

1622. July 6.

MURRAY *against* ADAMSON.

No 90.

SIMULATION of escheat cannot be opposed against a third party who acquires *bona fide*.

Fol. Dic. v. 2. p. 70. Kerse.

*** This case is No 54. p. 3658. *voce* ESCHEAT.

1632. June 27.

CASSIE *against* FLEMING.

No 91.

ONE Cassie, relict of one Hamilton, cordiner in Glasgow, reducing a contract and infestment of a wadset of a tenement in Glasgow, granted to Fleming by her husband and her, so far as concerns her consent to the alienation, she being conjunct fiar thereof, upon a reason of *metus causa*, *alleging*, that she was compelled to give her consent by her husband, upon just fear, she being beaten by her husband to the effusion of her blood, and menaced by him, and otherwise abused, and expelled out of his house, so that she behoved to consent; likeas, after her husband's decease, she revoked. This reason and qualification of fear, without that clause of the revocation, was found relevant and sustained, being *specifice* libelled, as was found necessary to be by the Lords, that the deeds libelled were done by the husband to her, for refusing to consent to this alienation, and for this cause expressly, albeit that, at the time of her subscription, she exprest no such cause of compulsion, and albeit the party, receiver of the wadset, knew no such compulsion, neither was the same ever intimated or signified to him, neither by the wife, nor no other, at her subscribing, or before, without which had been done, he *alleged*, that the reason libelled of *metus causa* could not be received against him, who had truly bargained with this party, and had really delivered to him the sums contracted for the wadset; and that it were against reason that he should be defrauded of his money, who had made a lawful bargain, and dealt *bona fide*, and was neither partaker of the violence enforced, nor cause of fear, neither knew thereof. This allegiance was repelled, and this qualification sustained; and thereafter the defender *alleged*, that she freely and voluntarily, of her own accord, gave her consent to the alienation, and received the money herself from the defender, never expressing any cause of discontent, but appearing to be well pleased therewith; and the pursuer opposing the reason of fear libelled, the deeds libelled being so done to her before her consent, that she behoved to consent thereafter, and durst not then express any contrary signification, so that she ought to have the prerogative of probation, the Lords found, that they would *ex officio* examine both the parties' witnesses, to be produced *hinc inde*, both anent the voluntary consent and coercion, and thereafter they would

A woman having consented to a disposition granted by her husband, it was found relevant against the dispoonee to elide the consent, that the wife offered to prove, that she was compelled by her husband.

No 91.

consider of the whole cause ; whereanent it is to be considered, that albeit, in these actions *super metu, talis metus* is required to be qualified, qui caderet in constantem virum, intelligitur vero metus et justus, qui etiam dicitur, quando res veresimiliter tendit ad metum, Bart. in L. Metum D. Quod metus causa ; is enim dicitur justus metus, qui dat causam restitutioni, *yet*, in muliere minor metus consideratur quam in masculo, quin et æstimandus est metus, etiam in viro, ex qualitate personæ, nam quidam potest metu affici et sic ad aliquod solvendum cogi, ex levi metu, qui tamen non caderet in virum constantem ; et quoad probationem metus probatur per indicia et presumptiones, sed hoc totum relinquitur arbitrio judicis ; et quoad exceptionem liberæ voluntatis notandum est, quod jura dicant, plus credi duobus testibus deponentibus de metu, quam centum de libera voluntate ; nam deponentes de metu, et violentia, attestantur de minis et tormentis, aliisque, quæ sensu corporis percipiuntur, et de mediis extrinsecis ; at deponentes de voluntate, dicunt de voluntate simpliciter secreta, quæ non tam aliorum sensibus subjacet, nisi et voluntas in actum aliquem eruperit, quæ per sensum dignoscitur, ut si actus factus sit in præsentia judicis, tum enim non præsumitur metus, tunc et quando est paritas terminorum, non est differentia circa fidem probationum de metu vel de voluntate, cum sic etiam per externa media, libera voluntas apparet : non est autem necessarium ut adhibeatur protestatio, ab eo cui metus infertur, de sic facta illi violentia et metu, sine enim ea protestatione actio procedit ; et cum ex quibusdam legibus protestatio videtur requiri, tum ex sola facta protestatione metus probatur, nec est opus alia probatione metus, sed si non sit facta protestatio, non negant illa jura, quin, probato metu, quis excusetur : metus vero purgatur ex libera voluntate, quæ post illatum metum expresse, vel ex aliquo actu deprehenditur, ut metus in promittendo tollitur, spontanea solutione facta ejus, quod fuit metu promissum, præsertim si interveniat temporis intervallum, inter metum et spontaneum postea factum, si ante spontaneam solutionem cessaverit causa metus ; nam durante et subsistente eadem causa metus, nunquam etiam cum intervallo, metus purgatur, ut in aliquo carcerato a communitate, quæ coegit carceratum ei præstare cautionem de certa summa communitati solvenda, quamque postea ille solvit liberatus etiam ex intervallo, non sic purgatur metus, nam durat causa, cum eum iterum communitas carcerare potuisset, nisi solvisset ; idem in uxore verberata a marito, quia volebat consentire cuidam instrumento, si postea, licet ex intervallo consentit, videtur metu facere mariti, durante matrimonio ; et hic est fere idem casus, de quo inter partes hic expressas agitur : ita est apud Philippum Decium, de regulis juris, ad regulam, in omnibus causis 68 ; hæc autem actio datur in rem, et non solum in eum, qui vim intulit, sed in quemcunque alium, ad quem res pervenit, etsi non ipse, sed alius vim metumque intulit : Ut est in Wesembecio. ad Tit. Quod metus causa, Tit 2. Lib. 4. D. et in legibus ipsis, hoc titulo. Idem in lege, Si vi 2. et L. Non-interest 5. Cod. eod. : at consideranda est dicta L. Si vi et L. Si per vim. Cod. eodem, quæ dicunt, pretium rei, quod datum est ei, cui metus fuit illatus, ut rem eo pretio venderet,

esse restituendum ei, a quo res petitur auferri, per hanc actionem, antequam restituatur: et hoc est notandum L. velle, 4. D. De regulis juris, quæ sic dicit, velle non creditur, qui obsequitur imperio patris vel domini; nam licet coacta voluntas dicatur etiam voluntas, non est tamen proprie et simpliciter voluntas; eâ enim, ex libero mentis arbitrio, et proprio motu procedit, et non ad alterius petitionem: quare voluntas coacta, est voluntas qualificata, et secundum quid, quæque instante necessitate fit; sic vero facta, non dicuntur in jure voluntaria; quod enim fieri debet ex voluntate, non est imponendum ex necessitate; L. Si per vim 4. Cod. de his quæ vi &c. requirit, ut actus æstimetur voluntarie factus fuisse, ut adhibeatur consensus ejus, qui dicitur compulsus, illi actui ex intervallo: idem authent. sive a me, sub. L. 21. Cod. ad Senatus Consult. Velleianum: ubi dicitur alienationem a marito, cum consensu mulieris factam, soluto matrimonio, illi non præjudicare, sed eam posse rem repetere, nisi duo concurrant. viz. nisi post biennium alienationi consentiat, et nisi aliæ res viro supersint, ex quibus illi plene possit satisfieri, alioqui licet frequenter consentiat mulier, non illa prejudicatur alienatione, quod et obtinet in alienatione rei dotalis; et authent. si qua. Cod. eodem: dicit oportere constari pretium fuisse conversum in rem mulieris, ut et jura canonum, nullum consensum admittunt, nisi juratum; ut cap. cum contingat. extra: de jurejurando: quod et convenit cum praxi, et legibus nostris, siquidem qui caute acquirunt rem, in cujus acquisitione requirunt uxoris consensus, solent coram judice hunc consensum adhibere, et juramentum ab ea exigere, consensumque hunc esse voluntarie præstitum ab ea, et non coactum, idque si ab illa præstatur extra viri præsentiam; ita est in statuto, 83. P. 11. Ja. III. And this action, upon the 19th of July 1632, was so decided; and the reasons of reduction *super metu* therein qualified, albeit long preceding the alienation, were sustained, and the exception of voluntary consent, albeit proponed for a wadsetter who was ignorant of the coaction, and alleged, that, at his contracting, she did willingly consent, which he offered to prove by the witnesses insert in his contract, was repelled. See VIS et METUS.

Clerk, Gibson.

Fol. Dic. v. 2. p. 69. Durie, p. 634.

1662. June 24. WOODHEAD against BARBARA NAIRN.

WOODHEAD pursues Barbara Nairn, for the mails and duties of certain lands. The pursuer *alleged*, Absolvitor; because the defender stands infeft in liferent of these lands. It was *replied*, The defender's husband disposed these lands to the pursuer with her consent, subscribing the disposition. It was *duplicated*, The defender's subscription and consent was extorted, *metus causa*, whereupon she has action of reduction depending, and holds the production satisfied with the writs produced,

No 92.

Found in conformity to Cassie against Fleming, No 91. p. 10279. *supra*.