered into when debtors are under diligence for performing their just obligations. Now, if I have him under caption, and to prevent future imprisonment he give me a further security, this is *justus metus et legalis*, and can have no influence to invalidate the deed, else most of our agreements might be quarrelled; and nothing repones him but when it is taken from one actually in prison, and to be detained there if he did not condescend to what is demanded of him.

The Lords, from a principle of compassion as well as justice, to mitigate this woman's rigorous execution, took hold of the defect of the decret, which did not bear it was proven, and therefore sustained the nullity; but the form did not allow him to come forth till it was read in the minute-book, and a charge to set at liberty: but allowed her yet to prove Alexander Short her husband granted that discharge, to redeem himself out of prison. Saline did likewise instruct, that Alexander Short was debtor to him, by intromission with some moveables, and intrusion into a house of his in Stirling; which circumstances likewise moved the Lords to the foresaid decision.

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1710. *January 25.*

In proving the value of some teinds, a query was moved to the Lords, whether miln-multures paid any teind? And the Lords said not; for they might as well crave parsonage or vicarage teinds of a growing wood.

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