relief, which was prior to the arrestment; and so had no occasion to decide in the case, as if there had been no distress. But it is conceived, that unless it were instructed, that the whole bonds wherein they were conjunct-cautioners were satisfied, so that Aytoun could seek no relief, that he could not be decerned to make forthcoming, unless they offered sufficient caution to warrant him against all distress; and even hardly upon that offer, because it is more easy to retain than to pursue upon warrandice.

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1673. *July* 22. JAMES CARSTAIRS *against* CHRISTIAN, JENNET, and GRIZELL CARSTAIRS, his Sisters.

IN a reduction of a decreet-arbitral, at the instance of the said James, whereby he was decerned to pay the sum of twelve thousand merks to his sisters, upon a reason of fraud and circumvention, in so far as he was induced to submit to the arbitrators, by concealing and keeping up of a disposition made to his father, of some lands and acres, which, by the said decreet, was conveyed to him, and for which he was decerned to pay the said sum; whereas if he had known of that right, it was so clear and absolute, that he needed not to have submitted to have paid any thing for his right to that land:—

It was ANSWERED, That it was offered to be proved by the arbitrators and communers, that his father's disposition was made known to him the time of the submission, and was read in all their presence.

It was REPLIED, That his private knowledge was not probable by witnesses, but by his own oath; and that the arbitrators, being concerned to maintain their own decreet, could not be witnesses.

The Lords did sustain the answer to be proven by witnesses and by the arbitrators and communers, seeing the reason of fraud libelled, was craved to be proven by witnesses, to take away a decreet; and, therefore, *a fortiori*, the allegeance of private knowledge was probable that same way, and before the same witnesses.

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1673. *July* 22. The LAIRD of PITTARRO *against* GLENBERVIE.

PITTARRO having charged Glenbervie to infeft him in the teinds of the lands of Drumlethie, he did SUSPEND, upon this reason:—That the said teinds were a part of the parsonage, and so his office to infeft was imprestable. But the same was only inserted by the notary *ex stilo*; whereas, in the disposition of the lands and teinds, he did assign him to four or five nineteen years' tacks, [and] to a bond of the Lord Arbuthnot's, to obtain the same renewed after expiring.

It was ANSWERED, That the disposition for lands and teinds, being of the like price for both, as to the chalder of victual, and the obligement to infeft being clear and positive for both, without distinction, and the assignation to the tacks to run being only in farther corroboration, the same was not equivalent to an

heritable right, and could not satisfy the obligement to infeft, he ought to be liable for *damnum et interesse, quod succedit loco facti imprestabilis.*

The Lords did find the letters orderly proceeded against Glenbervie, for damage and interest; which they did value to be the fifth part of the stock and teind disponed, which Glenbervie should satisfy according to the price of the lands disponed.

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1673. *July* 22. ELIZABETH DUNDAS *against* JAMES GLENN.

THE said James, being intrusted with a back-bond by Dundas of Philipstoune, for the sum of 4000 merks, payable by him and his heirs, wherein he did insert his own name; which he having confessed to have done, at the desire of the granter, whereupon decreet was given against him to grant an assignation to the said Elizabeth, that she might pursue the heirs of Philipstoune; he did suspend upon these reasons;—That he was willing to grant an assignation, so the warrandice ought to be qualified with an exception of a general discharge granted by him to Philipstoune himself, which was after the date of the said bond;—that it was lawful for him to do the same, seeing Philipstoune and he being mutually debtors to one another, they did subscribe mutual general discharges during the time of the trust, and before the delivery of the bond to the said Elizabeth; so that, if the said discharge were not excepted out of the warrandice, the heirs of Philipstoune, being distressed, would have recourse against him; and so, for intrusting his name, should be made debtor against all law and equity.

It was ANSWERED, That the reason was noways relevant; *first,* Because the decreet was given against him compearing and acknowledging the trust without alleging any such quality; and, albeit he could be reponed, yet it ought not now to be received; because his name being only intrusted, and the bond being still in his possession, he was *in pessima fide* to give a discharge, which might take away the same: and if he had done any thing against the trust, it ought not to prejudge the charger, who will thereby be totally defrauded of her right; but he ought to grant a valid renunciation, whatever may be the importance thereof as to himself.

The Lords did find the letters orderly proceeded, aye and while he should grant an assignation from his own proper fact and deed, without any exception, as being a trustee; and so could not do any deed in prejudice of her for whom his name was borrowed: But declared, That if the heirs of Philipstoune, being distressed, should pursue their relief upon the general discharge, they would then consider if this bond could be comprehended in the same; or if it could only be of the suspender's own debts contained in the general discharge; seeing Philipstoune did not retire the bond when the mutual discharge was subscribed, nor at any time during his lifetime: and it were very hard to make a naked trustee pay the debt for lending his name thereto.

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