

who were cited to give their oath, for a certain time, within which they might come in to depone, and return to their own dwelling; yet they never did grant a protection to a pursuer, that he might have *personam standi in judicio*, and follow forth actions at his instance as a free liege.

The Lords, notwithstanding of the answer, did grant a protection until the end of the session.

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1674. *June 24.* PATERSON *against* JOHNSTOUNE Son to the Laird of Lockerbie.

IN a suspension, raised at Johnstoune's instance, who was charged upon a bond of borrowed money, granted by him to Paterson, upon this reason,—That the said bond was granted for bygone maintenance due by his father, who, upon decreets recovered against him for the same, was under caption; and that, by the late proclamation, all maintenance was discharged, except where the bond was given by the heritor, who was debtor: but so it is that the suspender's father, being only debtor, had never given bond; and therefore, as he was free, so his son could not be decerned to make payment:—

It was ANSWERED, albeit this bond was given for maintenance due by the father, against whom several decreets were recovered, which the charger did accept as a sufficient security for payment; and had no more to do with the father; and so it could not fall within the proclamation; and the granter ought to seek his own relief, wherein the charger was not concerned.

The Lords did find the letters orderly proceeded, notwithstanding of the reason; and found, That, having voluntarily given bond in his own name, he ought to fulfil the same; and it did not fall within the case of the act of the council, the father not being distressed.

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1674. *June 24.* HENRY MURRAY of LOCHLEAN *against* SIR WILLIAM MURRAY of AUCHTERTYRE.

IN a pursuit at Lochlean's instance, as assignee by the heirs of Mr John Malloch in and to a back-bond granted to him by Auchtertyre, whereby he was obliged to lead a comprising for his own debt, and the said Malloch, for their security of the sums of money due to them; and in case of sale of the lands, to dispone as much thereof to the said Malloch as would be effeiring to his sum, principal, annualrent, and expenses; as likewise bearing, that he should not dispone without Malloch's consent. Whereupon he craved, that, the comprising being now expired, Auchtertyre should be decerned to dispone to him a full proportion of the said lands, as, Auchtertyre's own sums and his being calculated, would fall to his share.

It was ALLEGED, That the back-bond could not furnish any such action; because, Murray of Buchantie, being the common debtor, against whom several creditors were leading comprising, Auchtertyre took upon him the trust volun-

tarily, and led a comprising upon the said back-bond, whereby he hath a power to dispoſe with Malloch's conſent; and having now diſpoſed the ſaid lands to the common debtor, and thereby gotten payment to Malloch, as well as himſelf, of the whole principal ſum and annualrents, and reponed Buchantie, the common debtor, to his eſtate; it is a moſt odious and rigorous purſuit, that this purſuer, who was but aſſignee by Malloch for an inconsiderable ſum, ſhould crave that Auchtertyre ſhould diſpoſe to him a part of the lands far exceeding the worth of the whole ſums due; he being in as good condition as Auchtertyre himſelf; eſpecially ſeeing this truſt was undertaken with conſent and knowledge of the common debtor, who was preſent, and did write the back-bond at his own houſe, and delivered the ſame to Malloch.

It was REPLIED, That, the back-bond bearing a clear truſt, the purſuer ought to have the full benefit thereof, as if the expired comprising had been led in his own name; and Auchtertyre, the trustee, was *in peſſima fide* to diſpoſe theſe lands without Malloch's conſent.

The Lords, before answer, having ordained Auchtertyre to condeſcend what way he was intruſted to lead that comprising; whether to the benefit of the common debtor, as well as to Malloch and himſelf: and thereupon having taken the oath of Robert Hamiltoun, who declared he was ordered by the common debtor to lead that comprising; and that he paid the expenſes; and that Auchtertyre was willing to depone upon the verity thereof: as likewise, finding that the back-bond was all written by the common debtor's hand, at his own houſe, and that he had paid yearly the annualrents, and a part of the principal ſum, they did aſſoilye Auchtertyre, upon payment of the remainder of the principal ſum and annualrents, and expenſes, not only upon the condeſcendence foreſaid, but likewise becauſe, in law it being *factum impreſtabile* to diſpoſe any part of the lands which he had already diſpoſed to the common debtor, all that he was liable for in law was *damnum et intereſſe*; which was liquidated by the back-bond to be the principal ſum, annualrent, and expenſes; which Malloch could never reſuſe, if he had conſented; and he being dead before the diſpoſition, his children were in as good condition as if he had conſented.

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1674. June 30. LEWIS NISBET *against* MR JOHN WISHART.

IN an action, at the ſaid Lewis's inſtance, againſt the ſaid Mr John, from whom he had purchaſed an heritable right of the lands and teinds of Drimmie, to hear and ſee him found and decerned to accept of a diſpoſition back again of theſe ſame lands, or to refund the price thereof that he had gotten; or otherwiſe to procure to him a three nineteen years' tack of the teinds from the titular, upon an alleged promiſe made by the ſaid Mr John in the terms foreſaid.—

It was ALLEGED for the defender, That any ſuch promiſe being but verbal, and not put in writ and ſubſcribed, was not obligatory in law; there being always *locus penitentiæ* as to all diſpoſitions of lands or heritable rights, notwithstanding of any communing or verbal tranſaction; until the diſpoſitions, contracts, or bonds, be ſubſcribed by the contractors.

It was REPLIED, That the promiſe libelled, being alternative, either to procure