

to his wife's renouncing her life-rent by that contract in which himself was a contractor ;—and the father was as unjust to accept thereof without any onerous cause, when he could not but know that his daughter in law had nothing else. None of which specialities are to be observed in this case, where at first the disposition was made to strangers, and that of a particular subject irredeemably for onerous causes, upon the faith whereof the subsequent purchasers did rely, and it hath taken effect by many years possession.

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Replied for the pursuer : With all respect to the learned Craig, the former custom is most reasonable. And if it be not adhered to, the women's privilege will be eluded : For how easy is it for a husband to order matters so, as the wife can have no means of proving force or fear ? Besides, it is known that soft insinuations and frequent importunities prevail as much with well tempered wives, as force or fear doth influence such as are stubborn and ill-natured : And our law ought not to be less indulgent and favourable to the former, than to the latter. Whereas the adhibiting the judicial ratification, publishes to the wife's friends the danger she is in, that they may interpose to prevent it. Therefore the principle advanced by Craig, is to be understood where a wife consenting to the alienation of her life-rent, gets an equivalent fund from her husband. But where the husband is known to have no other fund to compensate the wife's deed, a purchaser ought to adhibit all the requisite solemnities of law, otherwise he partakes of the husband's fraud. And a wife *fraude inducta* should not be denied the protection of law, more than she who is *vi coacta*.

The Lords repelled the reason of reduction of the disposition, that it was not judicially ratified ; seeing neither force nor ferocity in the husband were alleged.

Forbes, p. 114.

1706. July 11. GRANT of Dalahaple against MAJOR ALEXANDER ANDERSON.

Major Alexander Anderson having granted Dalahaple a bond of corroboration of a debt for which his father was in the messenger's hands under caption at the time, with this quality, that the creditor should supersede payment for two or three years, and use all legal diligence to affect his father's estate by adjudication and inhibition ; and after using of the diligence against the father, and elapsing of the *supersedere*, being charged upon the said bond at the instance of Dalahaple ; he raised suspension and reduction *ex capite vis et metus*, upon this ground, that he had granted the said bond of corroboration to the charger in order to relieve his father, who was carried prisoner through the hills from place to place in his night-gown and slippers, while sick and not able to put on his clothes, with the hazard of his life.

Answered for the charger : 1st, That the bond of corroboration was a plain transaction ; in so far as the suspender got thereby more terms of payment than were contained in his father's original bond, and the charger obliged to adjudge his

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Effect of transaction in a case where force or fear are alleged.

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Replied for the suspender: That no transaction could be inferred from the *supersedere* and other quality in the bond charged on; these being *in græmio* of the right extorted, and terms arbitrarily imposed by the charger; *2dly*, Transaction doth not exclude reduction upon the head of force and fear of death; Stair, B. 1: T. 17. § 2. & B. 1. T. 9. § 8. L. 13. C. De Transact. December 4, 1671, M^cIntosh against Spaldings, No. 13. p. 16485. *3tio*, The suspender's accepting the foresaid assignation from his father was no more an homologation, than if he had got money from him to pay the debt, and upon payment had received a discharge, which the Lords in parallel cases, February 14, 1668, Mackenzie against Fairholm, No. 23. p. 5639.; February 20, 1668, Farquharson against Gordon, No. 65. p. 5685. found not to infer homologation against a cautioner.

Duplied for the charger: A transaction is understood in law to be interposed, where *aliquid est datum, promissum, vel retentum*; and the suspender in the bond of corroboration got an ease of the debt by a long term of payment: For *qui tardus solvit quam solvere debebat, minus solvere intelligitur*. Besides, the charger was bound by his acceptance of the said bond to lead several diligences against the father's estate: Which terms and conditions being profitable to the granter of the bond, and burdensome to the charger, cannot be looked upon as the effect of force and fear, but of a free treaty and agreement. *2do*, If this case were to be determined by the civil law, the suspender could never be restored against his bond; for there was no force used against him, but he voluntarily offered the same; and there was no lesion, and he corroborated a just and true debt; and by the edict, *Quod metus causa, non datur actio si nihil absit, et solum succuritur captis et læsis*, vid. L. 12. § 2. & L. 14. D. *Quod Metus causa*. My Lord Stair, in the place cited, says, "Neither will a transaction be convelled upon such grounds of force or fear as could convel other contracts, but such fear as imports imminent hazard of death or torture." And however in this case there might have been used some indiscretion in executing the caption, when the debtor was valetudinary and guttish, he was in no hazard of his life. The decision betwixt M^cIntosh and Spalding is not to the purpose, for M^cIntosh was apprehended upon a caption after intimation of a suspension thereof; *3tio*, The grounds urged by the suspender do nowise take off the homologation, for the suspender became debtor to his father, by transferring the debt assigned, and consequently obliged to pay the debt corroborated; although the simple taking of an assignation for his relief would not import homologation, because such a thing is only intended to be effectual in case the assignee were put to pay the debt. The decisions meet not the case, for the suspender was not cautioner, but the only person obliged in the bond of corroboration; and certainly, had he got payment of the money assigned, and there-

with satisfied the debt corroborated, that would have inferred homologation. The case of the last decision is, where a minor cautioner did obtain only a decree of relief against the principal debtor but no payment; which if he had recovered, the Lords would never have reponed him against his bond, seeing he could not pretend lesion.

The Lords found the suspender had transacted the debt for which his father was prisoner, and had homologated his own bond of corroboration, so as he could not quarrel or reduce the same *ex capite vis et metus*; and therefore found the letters orderly proceeded.

Forbes, p. 122.

1708. June 29.

JOHNSTON *against* NAPIER.

Katharine Johnston, wife to Montgomery of Crivock, being proprietor of some shops in Glasgow, there is a disposition thereof signed by her, with her husband's consent, to Provost Napier, in the year 1683; whereof the said Katharine now repenting, raises a reduction, on this reason, that it was impetrated from her by concussion, frowns, and undue importunities and solicitations, and being taken to a tavern at five o'clock at night, she was detained there till twelve at night on a Saturday's evening, before she could be prevailed with to put her hand to the alienation of her heritage, to pay her husband's debt, who was presently going to America to shun captions; and so it was elicited on promises to give her the price, which she never got; and thus being *spe numerandæ pecuniæ*, it was null. Answered, That the bargain was fair and honest, and no force nor compulsion used to procure it, not being done *intra privatos parietes*, but, in an open tavern, in presence of many witnesses, and acquiesced in without quarrelling by the space of 24 years, which she would never have done by so long silence, if there had been the least ground for reclaiming. The Lords, before answer, allowed a probation of the points of facts, that it might appear if any force, terror, or impression of fear were used; and witnesses being adduced, and their depositions coming to be advised, it was objected, That they had proved nothing relevant to infer any concussion, nor did they concur in the same acts and circumstances; unus singularis testis est nullus testis, etiamsi esset papa, aut imperator maximæ dignitatis honore præfulgeat; for all they depone is, that one of them thought she was very sweer and grieved to sign it; and the other says, that he saw her husband frown on her, and pull or touch her by the coats to come forward to the table to subscribe; but all of them agree in this, that they neither heard any threatenings, nor saw violence used; and they agree in nothing else but this, and the Jewish Sanhedrim, though highly enraged against our Saviour, yet would not proceed on witnesses discording amongst themselves; and all that is here deponed, does scarcely amount to a *reverentia maritalis*, which, by no law in the world, annuls wives' deeds. The Roman law is very clear, L. 3. C. Si quis aliquem testari pro-

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What degree of influence used by a husband will entitle a wife to reduction of a deed executed by her?