

bond would fall in consequence as granted for the same cause. The charger answered, That he was now not obliged to dispute in relation to the decret; *first*, Because the suspender had homologated the same, by taking a discharge thereof, and giving a bond therefor; *2dly*, There was not only a homologation, but a transaction upon a reference made by the parties to Baldone, conform to his attestation produced; so that that transaction cannot be recalled upon any pretence, but is the most firm obligatory contract of any. The suspender answered, That his payment making, and taking discharge, was no approbation, nor homologation, but that he might reduce the decret, and repeat if he had paid, or had been pointed, and so may retain; especially seeing it was done *metu carceris*, he being taken with caption; and as to the transaction, he denies the same; neither can it be instructed by Baldone's attestation, but by the suspender's oath or writ.

No. 12.

The Lords found that the granting of the bond was no homologation of the decret, but that he might quarrel the same; and that the giving of the bond was no transaction, if he paid or gave bond for the whole sums contained in the decret; but found, that if in consideration of the grounds upon which he might quarrel the same, he had gotten an abatement by arbitration, or otherwise, that he could not quarrel the same, and found it only probable by his oath or writ.

Stair, v. 1. p. 547.

1671. December 4. M^cINTOSH against FARQUHARSON and SPALDING.

In a reduction of a bond granted by Robert, Alexander, and James M^cIntoshes, to Spalding of Ashintully, and assigned by him to Farquharson, upon this reason, that their father John M^cIntosh being taken with caption, and carried to a private house in the Highlands, notwithstanding he had a standing suspension and intimate, the pursuer's sons finding their father kept under guard a close prisoner, did grant this bond for his liberation from the danger he was in by such an illegal execution, not knowing but his life might be in hazard. It was answered, That the father being truly debtor, and under caption, and not having the suspension to show the messenger, he was justly apprehended; and the reason he was not carried to a public prison was his own desire, so that the sons having voluntarily transacted and given their bonds, they could not reduce the same *ob vim et metum*, there being no violence done to them.

No. 13
Effect of detention in a private house.

The Lords did sustain the reduction, and found that children giving bond to liberate their father from imminent danger, who by the caption could not be lawfully carried away to the Highlands after a suspension intimated, albeit at the dwelling place of the creditor; that therefore the sons being moved out of duty and natural affection to grant a bond for his liberation, it was equivalent to violence and fraud done to themselves.

Gosford MS. p. 209.

No. 13.

* * Stair reports this case :

Robert Farquharson of Burghdarge having obtained a bond of 1700 merks from John, Robert, Alexander, and James M'Intoshes, and having assigned the same to Andrew Spalding, he charges thereupon, and they suspend, and raise reduction upon a reason of extortion, *ex vi et metu*, which they qualify thus, that Farquharson having obtained decree of spuilzie before the Sheriff, most unwarrantably against the suspender's father, he did suspend the said decreet, and intimated the suspension to Farquharson; yet Farquharson, with a number of his accomplices, came to M'Intosh the father's house, and notwithstanding of the suspended caption upon the decree of spuilzie, took him violently out of his house, and carried him to the mountains of Glenlee, and there detained him, and menaced him, until he was forced to send for his four sons, who gave this bond to liberate their father. It was answered, that the reason was not relevant, in so far as concerned the sons, who do not pretend any force or threats against them; and as a major becoming obliged for a minor, though the minor be freed upon minority, the major will remain liable; so a cautioner obliging for a person who granted bond, *ex vi et metu*, will not be liberated, though the principal was liberated; *2do*, Whereas it is alleged that the caption was suspended, *non relevat*, unless the suspension had been shown at the time of the execution of the caption; and for any citation or intimation of the suspension, it might have been at the charger's dwelling house, and not known to him, and might have been made without a warrant, as the same party had done before, having given the copy of a suspension when none was raised; *3tio*, Farquharson or the messenger had a caption against M'Intosh, at the instance of the Earl of Airly, which was not suspended; and for the carrying of him to Glenlee, it was offered to be proved that it was at his own desire; and there was a transaction made not only of their debt in the caption, but of several other questions; and though these suspenders would repon the charger, *res non est integra*, for *medio tempore* M'Intosh their father is *lapsus bonis*. The suspenders answered, that the unwarrantable imprisonment and threats against the father was *justus metus* as to his son, who by their natural obligation and affection could not but interpose to relieve their father from unjust imprisonment and hazard of his life; and seeing the father did intimate his suspension, and produced the intimation which he bides by as a true deed; he was not obliged to bear the suspension always about with him, but the chargers behoved to proceed upon their peril.

The Lords found the reasons of reduction relevant, and the several members thereof thus qualified, that the suspender was taken upon pretence of a caption, which was suspended, and the suspension truly intimated, without necessity to show it at the time of the execution of the caption, unless the intimation had been only at the charger's dwelling house, and that he would depone he knew not of it, and so had proceeded *bona fide* to a lawful incarceration; neither had they any respect to Airly's caption, which was not executed, nor any power granted by Airly for

that effect ; but as to that member, they found the allegiance relevant to be proved by M'Intosh's oath, that he was carried to, or kept at Glenlee by his own consent ; yet so, as that if any threats or menaces were used against him there, it should be relevant separately ; neither would they oblige the sons to be caution for what the father should be found liable upon the decree of spuilzie.

No. 13.

Stair, v. 2. p. 20.

1672: June 28. MURRAY against SPALDING of Assintilly.

Andrew Spalding being debtor by bond to Alexander Rattray in the sum of 500 merks, he to make compensation thereof, took assignation to the sum of £.100 Scots due by the said Alexander Rattray, who to evite the compensation, assigned the said sum of 500 merks to Robert Murray his good-brother to his own behoof, at least without any onerous cause ; whereupon Robert Murray did apprehend Assintilly with caption in a public market unexpectedly, and obtained from him a bond of corroboration of the first bond of 500 merks, bearing £.500 of penalty, and obliging him never to suspend. Assintilly being now charged upon the bond of corroboration, suspends on this reason, that the bond of corroboration did not import his homologation of the first bond, or any transaction thereanent, because it was an act necessary that he could not shun ; and though it was no violence, or illegal force, yet it was a legal compulsion nowise inferring his approbation, and there was nothing gotten down upon the uncertainty of any plea that might be thereanent ; so that if Assintilly had made payment, or to hinder the apprising of his lands, had offered moveable goods to be poinded, he might notwithstanding suspend, or reduce the principal bond, if he had just reason, and recover the money and goods as *indebite solutum* ; so, much more may he in this case, having an unquestionable reason of compensation against the first bond upon his assignation, which, though it was not intimated, yet it is sufficient against Murray's creditors' assignee, though his assignation be intimated, because his assignation is to the behoof of the cedent, or the sum due for it is yet in his hand ; and it is a fraudulent deed betwixt two good brethren, in prejudice of the debt assigned to Assintilly, done by collusion to exclude compensation, Rattray the cedent being at that time bankrupt or insolvent. It was answered, That the bond of corroboration was opposed, which, if it do not import a passing from compensation, it imports nothing, but puts the party in worse condition than before it was granted, for then he had his debtor in his hands by caption who now is liberated ; and therefore it must necessarily exclude suspension, even though the principal bond might be reduced ; and the bond of corroboration falls in consequence, if the reason was upon payment, or any intrinsic reason ; but compensation, which is extrinsic, and may be made use of by way of exception or action, is certainly past from by the corroboration, especially it passes from all suspension, and obliges never to suspend, and even repetition of payment could not be obtained, unless protestation had been

No. 14:

A bond of corroboration given by a person under caption for the debt found to be unchallengeable.