

moned of new, and a new process raised : for albeit the Lords, before interlocutor, will, *ex gratia*, suffer pursuers to mend their executions, and abide by the verity thereof, yet that is but *ex gratia*. And the ancient custom was, when the defender excepted against the executions, if they were defective, he was ever free, *ab instantia*, and not obliged to answer till a new process were raised : much more in this case, where, by interlocutor, the defence was sustained, upon the defect of the execution then produced.

It was ANSWERED, That defects in executions, albeit they may be strictly adhered to by the Lords, yet, *ex nobili officio*, they may allow some alterations ; and there can be none more favourable than this,—the addition of the defender's designation, *ubi constat de persona*. And the Lords' interlocutor finds only no process upon the execution produced ; but doth not assoilyie *ab instantia* ; and, though it did, there is nothing extracted.

The Lords sustained process upon this execution.

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1681. *January 7.* OGILVIE of LOGIE *against* JAMES HAMILTON.

OGILVIE of Logie having, by contract, disposed a quantity of victual to James Hamilton, he charges for the price.

JAMES SUSPENDS, upon this reason,—That his receipts of the victual bear expressly, that every boll wanted eleven pounds of weight ; whereof he must have abatement, conform to the Act of Council, ordering all bargains between merchants to be by weight.

It was answered, That this bargain was before the Act of Council, although the delivery was after ; and, therefore, the delivery behoved to be regulated according to measure, as the bargain was made, and not according to weight.

Which the Lords found relevant.

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1681. *January 11.* MR ROBERT LUNDIE *against* The MARQUIS of DOWGLASS.

MR Robert Lundie, as assignee, by Janet Jack, to a bond of 50,000 merks, granted to her by the Marquis of Dowglass, charges the Marquis for payment ; who SUSPENDS, and raises reduction upon these reasons, *1mo.* That albeit the bond bear borrowed money, yet it is notour that Janet Jack was a person of no fortune, but in the Marquis's family ; and was never able to lend any sum : and, therefore, unless she can instruct a just cause, the bond must be declared null, and *sine causa*. *2do.* If need be, it is offered to be proven that the bond was granted *ob turpem causam, scilicet stuprum* ; which is reprobated in law. *Stio.* This bond is discharged ; and the discharge is produced long before the assignation.

The pursuer ANSWERED, That all promises and obligations are, with us, effectual ; and, if there be no cause onerous, it is always interpreted gratuitous and donative. To the second, the law says, *l. 4, § 3, ff. De Conditione ob tur-*

*pem causam :—Mulier turpiter facit, quod sit meretrix, sed non turpiter accipit mercedem cum sit meretrix ; and l. 8, ibid. In turpi causa, ex mutua turpitudine, potior est conditio possidentis :* so that Janet Jack having the bond, the Marquis, who is *in eadem turpitudine*, cannot object. *2do*. Though this were relevant, seeing the bond bears borrowed money, it is only probable *scripto vel juramento* of the assignee. And, as to the discharge, there is a reduction against the same produced : *first*, Upon extortion and force, that it was granted by the said Janet when she was kept close in a chamber in Dowglass. *2do*. Upon minority.

It was REPLIED, That the allegiance from the civil law is an assertion of Ulpian, who was a heathen, and is rejected by all Christian nations, and by our custom : and, albeit the parity of the turpitude might hinder restitution, because *potior est conditio possidentis*, yet the Marquis not having paid, he is in possession of the sum *et in potiore casu*. And, whatever might be alleged as to obligations *ex post facto*, which were not anterior to, and the inducements of, crimes, it is notour this bond was granted to induce fornication ; that Janet Jack became an impudent strumpet to the Marquis and others. And, as to the reduction of the discharge *ex metus causa*, it is not relevantly libelled ; but, however, there are produced several letters posterior to the bond, requiring Janet's mother to deliver up the same, in respect of the discharge granted before. And, as to the minority, the discharge bears a promise, upon Janet's great oath, never to quarrel the same ; and, by the authentic *sacramenta puberum*, and by the custom of this kingdom, such oaths exclude the restitution of minors.

It was DUPLIED, That this bond contains only an assertion, but no oath, unless the name of God had been invocated ; and the acting contrary to such assertions, infers no perjury.

The Lords found, That the want of a cause was not relevant to reduce the bond ; but, in respect of the notoriety, that the cause expressed *of money lent*, could not be true, they ordained witnesses to be examined what was the true cause of the bond, before answer as to the turpitude, or as to the oath ; but found, that the letters produced did sufficiently elide the allegiance of the extortion of the discharge.

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1681. *January 13.* THOMAS GARVEN *against* DOCTOR TROTTER.

THOMAS GARVEN pursues a reduction of a decret-arbitral pronounced by Patrick Tailzifer between Doctor Trotter and him, in which Patrick did allow two receipts by Garven, as several payments, where the sums were near one, and the day of the receipt the same ; but, to make them appear two, the date of the one was vitiated.

It was ANSWERED, That the decret-arbitral is opposed : and arbiters do not insert particular debates and interlocutors in their decreets, nor keep they any thing upon record ; but they do proceed upon the acknowledgment of either parties, and upon such probation as are sufficient to convince good men, although not having all the solemnities requisite in law ; and therefore the arbiter ought to be examined, if these discharges were produced to him, and allowed by him as