It was ANSWERED, That the reason was nowise relevant; because the bond charged upon did expressly bear, that the charger, having given his bond to William Lockhart, creditor, at the desire of the suspender, to whom he was not obliged, therefore the suspender did oblige himself to relieve the charger at a certain day, which did long expire before Lockhart's decease, which was then *factum prestabile;* and the charger ought not to be in a worse condition, and lie under the hazard of that debt, through the fault of the suspender: neither ought he to accept of caution to relieve him when he is distressed, he not being in the case of a cautioner for a principal sum, who can only seek relief upon a distress; but, being solely debtor to Lockhart, at the desire of the suspender, his bond ought to be fulfilled *in terminis*, and he freed by a discharge of that debt.

The Lords did find, That the charger ought to be relieved without any distress, the suspender being bound, as said is; and that the charger was not obliged to accept of caution, whereby he might still lie under hazard; but did ordain the suspender to do exact diligence against the representatives of Lockhart, that they might receive payment, and grant a discharge of the debt betwixt and a certain day; and if then he did not procure a discharge, they decerned that the suspender should pay in to the charger as much money, to lie in his hands, as would relieve him, whensoever any representing Lockhart, to whom he was bound, should distress him for that debt: so that *intus habens*, he could pretend no danger or prejudice.

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1675. *January* 22. ISOBEL LAW *against* DAVID ARNOT of CAPLEDRAE.

THE said Isobel, having arrested the price of lands, belonging to Capledrae, in the hands of David Arnot, as creditor to William Arnot, did thereupon pursue to make forthcoming.

It was ALLEGED, That he could not be decerned to make forthcoming; because any right he had to the lands was only by a minute, whereby the said William was obliged to infeft him; which as yet he had never done: and so, as he could never crave the price of the said lands before performance, neither can any of his creditors arrest and pursue to make forthcoming, before he have a complete right in his person.

It was REPLIED, That the defender ought to be decerned, notwithstanding; because he having really bought the lands, and obtained a disposition, whereby it was in his power to infeft himself, he was liable for the price thereof to the pursuer, as creditor and arrester to the disponer, and can never evite the payment of the price, unless he can allege that the right made to him can never take effect, as not being valid, or affected with prior incumbrances.

The Lords, having considered the minute, which did bear no precept of seasine, or procuratory of resignation, or any obligement upon the acquirer to infeft himself, they did assoilyie from making forthcoming; and found, That the defender was not obliged to instruct real incumbrances; but that the money arrested, being the price of lands, until he obtained a complete right, he was not liable to the disponer nor his creditors. *Page* 455.