

to himself and daughter in fee, with power to contract debt, dispone or grant wadsets or tacks during his lifetime.

It was ALLEGED, That the said lands were so purchased and provided to the defender before the contracting of Walstoun's debt ; and so could give no ground for a passive title, she not being successor *post contractum debitum*.

The Lords, notwithstanding, did sustain the summons ; not to make her personally liable, as representing her father by that passive title, but only in so far as she had a real right, affected as said is, and had made benefit thereby ; and, therefore, ordained the pursuer to prove that the worth of the lands and rents intromitted with did exceed this sum contained in the bond ; and declared, that the counting for the bygone annualrents, and offering to dispone the lands in favours of the pursuer, she should be liberated ; otherwise she should be liable *in solidum* to creditors. This was done to obviate fraud and circumvention by such conveyances made of purpose to prejudice lawful creditors.

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1669. June 15. ASTHARST, Englishman, *against* ANNA DOUGLAS, LADY BOGHALL.

IN a reduction, pursued at the Lady Boghall's instance, who was relict of Anthony Roswall, for reducing a wadset granted Astharst, *ex capite inhibitionis*, which was served at the instance of Sir John Carstairs, upon a personal bond granted by Roswall before the wadset ;—there being a declarator raised at the defender's instance, to hear and see it found, That the debt was satisfied by Roswall himself, or by Maurice Trent, his cautioner, to whom Roswall had dispomed some lands for his relief ; and it being desired that witnesses might be examined, *ex officio*, anent the said conveyance, of filling up the lady's name in the assignation, notwithstanding of payment of the debt, as said is :—It being ALLEGED, That the assignation, being filled up in the lady's name, could not be taken away but *scripto vel juramento* :

The Lords, notwithstanding, before answer, did ordain Maurice Trent his oath to be taken *primo loco* ; reserving to examine Sir John Carstairs, and James Brown advocate, who was the lady's son-in-law, as they should find cause.

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1669. June 17. ANDREW DOUGLAS, Macer, *against* ALEXANDER CRAWFORD.

MR Thomas Crawford having gotten an infestment of an annualrent, effeiring to 3000 merks, out of a tenement belonging to John Douglas, the pursuer's father, and having given a back bond, bearing, that 900 merks belonged to Andrew Douglas, and that whensoever he should be paid of his 3000 merks, that he should pay the said 900 merks to the said Andrew : there was pursuit intended against Mr Thomas's son, at the instance of Andrew, for the bygone annualrents of the 900 merks, and for denuding of himself of a proportional part of the infestment effeiring thereto.

It was ALLEGED, That the back-bond could furnish no such action ; bearing no such obligation, but only to make payment of the 900 merks, after payment of the whole 3000 merks.

The Lords, notwithstanding, did sustain the pursuit as to the bygone annual-rents, in so far only as the defender had intromitted with the rents of the tenements ; for which they ordained him to count and reckon : and did likewise discern him to denude himself of a proportional part of the right, in respect the back-bond did prove a clear trust as to that sum, and that Mr Thomas's name was only borrowed ; whereupon, *quocunque tempore*, he might be pursued to denude ; which being done, would liberate him from the obligation to make payment.

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1669. June 17. THOMAS, JANET, and MARGARET KERS, *against* AGNES KER.

THERE being a pursuit raised before the commissaries, at the instance of the said Thomas, Janet, and Margaret Kers, against the said Agnes, as executrix to Margaret Ker, for payment of certain legacies left to the pursuers ; whereof advocacy was raised upon iniquity, in so far, that the commissaries had repelled a relevant defence, *viz.* That the executor had pursued an exhibition, and recovered the writs for instructing the defunct's debts, and thereupon had pursued and recovered sentence against the debtors. Which defence was repelled, in respect of this reply, That execution had not been used upon the decreets timeously.

The Lords found, That the reply could not elide the defence ; in respect that the decreets were but recovered six or seven weeks before the pursuit before the commissaries ; which they found to be so short a time, that it could not make the executor liable for the whole debts and legacies ;—that she was only obliged to assign to the decreets ; unless the pursuer could allege that the debtors, during that short time, had put away their estates, or were in a worse condition.

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1669. June 17. STREIT, Englishman, *against* LADY TORPHICHEN.

STREIT, pursuing a poinding of the ground upon an infeftment granted by James Mason, the Lord Torphichen, who was superior of the lands, and had comprised the property, did compear and ALLEGE, That albeit it was [true] that, as superior, he nor his donatar could have no right to Mason's liferent, in respect he had received his son to be his vassal ; yet, seeing the son's right was reduced, he might join his right of superiority and comprising, and thereupon crave preference as to the liferent.

The Lords found, That these two titles, being *disparata* and of divers natures, and the liferent escheat not being sustained, it could not fortify the right of the comprising, which was after the pursuer's infeftment of annualrent.

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