

behoof this assignation was taken ; which was referred to the charger's oath, and the liquidation of the coal to Moristoune's.

The Lords did supersede to find the letters orderly proceeded upon the bond, until the charger and Moristoune had declared and deponed ; That thereafter, the price of the coal being liquidated, the compensation should be allowed *pro tanto*.

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1675. January 19. THOMAS INGLIS *against* The COLLECTOR of the TAXATION.

THOMAS Inglis of Stratyrum, being obliged, by bond, to pay the taxations due since the year 1633 to the collector, or to enter his son prisoner in the tolbooth at a certain day ; being charged for payment, did suspend upon this reason,—That the obligation being alternative, *et electio est debitoris*, and he is content to produce his son ; but, if he were produced, he could not now be imprisoned for the said debt ; because the late act of grace and proclamation discharges all these taxations in favours of the subjects.

It was ANSWERED, That, the day for entering his son prisoner being long since past, the suspender did lose the benefit of the alternative, and so was liable in payment. To the second it was answered, That there is an exception in the proclamation of all bonds granted for taxation.

The Lords did find, That, the day being long since elapsed, the offer to make the son prisoner was not receivable, albeit the charger had not required him upon the special day, nor taken instruments upon their refusal ; because, in law, *dies interpellit debitorem* ; and he ought to have presented to the bailie, or keeper of the tolbooth, his son, and taken instruments thereupon, that it was not his fault that he was not imprisoned. And, as to the second, they found the charger was in the case of the exception of the proclamation, the bond being prior thereto ; as likewise, that there being a reservation in favours of Duke Hamilton, that he might pursue and uplift until he should fit his account, and it were found he were paid, the charge, at the collector's instance, was well founded, notwithstanding of the proclamation.

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1675. January 22. SIR ALEXANDER M'CULLOCH *against* GEORGE MOSSMAN.

SIR Alexander being charged, at Mossman's instance, to relieve him at the hands of William Lockhart, for the sum of £1000, he did suspend upon this reason,—That the charger was never distressed, neither could be distressed at this time, William Lockhart being dead, and no person representing him had any right established in their person, whereupon the charger could be pursued, or, upon payment, could grant a discharge to Mossman of his bond ; so that it was *factum imprestable*, and no damage or interest could be craved for not performance ; which is all the law allows, seeing the charger hath never been distressed : likeas, the suspender offers to find caution sufficient to relieve him whensoever he shall be distressed.

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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 infest 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 infest himself, he was liable for the price thereof to the pursuer, as creditor and arrester to the disponent, 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 obligation upon the acquirer to infest himself, they did assoilye 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 disponent nor his creditors.

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