for preference, and the executions did not mention the particular hours on which they were done, the Lords were in use to bring them in *pari passu*: for the distance of time lying in the lubricity of the memory of witnesses, they might very readily either forget or mistake the hour of the day: and so Lord Stair, *b.* 1, *tit.* 1, requires the difference of three hours at least. And, as to the competency of the commissaries, the same was not yet decided, but appointed to be heard in presence.

The Lords brought the two arresters in *pari passu*.

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1705. *July* 20. GEORGE MONRO of NEWMORE *against* OUCHTERLONY and OTHERS.

NEWMORE having sold a bargain of victual to Ouchterlony, Kid, David Alexander, and Maul, he gets their bond for 3000 merks, as the price, dated in 1701. Thereafter David Alexander and he make a new bargain in 1703, for which David alone gives him a bond for 2700 merks. There are many partial payments made by David to Newmore, some of them betwixt the date of the first and second bond, and some of them after the second bond; and these again, partly before the term of payment of the second bond, and partly after it. Newmore charges the four obligants in the first bond for payment of the 3000 merks therein contained. They SUSPEND, That the sum charged for is near satisfied and paid by David Alexander; and produce the receipts; and, in so far as they fall short, they offer present payment of the balance.

ANSWERED for Newmore, the charger,—The four obligants contained in the first bond are not bound conjunctly and severally, but only for their own shares; so it is not to be presumed that David Alexander would pay any more than his own fourth part: And, in so far as he has paid more, it must be ascribed and imputed in satisfaction of this second bond, as to all payments posterior thereto. And, *quoad* the prior payments, Newmore became debtor to David *receptione indebiti*; and now compenses the same by the sum which David alone owes him in the second bond; and the payments being indefinite, it is very lawful for Newmore to ascribe them to the debt for which he has the least security, *viz.* David's own bond, rather than to extinguish a debt where he has three sufficient persons bound with him.

REPLIED, 1*mo*,—Any payments which David made prior to the term of payment of his second bond, can neither in sense nor reason be imputed to that debt which was not then in being, but only to the first. 2*do*, He was manager of the society, and trusted with the victual; and, as the price came in, so was he ordained to pay Newmore's bond; which he accordingly did, and so must first extinguish that bond. 3*tio*, David, by a declaration under his hand, has imputed all his payments towards the first bond; and to ascribe the superplus above his own fourth, to constitute Newmore his debtor, and so when he is pursued, *condictione indebiti*, for repetition, to afford him a ground of retention and compensation on the second bond, is a mere notion and subtilty, never dreamed of by David Alexander or Newmore; but, *ex post facto*, invented by his lawyers.

DUPLIED for Newmore,—Law does not presume that any man pays more than what he really owes; and so David being only debtor in a fourth share of the first

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