

1671 and 1672. FARQUHARSONE and SPALDING *against* MACINTOSHES.

1671. *December 2.*—THIS is a reduction of a bond granted to thir Macintoshes, upon this reason, that Farquharson's father being taken by them with caption, though the ground thereof stood suspended, (which suspension was intimated,) and carried away to the hills, instead of taking him to Inverness prison, and his son having followed them, they, in his presence, threatened to kill his father instantly, without any mercy, if he would not corroborate the debt, and give them a new bond for the same; upon which most just and natural fear, he granted the bond he now craves to be reduced *ex capite vis et metus*.

To which reason it was ANSWERED,—That the bond could never be quarrelled as extorted, seeing he confesses he himself was free, and no terror-dreader, nor threats made to him, nor violence used against him; and for the *metus incussus patri*, that is not enough to annul a voluntary bond granted by the son.

To this it was REPLIED,—Whatever strength the answer may have where the parties are strangers, yet sure I am it has none betwixt father and son, *qui censentur una et eadem persona in jure; et naturalis pietas nos stringit omnibus modis servare vitam eorum quibus ipsi vitam debemus*; yea, if this bond stand good against the son, it will be equivalent as if it had been granted by the father, because the son will have relief therefore of the father. And to sustain the bond will be a practise immeasurably dangerous in that part of the country. And, therefore, the affrighting the father with death, (though no violence was offered to the son,) is sufficient to invalidate any deeds done by the son in contemplation thereof.

They were to have the Lords' answer whether the reason of reduction was relevant, yea or no. And it was remembered how one having been taken by virtue of a caption which stood suspended, and incarcerated within a lawful prison, and having there granted a corroborative bond for the sum, that he might get his liberty; and having the last session intented reduction of the said bond as granted by him *per vim et metum*, the said reason was sustained and the bond annulled.

It was ALLEGED,—Though the debt in one of the captions stood suspended, yet they had other captions not suspended, by which they took him.

To this it was ANSWERED,—That he must only be presumed to have been taken by virtue of the caption which stood suspended, because they allenary take a corroborative right for the 2000 merks contained in that caption, from the sons, and no other, which they would not have done had they taken him by the other captions and not this; for hence it manifestly appears they eyed only this caption and not the rest.

They farther alleged, it was at his own desire they took him to *de natura* the hills. Answered, they found the said desire relevant; but being *mandati*, it could only be proven *scripto vel juramento*.

Grotius, *lib. 2, de jure belli et pacis, cap. 11, num. 7, item lib. 3, cap. 19, num. 4*, is positive, *si quis promiserit præteritum ut amicum vinculis injustis eximerit, tenebitur tamen, quia (ut inquit Seneca,) tu a paciscente coactus non es; idem Grotius in annotatis ad superius caput 11.* See 27th July, 1678.

*Advocates' MS. No. 278, folio 117.*

1671. *December 5.*—The said interlocutor being reported, the Lords found, though the violence was only used to the father, and not to the sons, and though the sons granted the bond, and not the father, yet because of the *pietas paterna*, and propinquity of blood, that the bond was null; the reducer always proving the force adhibited to the father, and that there was a standing suspension of the caption by which they took him. *Vide infra*, No. 532, *January 10, 1677.* [*Duke of Hamilton against Stewart.*]

*Advocates' MS. No. 279, folio 117.*

1672. *June 13.*—The probation coming to be advised, used in that action marked *supra*, betwixt Macintosh and Spalding, at Numbers 278 and 279; the Lords reduced the bond, because they found the force adhibited to the father equivalent as if it had been done to the sons, and that he was taken with caption, the ground thereof being suspended and the same intimated. *Vide infra*, No. 363, [*July, 1672, Essentuly.*]

Then it was ALLEGED,—That the Lords reponing him against that bond as elicited by force, then they must also be reponed against a discharge given by them of all they could ask or crave of him, which they did in contemplation of this bond now reduced, which they accepted in satisfaction of all; and, therefore, they seek regress to what they could have charged him with, before they got that bond. The Lords found the reposition ought to be mutual and reciprocal, and therefore ordained him to deliver up that discharge, and declared that both parties should be in *eodem statu* they were in before that time, as if the said bond and discharge had never been granted.

Then they craved to be reponed to the condition they were then in, *cum omni causa*; and seeing he was now much deteriorated, and diligence done against him since that time, that *cautio judicatum solvi* might be found to them, in case they might prevail in those claims they had against him.

The Lords refused to repone them otherwise than *in statu quo*, seeing it was their own fault and illegal procedure (*ex quo nemo debet lucrari,*) that has drawn them in this *premunire* and prejudice, *et sic tibi imputes.*

*Advocates' MS. No. 337, folio 134.*

1672. *June 15.* ———— *against* STUART of BRUGH and his SPOUSE.

ONE Mrs. Stewart being married upon one Buxton, he, being taken at Worcester, made his escape and went over to the parts of France, where he staid by the space of eight or ten years. His wife, having waited about seven years without hearing from him, supposing him to be dead, married one Mr. Seaton. After they are married some two or three years, home comes Buxton, her first husband, and confesses ingenuously he had wronged her, and occasioned that snare she had fallen in, in never giving her the least notice of his being on life; and, therefore, to make her amends, takes her home and treats her very kindly as his wife. He at last dies, and she marries again to one Stewart of Brugh, in Orkney; and having given a bond in her reputed viduity, betwixt the going away of her husband and her marrying Mr. Seaton, for 700 merks; and she and her present husband being