

heritable right, and could not satisfy the obligation to infest, 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 disposed, which Glenbervie should satisfy according to the price of the lands disposed.

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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 decret 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 decret 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 prejudice 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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