

Fleeming.

Commission is not to be presumed, but must be proved c. iiii. p. ff. quod. m. caus. fo. uict. lom. ad ff. lib. 4. fit. 2. n. 14. at least per indicia et  
spectus. Mascard de prop. concil. 1057. n. 2 & 3. The Proof of Fear by  
these is allowed, because of the difficulty thereof. And the importance of  
Relevancy is left to the Judge's Arbitrement. Mascard lib. n. 13 & 12  
Tho' it is not necessary for a Person concussed to prove that what he does  
against his Will. Yet if he at the firste interpose a protestation of  
unwillingness to do such a Deed, there needs no other evidence of Force and  
to be produced. The Difender of a Reduction of alienation having offered to  
prove his Libel; and the Difender having engaged to prove that the Alien  
was free and voluntary; and witnessess him inde being examined ex officio  
whereof as many deponed that the quarralled Deed was voluntary as did de-  
pone that it was forced. The Lord's preferred the Difender's Proof of the  
Libel. Spalding Drall. lib. metris. Capit. contra Fleeming. For plus  
creditor duodecim menses affirmavit huius de mortis quam milles de spontan-  
e voluntate. Mascard de prop. concil. 1058. p. n. 5. Because Force and terror may  
be proved by the sensible externa media. Threatences. Maltreatment.  
and the like. Whereas a Person's free Will is secret this not obvious to  
Senſes of another unless it break out in some overt Act at a judicial  
~~Reduction~~<sup>or Ratification</sup>. Reduction of a Disposition being crowded upon the  
Design of Force, offered to be proved by the Difenders Servants who were Detain-  
ees and the Difender having offered to prove by the same Threatences, the  
granter of the Disposition has 24 hours at full freedom and sub-  
scribes carelessly. The Lord allowed either Party to adduce Witnessess to  
prove what Condition the Granter of the Disposition was in at and for a  
space of two Days before his subscribing thereto; and allowed the Execution  
servants accessory to the Force to be adduced by the Difender as necessary  
Witnessess, but declared, that if Force had been begun they would not ac-  
quit their selfe to prove the Freedom so January 1671 Stewart contra Whately  
and Dr. Hamilton.

The Allegation of force is taken off by proving that the Deed  
quarrelled was a Transaction. That a Person having for relief of his Foe  
who was taken with caption for a Debt in bad Winter Weather and con-  
fined betwix the Hills from place to place in his Nightgown and slippers  
when valetudinary and unable to put on his Cloaths, granted a Bond  
of corroboratior of the Debt, superseding payment to a longer Term,  
and obliging the Creditor to affect his Father's Estate by Diligence of  
Redjudication and Inhibition. That was found a Transaction of the Deb-  
t so as the Son could not reduce or impugn the said corroborative Security  
capite vis et metris is July 1706 grant contra Major Anderson. But  
Transaction doth not exclude Reduction upon the ground of Force and  
Fear of Death or Torture lib. 13. C. de Transact. Part. lib. 1. fit. 17. § 2. Tho'  
it would be good against Fears of an inferior Degree Stair lib. And a Bond  
granted to ~~redeem~~ redeem a Father brought under Confinement for  
Stair

Straits by Virtue of a Caption, after personal Intimation of a Suspension thereto  
was found reducible upon the Head of Fine the Fear albeit the granteer of  
the Bond got thereby an Ease of the Debt & Decr. 1671. McKintosh contra  
Spalding and Forgharson. 2. The Allegation of Force and Fear is elided by  
a subsequent Ratification of the quarrallable Deed after the cause of Fear is o-  
ver. Such Ratification is either tacit by implementing the Deed lib. 2. c. 4 C.  
de his g. vi. or by granting a corroborative security for it or by creating a  
longer Term to pay lib. 2. c. 4. re p. or exp. by renouncing the benefit  
of Reduction solemnly after ceasing of the cause of Fear fo. uict. lom.  
ad ff. lib. 4. fit. 2. n. 16. Sua cum sua iudice recte renuntiat lib. p. c.  
de part. So Reduction of a Wifes consent to her Husband's alienation of  
her conjunct Fee was excluded by her having judicially ratified the said con-  
sent, and sworn that she did it voluntarily conform to the. fit 84. d. n. 5.  
q. 3. (8 July 1672 grant contra Balcar) metris enim non presumi-  
tur ex alio gesto in curia uti redditur his aut coram aliquo judice aut  
magistrati, Mascard de prop. concil. 1056. n. 5.

### Tit. 9.

#### C. Fraud.

Fraud or Lovenage, is any Surprise Trick, Cunning, Misre-  
ding and any unfair Way that is used to cheat one lib. 1. s. 9. ff. de min.  
lib. 7. q. 9. q. 8. de pactis or the pretending one Thing and doing another to  
deceive and entice a Person. Which is term'd not improperly Dolus ma-  
ius, in opposition to what Lawyers call dolus iniurie or Deceit. Such  
is a Strategem in War. lib. 1. s. 13. ff. de bello mai. And Merchant Craft  
in Trade lib. 18. p. 2. ff. de minor. lib. 22. q. ult. f. locati. For the Ways  
by which every one manages his own Interest at the Time he contracts  
with another, and the Resistance of one Party to the Pretensions of  
the other within the Bounds of that which is uncertain and arbitrary,  
and which must be regulated, have nothing in them contrary to honest-  
ty. Les Lois Civiles &c. Tom. 1. Part. 1. Liv. 1. fit. 1. Sect. 3. q. 17. bid.  
Thus it is lawful in a Sale for one Party to overreach and take Advan-  
tage of the other in that extent which is uncertain and arbitrary, as in  
the greatness or lowness of the Price lib. 16. q. 4. ff. de minor. lib. 10. C. de-  
resund. vend. They distinguish Fraud into Fraud ex confilio a contrived  
cheat lib. 1. q. 2. f. de dol. mal. lib. 7. q. 9. f. de part. lib. 7. q. f. de reg. juri.  
or personal Fraud, which implies a Design of one of the Contractors to  
cheat the other, and the actual accomplishment of the cheat lib. 10. q. 1.  
ff. qua in fraud. cred. and dolus ex re ipsa lib. 36. f. de verb. oblig. Where  
one of the parties contractors happens to be cheated by the Thing itself,  
without any Fraud on the part of the other, as when a Thing is sold for  
less than half the true Value lib. 2. C. de resund. vend. But for the Bene-  
fit of Commerce our Law sustains only Fraud ex confilio (which is  
Hydra multorum capitum) as a reason of Reduction, and allows not  
the