tarily, and led a comprising upon the said back-bond, whereby he hath a power to dispone with Malloch's consent; and having now disponed the said lands to the common debtor, and thereby gotten payment to Malloch, as well as himself, of the whole principal sum and annualrents, and reponed Buchantie, the common debtor, to his estate; it is a most odious and rigorous pursuit, that this pursuer, who was but assignee by Malloch for an inconsiderable sum, should crave that Auchtertyre should dispone to him a part of the lands far exceeding the worth of the whole sums due; he being in as good condition as Auchtertyre himself; especially seeing this trust was undertaken with consent and knowledge of the common debtor, who was present, and did write the back-bond at his own house, and delivered the same to Malloch.

It was REPLIED, That, the back-bond bearing a clear trust, the pursuer ought to have the full benefit thereof, as if the expired comprising had been led in his own name; and Auchtertyre, the trustee, was *in pessima fide* to dispone these lands without Malloch's consent.

The Lords, before answer, having ordained Auchtertyre to condescend what way he was intrusted to lead that comprising; whether to the benefit of the common debtor, as well as to Malloch and himself: and thereupon having taken the oath of Robert Hamiltoun, who declared he was ordered by the common debtor to lead that comprising; and that he paid the expenses; and that Auchtertyre was willing to depone upon the verity thereof: as likewise, finding that the back-bond was all written by the common debtor's hand, at his own house, and that he had paid yearly the annualrents, and a part of the principal sum, they did assoilyie Auchtertyre, upon payment of the remainder of the principal sum and annualrents, and expenses, not only upon the condescendence foresaid, but likewise because, in law it being *factum imprestabile* to dispone any part of the lands which he had already disponed to the common debtor, all that he was liable for in law was *damnum et interesse;* which was liquidated by the back-bond to be the principal sum, annualrent, and expenses; which Malloch could never refuse, if he had consented; and he being dead before the disposition, his children were in as good condition as if he had consented.

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1674. *June* 30. LEWIS NISBET *against* MR JOHN WISHART.

IN an action, at the said Lewis's instance, against the said Mr John, from whom he had purchased an heritable right of the lands and teinds of Drimmie, to hear and see him found and decerned to accept of a disposition back again of these same lands, or to refund the price thereof that he had gotten; or otherwise to procure to him a three nineteen years' tack of the teinds from the titular, upon an alleged promise made by the said Mr John in the terms foresaid.—

It was ALLEGED for the defender, That any such promise being but verbal, and not put in writ and subscribed, was not obligatory in law; there being always *locus penitentiæ* as to all dispositions of lands or heritable rights, notwithstanding of any communing or verbal transaction; until the dispositions, contracts, or bonds, be subscribed by the contractors.

It was REPLIED, That the promise libelled, being alternative, either to procure

a tack of the teinds, or to accept of a disposition of lands, it was sufficiently relevant to be proven by the defender's oath, without any writ; and the promise, in the first place, being to procure a tack of the teinds, which in law was obligatory, albeit the other party accept of the right of lands, could not be binding, except writ had intervened; yet the adjection thereof to the first member of the alternative gave the defender only power to resile from that part, in case he thought it better for him to procure a tack to the teinds, than to accept of the heritable right of lands.

The Lords did find, That such a promise being complete, albeit it was alternative, was not at all obligatory to infer that the defender should receive back again a disposition of the lands sold, and refund the price; or to procure a three nineteen years' tack of the teinds; unless it had been put in writ by way of contract or bond. *Page* 420.

1674. *July* 7. MR ALEXANDER LISK *against* GILBERT ROB.

IN a pursuit, for damage and interest, at the instance of Mr Alexander Lisk, upon this ground, That he had set his lands to Gilbert Rob, and he was obliged to enter and possess the same at Whitsunday; and that, after the flitting Friday, he had required him to enter to the possession, and taken instruments upon his refusal:—

It was ALLEGED, That the defender, not being required until five days after the term, and the houses and lands not being made void and red, by the removal of the present tenant, the defender was not obliged to remove from his old room his whole family and goods, having no place to which he might enter.

It was REPLIED, That the defender, being required, was obliged to come to the new room with his family and goods, and then have required the heritor or his tenants, that he might have present possession; otherwise the heritor was not obliged to remove the present tenant, and make his room void: which not being done, the defender is liable for damage and interest.

The Lords did look upon this as a general case; and, after much reasoning amongst themselves, did at last find the defender liable in damage, unless he would offer to prove that he had required the pursuer, after the ordinary day of flitting, to enter him to the possession; or otherwise, that he offered to prove that the heritor had set a new tack: Notwithstanding it was urged, that the removing of a present tenant is necessary in order to the entering of a new; and that the master, being obliged in law to enter the tacksman, he ought to make the room void, and put him in a condition that he might enter. This was hard.

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1674. *July* 10. THOMAS ANDERSON *against* SIR GEORGE PRESTON of VALIEFIELD.

THOMAS Anderson, as having right to an annualrent out of the lands of Overtoun; whereupon he obtained a decreet of poinding of the ground; which being