bond, he cannot be supposed so officious as to pay for the other three. And his declaration now cannot be regarded, being given after he is turned bankrupt, and in prison; as was found by the Lords, 13*th February* 1680, betwixt *Samuel Maccreith* and *Campbell*, where one not *lapsus* is allowed the particular application of general payments; *ergo, a contrario sensu*, bankrupts may not.

All the Lords were clear, as to those receipts that bore "for a debt due by himself and others," or, "for value in his hands," that these behoved allenarly to cut off the first bond: And sundry were clear, that the rest which preceded the date of the second bond behoved also to be ascribed to the first. But, in regard some of the Lords thought that what he paid above his own share did only constitute Newmore his debtor in that superplus, and which he might compense by the second bond wherein David was bound alone; therefore, some started a new point, Whether a bond, wanting the words, "conjunctly and severally," and not bearing, that they are only bound conjunctly, or *pro ratis portionibus*, (for their equal shares,) will be reputed to divide, or to make them all *correi debendi*, and liable *in solidum*. Some thought these words, "conjunctly and severally," were only exegetic, and, by the exuberance of our style, adjected *ad majorem cautelam;* and that, without them, the parties must be understood as bound *in solidum*, and that the said clause *inest de jure*, though omitted. Others said, That, in obligations, no words should be superfluous; and this has been contrived by our predecessors to distinguish it from the other case. The Lords, thinking this point new, ordained it to be further heard.

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1705. *November* 6. GRANT of DALLAQUAPPLE *against* MAJOR ALEXANDER ANDERSON.

THE Lords advised the concluded cause, Major Alexander Anderson against Grant of Dallaquapple. Anderson of Westerton being debtor to Grant, by bond, in 1000 merks, and thereupon being charged, and taken with caption in February, and carried from his own house towards Inverness prison; by the way, his son, Major Anderson, granted a bond of corroboration, and thereon obtained his father's liberty. The Major, being charged on this bond, raises suspension and reduction of it, on this reason, That it was extorted *per vim et metum*, his father being sick and valetudinary at the time he was apprehended, and carried up to the Highlands from place to place, till the Major, *ex affectu filiali*, was forced to give this bond for relieving him. Which reason being sustained, and a conjunct probation being allowed anent his condition of health at the time, and how he was used by the way; and the testimonies coming this day to be advised, it appeared to be proven that Westerton was then troubled with the gout, and that they brought him away with that haste that he had not liberty to put on his upper stockings or shoes, but was in his gown and slippers; and that the first night he was locked up in a room wanting a fire; and next day was carried over several hills and mountains, till the Major his son interposed and gave this bond. From which it was CONTENDED,—That his indisposition was sufficiently proven, and the barbarous inhumane usage he met with. And the prison of Nairn being much nearer than Inverness, yet they would not

carry him there, but detained him *in privato carcere*, contrary to all the rules of humanity and law.

ANSWERED,—The probation did not amount to the terms found relevant by the act; for thereby sickness behoved to be proven; which was not done; but only that he said he had the gout, which every debtor, when in the messenger's hand, may pretend. And, *esto* he had been subject to it formerly, yet we know it comes and goes; and one will be, for many months, absolutely free of it. And, *esto* Nairn be a nearer prison, yet creditors are not precisely bound to carry them thither, seeing their nearness to their friends and others may obstruct their satisfying the debt; whereas the *squalor carceris* is mainly intended to force them to discover their effects. If a creditor, out of pure malice, would pass by many nearer prisons, and send him to a remote one, it is likely the Lords would consider it; but here, the hills they passed were in the direct straight way to Inverness; and he went but two miles the first night, and lodged in the minister's house, where every room is not accommodated with a fire; and next day, having only travelled four miles farther, his son transacted the debt, and so he returned home. And it were of very dangerous consequence to the security of creditors, if, on such allegeances of maltreatment, their transactions were reduced and convelled. And, as to the precipitation in carrying him off, they behoved to make the more haste that Westerton's tenants were gathering to deforce the messenger and rescue their master. And he had no prejudice; for there was not one sixpence more in this bond of corroboration than was in the principal original debt; and he had homologated it, by taking an assignation for his relief to another bond.

REPLIED,—That, as the security of creditors was a weighty argument on the one hand, so common humanity to the nature of mankind pleaded as strongly on the other. And it is most unaccountable to carry an old poor sick man from his house, in the midst of winter, to the evident endangering of his life. And, as it was very dutiful in the Major to redeem his father from this hazard, so law cannot be so cruel as to make him liable in a bond so unjustly impetrated and extorted. And that, in several cases, the Lords have annulled such bonds; as *22d January* 1667, *Moir* against *Stewart*; *8th December* 1671, *Macintosh* against *Spalding*; and *10th January* 1677, *Stewart* against *Whiteford*.

It was farther ALLEGED for Grant, the charger,—That, whatever force or fear may be pretended to have been used against the father, yet there was none used to the Major, but he freely and voluntarily granted the bond; so that the *metus incussus patri* cannot repone him, no more than a cautioner for a minor is liberated, though the minor himself, by his personal privilege, goes free. And the law seems to be of this mind, *l.* 13, and 14, *D. quod metus causa.* And Grotius determines this point, *lib. 2, de Jure Belli et Pac. cap.* 11, *num.* 7, *et lib.* 3, *cap.* 19, *num.* 4, where he is positive, *Si quis promiserit prætium, ut amicum injustis vinculis liberaret, tenebitur tamen, quia (ut inquit Seneca,) tu a paciscente coactus non es.*

ANSWERED,—Whatever that might operate amongst strangers, it could not take place here, where a son engages to redeem his father; they being *una et eadem persona in jure*; and natural piety obliging him *omnibus modis servare vitam illius cui ipse suam debebat.* And here, to sustain the son's bond, is all one as if the father, in these circumstances, had given bond; for he will be obliged to relieve his son if he be overtaken.

The Lords, having advised the testimonies and debate, did, by a scrimp plurality of six against five, find the reason of reduction on his sickness and force not sufficiently proven; and therefore sustained the bond, and assoilyied from the reduction. It is true, in the forecited case of Macintosh and Spalding, the bond was reduced on the circumstantiate fact of extortion and fear; but what influenced that decision was, the debt for which the bond was taken stood suspended, and the suspension undiscussed; which is not pretended in this case.

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1705. *November* 9. JOHN BALLANTINE *against* ELISABETH CHARTERIS.

JOHN Ballantine, in the Canongate, against Elisabeth Charteris, daughter and heir to Charteris of Amisfield. John Ballantine having right, by progress, to a comprising led by Thomas Rome of Clouden, against Sir John Charteris of Amisfield, in June 1638, he pursues a reduction and improbation of the rights upon that estate.

ALLEGED against the said John,---That his apprising was prescribed *non utendo*, there being nothing done upon it for the space of forty years after its date.

ANSWERED,---That the prescription was interrupted, either by diligence on it, or the minority of Mr Thomas Rome of Clouden, the appriser. And this being sustained as relevant to elide the prescription, John Ballantine adduced probation to instruct that the said Mr Thomas, the appriser's heir, was born in May 1647; that his father Thomas died in October 1654; whereby it appears that the son was then only seven years and five months old, so he had thirteen years and seven months to run for completing his minority; and that the summons of improbation being raised in December 1690, and executed in January 1691, there are fifty-two years betwixt the leading the apprising and executing this summons; out of which, if we subduct the thirteen years and seven months of minority, there remain but thirty-eight or thirty-nine years; so it is clearly brought within the forty years of prescription.

Against this probation it was ALLEGED for Elisabeth Charteris,---That his being born in 1647 is not sufficiently proven; because there was only one witness, *viz.* George Rome of Beoch, who deponed he was born that year: and the rest were only adminicles; as the contract of marriage, the father's bible bearing his age, the clerk of the kirk session's testificate of the time of his baptism, and his act of curatory, bearing him to be then sixteen years old; none of which are authentic probative writs, but mere assertions, which can make no faith. And, as to Beoch, no respect can be had to his deposition, because he was the said Mr Thomas's uncle; and, by his deposition, he makes his nephew a gainer: for, if this apprising subsist, it pays so much of his father's debt, and disburdens his estate of the same.

ANSWERED,---This objection, whatever it might operate, if Mr Thomas Rome, his nephew, were pursuer, can never militate against John Ballantine, a singular successor and adjudger from him, who is no relation to Beoch the witness.

The Lords repelled the objection, and found him a habile witness. Then they fell to consider how far his single testimony, being conjoined with the other documents produced, did amount to a sufficient probation of his age *ad victo-*