

excessive, seeing £50 Scots was the ordinary fine in riots pursued before the sheriff, it was alleged that circumstances might aggravate the crime and justify a much larger fine; and that they could not be modified, seeing they must be given up to the Exchequer.

But it was ANSWERED,—That held only after they were exacted, levied, and paid.

The Lords, by plurality, restricted the fine as too high; and then a second vote being put, whether it should be £25 or £30 sterling? it carried £30 by my Lord President's casting vote. *Vol. II. Page 556.*

1710. *January 20.* CATHARINE GRAHAM *against* The EARL of LEVEN and MAJOR COLT.

CATHARINE Graham, relict of John Murray, sergeant in the castle of Edinburgh, as executrix to her husband, pursues the Earl of Leven as governor, and Major Colt as paymaster of the said garrison, for £38 sterling of arrears, when he served there; and, after some debate, she obtains a decret: which being suspended, the Earl insisted on thir reasons:—That the decret was null, being pronounced the last day of the Session, and extracted in the vacance, when the Earl had no access to apply. *2do*, She had no sufficient active title in her person, being only a decret dative and a license, *excludendo sententiam*; and though she now produces a confirmed testament, yet, that being confirmed after she had extracted her decret, that superveniency can never validate nor supply the defect, seeing the confirmation should be before extract. *3tio*, He produces a discharge under the husband's hand for a part of the claim; and, as to the remains, he must have deduction and allowance of sixpence off his eighteen pence, which is a sergeant's pay, each day, for clothing-money, and a penny the pound for poundage-money, and one per cent. of invalid-money; all which being allowed, he is willing to pay the superplus.

ANSWERED to the *first*,—That decreets pronounced the last day of the Session are as good as those pronounced any other day, else the lieges would be very insecure. To the *second*, Her active title is good enough, seeing she produces a confirmed testament, whether it was produced before extract or not. As to the *third*, anent the discharge, it was competent and omitted, and was kept up on design to procure a new suspension; and she repeated a reduction of it *ex capite metus*, as extorted from her husband *vi majore*,—he being thrust into the pit of the castle till he gave it. To the *fourth*, No deduction for clothing, except for those years they got clothes, seeing he was put to buy to himself; *2do*, Fourpence is all that uses to be defalked off a sergeant's pay; and, for the poundage and invalid-money, she is content to allow them.

REPLIED,—Though decreets in the end of the Session are valid, yet, where parties are surprised, and left without remedy, they may the more easily be reponed; and her active title is nowise sufficient, unless it had been produced to the clerk before extracting: And, for the discharge, competent and omitted can never be obruded against it; for *bona fides non patitur bis idem exigi*, and *exceptio doli mali* will for ever exclude a party from seeking payment of that which

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.

Vol. II. Page 557.

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