

# DECISIONS

OF THE

## LORDS OF COUNCIL AND SESSION,

REPORTED BY

ROBERT MACGILL, LORD FOORD.

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*Certain Practiques, composed and framed by the Author hereof, as they were observed and decided before the Lords of Council and Session, in the time that the said Author was one of the Senators of the College of Justice.*

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1649. June 14. MARGARET HOME, LADY CHARTERS, and GEORGE DOUGLAS, her Son, *against* LORD BELHEAVEN.

IN the cause pursued and disputed *in præsentia Dominorum*, between Margaret Home, Lady Charters; and George Douglas, her son; and my Lord Belheaven, defender, for making arrested goods forthcoming,—the pursuers insisted to have a decret out, alleged given by the Lords of before, against the defender, as he who had confessed, by his oath, that he was debtor, as cautioner for Duke Hamiltoune, who was alleged to be debtor to William Muirhead, at London, in £2000 Sterling, the which William was debtor to the pursuers in much more; likeas, they had arrested the said sum of £2000 long ago, in the hands of the said principal and cautioner; and, because the Duke was not here, they, in January 1646, upon a supplication to the Parliament, then at St Andrew's, moved my Lord Belheaven, of consent and his own accord, to give his oath, as is therein contained; but not having got decret, they, by an ordinary action for making

arrested goods forthcoming, obtained decret against him, holding him as confessed. As, likewise, the Duke being come to the country, and urged to give his oath, declared, that he was not debtor to William Muirhead the time of the arrestment, to his memory and knowledge. Likeas, the said Lord Belheaven being reponed to his oath, declared as is therein contained. The pursuers alleged, That the oath given at St Andrew's, and the holding of him as confessed, together with the oath whereto he was reponed, were enough, *ad victoriam causæ*, to find the letters orderly proceeded in the process of suspension raised by him. But the Lords of before, and now again, suspend the letters, in favours of my Lord Belheaven, cautioner; because the principal, who should relieve him, did deny the libel, *et fidejussoris obligatio est accessio principali, ita ut liberato reo, liberetur et fidejussor, qui in durio rem sortem aut conditionem obligari non potest; et multis casibus fidejussor non teneatur, licet ipse reus obligetur. Tit. de fidejuss. F. F. C. et jusjurandum est ita litis decisorium ut de ea transactum censeatur, et res jam transeat in rem judicatam, et vere dicatur, licet false satis emplastrum æris alieni atque evolucrum.* And where it was urged, That the pursuers might take them either to the principal or cautioner, seeing, by the common clause in bonds "*cautioner and full debtor,*" they are *correi debendi*; I am not of that opinion, where a bond is not produced to verify the same; for, if either those words, or the words "*conjunctly and severally,*" be left out, as here, the debtors will be obliged only, ilk one, for their own part; so there, *est discussionis beneficio locus*; as, in a cautioner for an executor or a tutor, is used in other practick. And where they urged upon the defender his oath, at St Andrew's; it is clear, that he deponed without contest-making, only thinking that he was debtor to William Muirhead, *non ex certa scientia, et protestatione* that his confession may not be prejudicial to him while the matter be farther tried, and all parties interested heard. Which being done, and not only the Duke having deponed, but he also heard, to clear his former oath, he did declare, that the bond, by the which he thought himself debtor to William Muirhead, was blank of the creditor's name, and yet delivered to the said William, who had told to my Lord Duke his attenders the money. Yet the Lords, as of before, give no absolvitor; but suspend all, while farther trial may be had anent any bond, if not to Muirhead, yet to Gowld, his wife's uncle, or any other confident person, for the said William his behalf, subscribed by the Duke and my Lord Belheaven; and, upon the 19th day, assign the 28th to summon such witnesses as are condescended upon, the defender being warned *apud acta*.

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The 15th or 16th of June 1649, it was supplicated, that, for farther trying anent the bond, certain other persons might be examined by the Lords, *ex nobili officio*; and that my Lord Belheaven himself might be reëxamined. Which the Lords granted, reserving to themselves what it might work, since the Duke his deposition carried according to his memory and knowledge; and ordained, That the interrogatories to be answered by my Lord Belheaven should be first given in to the Lords, to be considered by them. *Item*, That my Lord Belheaven should crave suspension of any execution that should pass against him.

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