

ing-house of Thomas Lawson in Bamblea, without past bill or suspension, under the pain of 1000 merks by and attour performance:—The Lords found that James Henderson's compearing and offering himself prisoner for himself, and in name of the other co-obligants, who had no lawful excuse for not appearing, was not sufficient to free them from the penalty in the bond of presentation; albeit payment by one of severals bound jointly and severally, would liberate the rest: and Henderson behaved either to pay the penalty, or go to prison.

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1710. July 15. JOHN BARCLAY *against* Mr. DAVID BARCLAY of Touch.

IN the action at the instance of John Barclay, third son of the second marriage to Mr. David Barclay of Touch, against Mr. David Barclay, now of Touch, as representing Mr. David his grandfather, for payment of one thousand two hundred merks, as the remainder of four thousand two hundred merks, contained in the grandfather's bond of provision, in favours of the children procreated, or to be procreated, betwixt him and Anna Hamilton his second wife; the grandfather having granted an heritable bond for one thousand pounds to each of Robert and James Barclays, two of his three children of that marriage; and afterwards granted bond for, and paid other five hundred merks to Robert:—The Lords found, That albeit *debitor non præsumitur donare*, yet the five hundred merks was not to be imputed in payment of any part of the one thousand two hundred merks; and the brocard took no place in this case.—Because, 1. The bond for the five hundred merks bore,—In respect of the one thousand pounds formerly provided to Robert, was liferented, and the granter was willing to provide him to a sum for his education; he obliged himself, by and attour the said one thousand pounds, to give, content, and pay to the said Robert the sum of five hundred merks;—which narrative imported the said sum to be a mere gratuity. 2. Old Mr. David Barclay not being debtor to Robert at the granting of the five hundred merk bond, there can be no place for the brocard, *debitor non præsumitur*, &c. And it is clear he was not debtor, being under no obligation to give him more than the one thousand pounds already provided, which was more than his share: and, perhaps it may be said, he was under no obligation to give Robert any thing, having the privilege to divide the sum among the bairns at his pleasure.—Albeit it was alleged for the defender, That *utcumque* his grandfather shewed more kindness to Robert than to his other children of the second marriage, by giving him the additional provision of five hundred merks; it was never intended as a free donation, not to be imputed in payment of the capital sum, wherein he stood bound to the children of the marriage.

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