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-*

riam causæ. And they found that, by the contract of marriage, his father and mother were married in 1645, and that, by the memorial in the first leaf of his father's bible, there was a daughter born as their first child; and he is only the second, and set down as born in 1647; and not only are their two ages recorded, but all the other children's births regularly set down: And what could tempt the session-clerk, or the commissaries in the act of curatory, to insert a false date? And therefore sustained these adminicles, with Beoch's oath, as a sufficient instruction and probation of his being born in 1647. But the Lords wished that there would be an authentic register settled for baptisms, burials, and marriages, as the French King's edict at Versailles has done; which would facilitate such processes, and hold in a great expense to the lieges.

Then Charteris the defender OBJECTED,—That the time of his father's death was not fully proven; in so far as one of the witnesses deponed he was now sixty years old, which made him but nine years old in the 1654, at which time he says Clouden died; and his *causa scientiæ* is not, that he was at his death, lykewake, or burial, but only that the said Thomas Rome of Clouden, having made a right, in his sickness, to his heir's prejudice, he raised a reduction of it, *ex capite lecti*, which made him curious and inquisitive to inform himself at what time he died; which reason resolves into a mere hearsay, and makes him only a *testis de auditu.*

ANSWERED,—What a man hears at nine or ten years old, he may afterwards very well depone thereupon. It is true, the common uncontroverted rule is, What we have heard or seen after fourteen is to be credited, and what we declare we saw or heard before seven, (which is the period of infancy,) is not to be credited: but law has not precisely determined a fixed time betwixt seven and fourteen, but has left it to circumstances; for our memories will be very fresh and retentive at nine or ten, and our senses capable enough of impression from things then falling under them. And though he was not at the burial, yet his concern to reduce that deed *in lecto* made him very nice and exact in his inquiry anent the time of his death, wherein he could not be readily mistaken; which fortifies his testimony as much as if he had been at his burial, seeing even in that case he had no more but the common report that it was his burial, and that his corpse was in the coffin, and laid in the grave.

The Lords found the probation of his death sufficient, being *in re tam antiqua* as fifty years ago; and so repelled the objection.

Then the defender CONTENDED,—That the citation on this summons, in January 1691, was not a sufficient interruption; because, by the Act of Parliament in 1699, it is declared, That all citations used for interruption must be likewise executed at the kirk-door, on a Sunday, after divine worship; which was not done here.

ANSWERED,—That is only used where the process is not insisted in, but suffered to lie over and sleep; but here the cause was duly insisted in.

The Lords superseded to give answer to this nullity, till the calcul were made; when the cause was marked, called by the clerks, and given out to be seen and enrolled.

It was suggested,—That, if the surcease of justice, after Oliver's death in 1658, and at the Revolution in 1689, be subducted here, the prescription will be clearly found not to be run; but it was thought that, in the grand prescription of forty years, these stops and intervals of justice were not considered nor

deduced, so as to take any place; for as prescription is the great security for ascertaining our properties, yet interruptions are not so odious and unfavourable but sometimes any evidence or document, *talis qualis*, has been found sufficient to stop the course of prescription. *Vol. II. Page* 289.

1705. *November* 13. WILLIAM GORDON *against* SIR ANDREW KENNEDY.

[See the prior part of this case, Dictionary, page 7508.]

WILLIAM Gordon, late factor at Campvere, now merchant in Aberdeen, pursues Sir Andrew Kennedy, conservator of the Scots privileges in the Netherlands, for payment of certain sums contained in accepted bills; and, after some debate, obtains a decreet against him; which Sir Andrew suspends on this reason, That he must have compensation; because you having pursued a divorce against your wife, and the Dutch having owned her, you employed me to negotiate that business for you, at the Hague and the Loo, wherein I was at great expenses and trouble, which you must refund me. And the conservator being reponed against the first decreet, as being then out of the kingdom when it was obtained; and having referred his reason of suspension to William the charger's oath, he confessed that he applied to him, as judge of the place, to protect him against the injustice of the Dutch, but did not promise him payment, &c.

This oath coming to be advised, it was first ALLEGED for Gordon the charger, —That the reason of suspension being a compensation, and not proponed in the first instance, was not, by the 142d Act of Parliament 1592, receivable *in secunda instantia*, being competent and omitted in the first.

ANSWERED,—The allegeance was very true, if the first instance was subsisting; but it was extinct, in so far as Sir Andrew was reponed against that first decreet, and paid £20 of expenses; and so, it being turned to a libel, this became truly the first instance.

The Lords, in respect that the first decreet was turned to a libel, found the compensation yet receivable.

Then, *2do*, it was ALLEGED for Gordon, That his oath did not prove the compensation, seeing he denied any promise of payment; his employing him being *ratione officii*, as a judge bound to protect all Scotsmen under his jurisdiction; and which he was bound to do *gratis*.

ANSWERED,—By an express article and instruction from the royal burghs, as he was obliged to act and negotiate for the Scots merchants, so it is expressly declared it was to be on the employer's expenses. *2do*, This obligement of reimbursing and indemnifying me is implied, *ex natura negotii*, without any express paction. If I employ you, though there be nothing treated anent my repaying you, yet, without a promise, it is due; and your swearing that you never promised to repay me, does not liberate, because it is presumed and included; and you depone on a point *in jure* anent your own credulity, which is only your erroneous opinion.

Some of the Lords thought Sir Andrew's grounds of compensation not being so liquid nor instantly verified, that they ought to be reserved to a farther liquidation in a process particularly to that effect: But the plurality inclined to receive them *hoc ordine*, without multiplying pleas; and so found that employ-