

his own means;—it was answered, That the Earl of Loudon not being anywise debtor to Sauchie *proprio nomine*, but only assignee constituted by the pursuer, which was only in trust, any right he acquired to a prior comprising of the said estate, can only be looked upon as done in contemplation of that trust, and ought to be accountable for the whole value thereof, with deduction only of such sums as he truly paid, seeing the assignation was for greater sums due by the Earl of Loudon, and the Earl of Marshall, than that whole right acquired amounts to. The Lords did find, that Sauchie ought only to have deductions of such sums as he did truly depurse with the interest thereof *et cum omni causa*, but ought to be accountable for the superplus, in so far as that right did extend to; in regard that any sums he had advanced, albeit they were his own proper means, yet it was as a person entrusted by the foresaid assignation; but they reserved how far the assignation was onerous, until the whole count and reckoning should be determined.

Gosford MS. p. 323.

No. 13.
communicate
the advantage
of his pur-
chase, for
behooof of the
trust-estate.

1673. November 27. BEATTIE against The LAIRD of MORPHIE.

The Laird of Dun having disposed certain lands to the Laird of Morphie, he gave a back-bond, obliging himself to pay certain particular sums of Dun's debt, with a general clause to pay all sums due by him to the Earl of Ethie for himself, or whereunto Ethie was assignee; and by a posterior bond of corroboration, the foresaid back-bond, and that clause is repeated, and then it bears, "that a sum of £.2,000 due to Robert Beattie, whereunto Ethie was assigned, was not yet satisfied, therefore Morphie obliges himself in corroboration of the first bond, and but derogation thereto, that being satisfied of the sums due to himself by Dun, he should pay Beattie's sums out of the superplus of the price of the lands: After both bonds Ethie grants a retrocession to Beattie, bearing, "that his name in the assignation was only in trust, to Beattie's behoof, and assigning Beattie to the back-bond, and bond of corroboration. Beattie's executors pursue Morphie upon the general clause in his first back-bond, to pay this debt whereunto Ethie was then assignee: It was answered for Morphie, that the clause being only in favours of Ethie, who stood then assignee to this sum, Ethie might have discharged the clause, or qualified it as he pleased: *Ita est*, he qualified the back-bond by the bond of corroboration, that Beattie's sum should only be paid out of the superplus of the price, which therefore must be accounted as only due, in so far as there is a superplus. It was replied, That by the first back-bond, there was *jus acquisitum* to Ethie, not only for himself, but as being in trust for Beattie, which therefore Ethie could not qualify or lessen by the bond of corroboration; neither is the said corroboration a deed of Ethie's, but of Morphie's, whereupon Beattie doth not found; *2do*, The bond of corroboration bears expressly, but derogation to the first back-bond, and so nothing therein can derogate

No. 14.
Import of an
assignation
in trust.

No. 14. therefrom. It was duplied for Morphie, That there being no writ to instruct any interest of Beattie's, but the reposition granted by Ethie, bearing in the narrative of it, that Beattie's assignation to him was in trust, that being after both back-bonds, there was then no right acquired to Beattie, but Ethie might discharge or alter the back-bond as he pleased; and therefore Ethie's acceptance of the second back-bond is as effectual as if he had subscribed it; and though it bears a clause, but derogation of the back-bond, that general clause cannot take away the effect of a special clause subjoined, which is truly a derogation of the first back-bond, limiting Beattie's payment to be out of the superplus of the lands, and therefore the general clause is but like *protestatio contraria facto*, and is only to be understood, but further derogation to the first back-bond, than what is particularly expressed in the second.

The Lords found that Ethie standing in the right of the assignation without any anterior writ to instruct the trust in favours of Beattie, that he might derogate by accepting the bond of corroboration, and that he had derogated thereto, as to the nature of payment, notwithstanding of the general clause, but derogation.

Stair, v. 2. p. 231.

1675. January 5.

EARL of NORTHESK against The LAIRD of PITTARRO.

No. 15.

The duty involved in a trust found not to oblige the person entrusted to pay more, than as much as might have been recovered by the right entrusted.

The Earl of Northesk having charged Pittarro for £.2,000 contained in his bond, he suspended on compensation, as having obtained assignation from Catharine Carnegy to the sum of £.1000, and to Northesk's back-bond, bearing, "That he having received assignation from Catharine and her husband, and thereupon had with several other sums of his own apprised the lands of Craig their common debtor, therefore he obliged himself so soon as he should recover payment of the said apprising, he should pay the said Catharine;" and true it is, that Northesk hath disposed this apprising to Hatton, and so must be presumed to have gotten payment, otherwise he would have reserved this right, or disposed it with burden of the back-bond. It was answered, That albeit Northesk hath disposed the apprising, he cannot be liable, unless in the terms of his back-bond he had gotten payment, which no presumption can infer, *quæ cedit veritati*; the agreement betwixt him and Hatton is produced, by which it appears that there were anterior rights upon Craig's estate wholly exclusive of this apprising, and that all he got was upon the account of his anterior rights; neither is this liquidated how far the said Catharine could have interest. It was replied, That the back-bond cleared that Northesk's name was but in trust, and that at no time he could refuse to denude himself, unless he had paid the sum, and now he cannot denude, because he is already denuded, without reservation or burden of the back-bond. It was duplied, That to denude is *factum*, and no ground of compensation, and it now being *factum imprestable*, he can only be liable for damage and interest. It