

S E C T. XI.

Vis et Metus how Proponable.

No 47.

Metus may be proponed, not only by way of exception, but reply, and that against a third party, possessor of the thing extorted, but *qui metum intulit*, seeing it is *actio in rem scripta*.

1543. December 7. TENANTS OF COCKBURNSPATH *against* LORD HOME.

IN causa spoliū intentati per tenentes de Colbrandspath *contra* Dominum Home et suum primo-genitum pro cunctis victualibus per ipsos ab iisdem spoliatis, *exceptum fuit* pro parte reorum quod actores renunciarunt sponte dictam actionem spoliū. Sed pars tenentiam *replicaverunt*, Quod metu cadente in constantem virum per reos, eis relat. fecerunt dictam renunciationem. *Duplicatum* fuit pro Domino et Magistro de Home, Quod metus via exceptionis non esset hic admitendus; sed quod deberunt hunc tenentes agere per viam actionis quod metus causa ad retractandam renunciationem predict. *Triplicata* fuit, Quod per viam exceptionis vel replicæ metus opponi potest. DOMINI interlocuti sunt, de metu agere posse via exceptionis vel actionis ad libitum metum possi, juxta jura ff. quod metus causa, et de dolo mali et metus exceptione.

Fol. Dic. v. i. p. 173. Sinclair, MS. p. 109.

No 48.

The contrary found.

1554. March 18. OLIPHANT *against* BOCHTIE.

ANENT the actione persewed be Sir David Oliphant *against* the Ladie Bochtie, for holding frae him an yearly annwell annaillziet to him be her husband with her consent; it was *alleged* be the said Ladie, That the land that paid the said annwell was her conjunct-fee; and, if she consented to the alienation thereof, it was for fear of her lyfe, and therefore she had just cause to with-hold the samen. It was *replied* be the said Sir David, That the said Lady sould not be heard to propone that exception, *per viam exceptionis, sed per viam reductionis*, whilk was admitted be the LORDS, and the said Lady's exception repelled.

Fol. Dic. v. i. p. 173. Maitland, MS.

1591. June. FORBES *against* TENANTS.

No 49.
Decided in conformity with No 47. *supra*.

FORBES of Monimusk wairnit certain tenants dwelling upon the lands and baronie of Monimusk, alleging them to be tenants to the Earl of Huntly, to flit and remove. The persewar producit, for his title to instruct his warning, ane retour and service, where he was retoured as nearest air to his father Mr Duncan Forbes in the said lands. It was *alleged* *against* the retour, That it

could give him no action; because his unquhile father, to whom he was as nearest and lawful air retourit, renuncit all right, interest, and title, that he had to the said lands; for the truth was, that the lands being wadset to him be the Earl of Huntly, and his brother, and Patrick Gordon, the lands were lawfully redēmit frae him, and he renuncit all right, title, and interest, that he had to the said lands. It was *replied*, and the persewar offered him to prove, That if any such renunciation was made, it was done *metus causa*; and the persewar deduced the matter *cum variis circumstantiis metus qui potuit cadere in constantem virum*. It was *duplied*, That he could not be heard by way of reply to allege *metum et quod metus causa fuit factum facta hac renunciations et præcipue contra tertiam personam qui vim aut metum non intulit* whilk was the tenants: Nor yet could the persewar be heard to allege the same against the Earl of Huntly, his infeftments and renunciations standing unreduced. To this was *answerit*, That, conform to the law and daily practice, the exception, *quod metus causa*, will be ay refused be way of exception *et de jure, prout in L. quod metus causa est actio in rem scripta nec solum personam vim facient reducet, sed adversus omnes restitui velit quod metus causa gestum est*; and the persewar, be way of reply, not only persewed the Earl of Huntly *qui vim et metum intulit*, but also the tenants and possessors of the ground.—THE LORDS fand be interlocutor, that *exceptio quod metus causa gestum fuit* might come in be way of exception or reply, conform to the act of Parliament, whereby nullities are ordained to come in by way of exception or reply, and therefore ordained the persewar to qualify his reply *quod metus causa* in writ, and the defenders to answer the same.

Fbl. Dic. v. I. p. 173. Colwil, MS. p. 469.

No 49:

SECT. XII.

Irritancy how Proponable.

1629. January 29. STEVENSON against BARCLAY.

By contract between Robert Stevenson and Alexander Barclay, Robert disposed to Alexander a tenement in Strivling redeemable upon 1400 merks; and, during the not redemption, Alexander set a back-tack to Robert for 140 merks yearly. Alexander, having caused registrate the contract, raised a charge of horning thereupon against Robert, which he suspended. The charge was, to enter him to the possession of the house disposed. The reason of suspension was upon the back-tack during the not redemption. To this *answered*, That

No 50.
Found that a back-tack with a clause irritant of two years running in the third, could not be taken away by exception, but behaved to abide a declarator.