

No. 18. ed, and yet the way of procuring the same may be severely punished; 6to, As to the difficulty of probation, there being no adminicles in writ, that there were such a minute, it is not considerable; seeing *multa permittuntur causative*, which cannot be done directly; and that though the result of probation by witnesses, may be the making up or taking away of writs, which cannot be done directly, but by writ; yet when that which is to be proved is in fact, it may be proved by witnesses; as in the same case, that the disposition in question was extorted, it may be proved by witnesses, to take away the said disposition: And if a person should be forced to grant a disposition of lands of 20 chalders of victual of rent, and in exchange should get a disposition at the same time of other lands of the half value, it were a good defence and proveable by witnesses, that the pursuer did get, the time of the granting the disposition of lands, worth 20 chalder victual, a disposition of less value; and *contingentia causæ* and of a transaction and circumstances of the same, ought not to be divided; but may and ought to be entirely proved by witnesses, as well for the defender as the pursuer.

Act. Lockhart & Sinclair. Alt. Cunningham & Mackenzie. Clerk, Mr. John Hay. In presentia.
Dirleton, No. 419. p. 207.

1680. February 18. BURNET against EWEN.

No. 18.
Homologation of a debt not inferred by the debtor granting a bond in prison.

An abatement given, infers a transaction, which will be presumed to have been entered into freely.

Mr. Andrew Burnet pursues John Ewen for reduction of a bond of £.7,000, upon this reason, that it was extorted by unwarrantable force, Mr. Andrew having been arrested and imprisoned at London by a bill of Middlesex, at the instance of Ewen, arresting him to find caution for £.2,000 Sterling, or go to prison; and he being a stranger, and not able to find caution for such a sum, was detained nine weeks in prison, and forced to grant this bond to get out, without any antecedent debt. The defender alleged *absolutor* from this irrelevant reason, because the bill of Middlesex is a legal execution, which never infers extortion or force; and though it be peculiar to that place, yet there is an ordinary remeid whereby the party in prison may have the debt determined within three court-days, and gets great damages, if the arrestment be found unwarrantable; and by the law and mutual correspondence of all nations, legal executions, many of them are never sustained as extortion, either in the same or any other nation; and to sustain this execution as an illegal force, would ruin the commerce of Scots merchants in London, who would never get any thing there on trust. The pursuer answered, That he being a stranger, unacquainted with the laws and customs of England, albeit he through ignorance did not discuss Ewen's claim in England, yet both being Scotsmen, Ewen cannot decline to discuss it in Scotland; by which it will be evident, that it was a most unwarrantable arrestment for £.2000 Sterling, without any ground of debt. The defender replied, That there was an antecedent debt, and produces Burnet's letter, desiring Ewen to honour the bills of Thomas Burnet

his brother, though it were to the value of both his own and his brother's estate ; upon credit whereof Ewen had honoured Thomas Burnet's bills, and by an account betwixt them, Thomas was debtor to him in £.500 Sterling, and Mr. Andrew himself is debtor in two bills, so that it is an unjust clamour that there was no antecedent debt, which being, this bond can upon no account be quarrelled ; for after bonds are granted, the instructions of prior debts are neglected by the most provident men, and most ordinarily lost ; and it were of pernicious consequence, after bond is granted, to put the creditor to instruct the anterior cause of it : Likeas there is here produced a general discharge by Burnet, bearing, That he had received a bond from Ewen, that upon payment of this £.7,000 he should give him a discharge, which in effect is equivalent to a discharge ; so that there being mutual discharges, the bond must be understood as upon a transaction, which is the most unquestionable security to spite all plea, that when upon account of any doubtful process, parties do settle by bond and mutual discharge, that can never be recalled, upon pretence that the claim or process was not just. The pursuer duplied, That albeit ordinarily when bonds are obtained, the creditors are not put to instruct the anterior cause, these being voluntary deeds, supposing or acknowledging the anterior cause ; but that holds not in bonds granted upon legal distress, as was found between Rew and Houston, in 1668, No. 12. p. 16484, where Houston being under caption, granted a bond of corroboration, yet it was found " no transaction, seeing there was no abatement or deduction, or yet a homologation of the former bond, being done upon caption, as an act of obedience : Likewise found the 10th of June, 1673, Sir James Thomson against Robertson, (not reported), that a bond granted *pendente processu*, was no transaction, seeing there was no abatement ; so that in this case there being no instructions given up, and no discharge granted to Burnet, but an obligation to discharge upon payment ; and it being acknowledged what were the grounds of the claim and account, he might thereupon have pursued Burnet or his brother, either upon the first grounds of debt, or upon this bond, and all that they could allege, were, that he could not seek both, being double securities for the same sums, and therefore this bond is but a corroborative security, albeit the arrestment had been never so legal, and there is neither transaction nor homologation in the case.

The Lords found, That seeing Ewen acknowledged this bond was granted when Burnet was arrested and imprisoned at his instance, the former ground of the debt remaining undischarged, that this bond was but an accumulative or corroborative security, and therefore sustained the same only in so far as it might be astructed by instructing anterior debt, no instructions having been given up ; but found it relevant that Ewen had given in a special account to Burnet, " charging him with sums exceeding this bond, and that he had accepted a lesser sum than this claim amounted to, and thereupon dismissed Burnet, whereby this bond was upon transaction ; and found the same relevant *scripto vel juramento* of Burnet, to sustain the whole bond, without further instruction.

Stair, v. 2. p. 758.