

*PACTUM DE NON PETENDO.*

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1624. March 20.

JOHN MAKIESON *against* JOHN RAMSAY.

No 1.

JOHN MAKIESON being pursued by John Ramsay, Prior Letham, for payment of 500 merks, excepted upon a promise of Mr Simon Ramsay's, (who was donatar to John Ramsay's escheat), never to seek it of him. *Replied*, That the donatar had put the pursuer in his own place again.—THE LORDS sustained the charge, because they thought that he being reponed, could not be prejudged by any promise of his donatar.

*Fol. Dic. v. 2. p. 18. Spottiswood, (PROMISE.) p. 248.*

M'MATH *against* MONTEITH.

THERE being a bond granted by the deceased James Nisbet, William and James Arnots, all conjunct principals, to Gilbert Gourlay, for a sum of money, whereupon Gilbert comprises the said James Nisbet's lands; thereafter the said Gilbert assigns the debt and comprising to the deceased Sir William Nisbet, brother to James, with an express condition, That he should use no execution against the two Arnots; and Sir William transfers his right to William Monteith of Egilshaw, upon the same condition, who disposes the same to William Monteith, his son-in-law, who enjoys the land by virtue of the said comprising, being now long expired. Elizabeth M'Math being executrix to the deceased William M'Math, her father, and who gets a decreet *cognitionis causa* against the apparent heir of the said umquhile James Nisbet, and adjudges the said land; and upon the said adjudication, with concurrence of her husband, Mr John Anderson, pursues a reduction of the said Monteith's right, upon diverse reasons, specially, That the assignation granted by Gourlay to Sir William Nisbet, and the translation granted by him to Monteith, both contain the said provision,

No 2.

A creditor, in assigning a bond, granted by diverse *correi*, may provide that the assignee is not to use execution against some of them; but this hinders not the assignee to seek the full debt from the rest, nor does it liberate the *correi*, in whose favour it was made, from a proportional relief.

- No 2. That they should not use execution against the said Arnots, who were *correi debendi*, which being *pactum de non petendo*, is equivalent to a discharge of their parts of the debt, and consequently makes the comprising null and extinct, at least as to the two parts : It was *answered*, That the reason of reduction is not relevant, because all three being bound conjunctly and severally, it was lawful for Gourlay to use execution against any one, or all, at his pleasure ; and in the assignation, he might also provide, That the assignees should not use execution against two of them, but the third only, which noways did exoner the third *Correus*, unless the assignation had granted the receipt, of the other two, of their parts, and had discharged them thereof ; and that provision of not using execution against the two, could not impede the third, who was distressed, to seek his relief against them, notwithstanding of the said provision, unless they had paid and been clearly discharged.

THE LORDS found the answer relevant.

*Fol. Dic. v. 2. p. 18. Gilmour, No 145. p. 104.*

1680. July 10. LEITCH *against* HEDDERWICK.

No 3.

A *pactum de non petendo*, made to a principal, frees not the cautioner.

*Fol. Dic. v. 2. p. 18. Stair.*

\* \* \* This case is No 10. p. 2077. *voce* CAUTIONER.

1685. February. WOOLMET *against* FLEEMING and CUNNINGHAM of Barns.

No 4.

Found in conformity with M'Math *against* Monteith, No 2. p. 9449.

CUNNINGHAM of Barns being cautioner in a suspension for John Wilkie and others, wherein a decret was obtained, but again suspended by Wilkie and Barns ; in which suspension, Hog and Bigger of Wolmet were cautioners ; the creditor in the bond assigned the same against the principal and cautioners therein, and against the cautioners in the second suspension, but not against Barns, the cautioner in the first suspension, whom he discharged. The assignee having pursued Hog, who *alleged*, That he being cautioner for Barns, who was a suspender, and principal *quoad* him, and Barns being discharged, he must be free also ;

*Answered* for the pursuer ; The discharge given to Barns was without an onerous cause, and but *pactum de non petendo*, which cannot profit the defender.

THE LORDS found the answer relevant.

*Fol. Dic. v. 2. p. 18. Harcarse, (CAUTIONERS.) No 244. p. 58.*

See APPENDIX.