lief; and any right he made to Frendraught being affected with a back-bond, that the said lands should be burdened with the debts for which he was creditor or cautioner; no posterior factory granted by the Viscount could free the factor, unless they had been so applied.

It was REPLIED for the pursuer, That he was not obliged to take notice of any such reservations or back-bonds, which were not known to him, and could only affect the Viscount and his representatives; so that, he being only obliged to employ his intromissions in general for payment of the Viscount's debts, which accordingly he had done, he ought to be exonered; and albeit he was a witness in Gregorie's disposition bearing that reservation, yet he was not obliged, nor did know the whole tenor of the disposition; and so having given out the whole sums intromitted with, without being interrupted, in law he cannot be liable.

The Lords did decern the factor to be free, as having *bona fide* followed his commission before interruption; and found, that his being a naked witness could not bind him, unless Gregorie had interrupted him, or that he had taken him personally obliged to pay his yearly annualrent, but reserved him a poinding of the ground, as accords.

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1677. *June* 26. KINCAID *against* GORDON of ABERZELDIE.

IN an action of declarator, at Kincaid's instance, against Aberzeldie; for payment of a debt due by his father, as vitious intromitter with his moveables, and as intromitting with the rents of his father's lands, wherein he died infeft; as likewise, there being a reduction of his right, as being paid of the sums contained in an apprising, to which he acquired right, being an apparent heir, conform to the late Act of Parliament:

It was ALLEGED for the defender,—That, his father being denounced to the horn, and his escheat declared, his intromission can only be questioned by the donatar, and was no ground of a passive title.

It was REPLIED, That, the apparent heir having no right from the donatar, his intromission was vitious, and made him liable.

The Lords did sustain the defence, notwithstanding of the reply, and found, that the donatar's gift being declared by a decreet, the defunct rebel nor his representatives could have no right thereto; and the goods belonging to the king and his donatar, his representatives in law, could never have any title to the moveables, or moveable heirship; and so their intromission could not be any passive title, to make them liable to other creditors.

It was ALLEGED farther, That the intromission with the rents of lands was no behaviour, because his father was denuded by a comprising, to which the defender had right before his intromission.

It was REPLIED, That there was no infeftment upon the comprising; without which an apparent heir was liable for behaviour.

The Lords did sustain the defence, notwithstanding of the reply; but found, that his intromission ought to satisfy the comprising *pro tanto*; and therefore ordained a count and reckoning.

It was farther ALLEGED, That albeit he was an apparent heir, and had acquired the right of the comprising, yet there being no order of redemption used, nor he satisfied by intromission, the declarator to find his right null could not be sustained; the Act of Parliament only allowing to use an order within the legal.

It was REPLIED, That the pursuer being willing to satisfy what was resting besides his intromission; and having raised a declarator for that effect, the same ought to be sustained, without any order of redemption.

The Lords did repel the defence, in respect of the reply; and found, That the defender, as apparent heir, being satisfied, by intromission, of the true sums paid for his right of the comprising; and after count, if there be any thing resting, the pursuer having offered presently to make payment, that the delarator being raised within the legal, it ought to be sustained; albeit there was no order of redemption. *Page* 662.

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1677. *June* 28. THOMAS NAIRNE *against* CLAYHILLS of INNERGOWRIE.

IN a suspension, raised at Thomas Nairne's instance, for payment of the price of the lands of Bank, disponed to him by Innergowrie, upon these reasons:—

1*st*. That, by the disposition, he is obliged to infeft the suspender in his own lands of Innergowrie, in warrandice of the principal lands; and therefore ought to obtain a confirmation of the king, of the base right of the warrandice lands.

2*d*. Since the disposition of the warrandice lands, he hath granted an infeftment of three hundred merks of a yearly annualrent; which he ought to purge; seeing it may prejudge him of his recourse, in case of distress.

It was ANSWERED to the *first*, That the infeftments of the principal lands being public, and clad with possession, the warrandice lands, as to all posterior rights, is a public right; and there being no obligement in the disposition to confirm the same, the disponer, by our law and practick, is never found liable.

It was ANSWERED to the *second*, That there was no necessity to purge the annualrent, because the lands given in warrandice were triple more worth in rent than the principal lands; and so was more than sufficient to give relief in case of distress.

The Lords did find the letters orderly proceeded for payment of the price of the lands, notwithstanding of both these reasons; because, as to the first, there was no special obligement to obtain a confirmation from the superior; but, in case of forefaulture of the disponer, recognition, or liferent escheat, the suspender might obtain a confirmation himself. Likewise, he was expressly bound to pay the charges of the infeftment of the principal lands; as likewise, there was sufficient for relief, notwithstanding of the annualrent.

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1677. *June* 28. The KING'S ADVOCATE *against* AUCHINFLECK.

IN a declarator, at the Advocate's instance, against Auchinfleck, for the avail