

To which it was DUPLIED, That Northesk being only intrusted, by the assignation made by the Arbuthnots, to lead a comprising, which he did; and having disposed the same to the Lord Hatton, without the burden of the back-bond, *eo ipso* it is presumed in law that he got payment; the Arbuthnots being altogether cut off from seeking the benefit thereof, or from any retrocession which was not in the power of Northesk to grant; as was found lately in a case betwixt Janet Watson and Mr Walter Bruce, where it was found, that an assignation, being granted upon trust, to lead a comprising which he had disposed, she was not obliged to take a retrocession, the disposition not being affected therewith; but was found obliged to pay the sums assigned.

The Lords, having considered the dispute for both parties, did find, that Northesk ought to procure a retrocession from the Lord Hatton, or otherwise should be liable for damage and interest; as to which they ordained him to count and reckon, upon these reasons:—That he had disposed the comprising without the consent of the assignees; and had not burdened his disposition with the back-bond. *2d.* That his assignation was clearly upon trust; and albeit it did bear only to make payment in case he should be paid, yet, having put his cedent to an impossibility of making use of the comprising, or offering to retrocess them before it was disposed; if they shall be now altogether frustrated of the benefit thereof, by a retrocession from the Lord Hatton, *loco facti imprestabilis*, the law allows *damnum et interesse*.

It was ANSWERED to the second reason, That the missive letter written by Bracko did contain no assignation, nor never took effect; likeas the Lord Northesk, upon several orders from Bracko, had paid several parts of these sums, for which he was infest.

The Lords did find, that the missive letter was no assignation; but, notwithstanding thereof, Northesk might lawfully pay upon Bracko's order; and as to the superplus, he could not be obliged to allow the same to Pittarro by way of compensation, until first he got a disposition of that heritable right from Bracko, which affected that estate.

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1675. January 5.

BANNANTYNE against IRVINE.

IN a reduction, at Bannantyne's instance, of the lands of _____, *ex capite inhibitionis*, against Irvine, who had a right of liferent granted to her by her husband, who was heritor of the said lands, for reducing her liferent;—It was ALLEGED, That Bannantyne's inhibition could be no title to pursue a reduction; because, being raised upon a personal contract for a sum of money, and served against the whole estate of the debtor, who had disposed several parcels of that estate to other creditors; it was offered to be proven that these creditors did pay several sums of money to Bannantyne, whereupon he did consent to their right, or discharged the inhibition; which sums of money ought to extinguish so much of the debts and bonds whereupon inhibition was served.

It was REPLIED, That the defence ought to be repelled, unless it were alleged that any sums of money paid to him by the purchasers of these particular lands, could be imputed to the payment of any part of his debt; and that his re-

ceipts and discharges of the inhibition did bear that that was the cause thereof; and that he had discharged so much of the debts : whereas the most it could import was, that he should not trouble these particular rights by his inhibition ; and, in effect, what he received was but inconsiderable, *et pro redimenda lite* ; which was lawful to him to do, but prejudice to affect the lands with the inhibition.

The Lords did find the defence relevant, notwithstanding of the reply, upon these reasons ;—*1st.* That a creditor having a certain right, which in law could not be quarrelled, nor any process intended but for questioning that right ; any sums of money paid to him could not be ascribed to that cause, that they were given *pro redimenda lite* ; and therefore, unless he could ascribe the payment for some other cause, they ought to be ascribed for payment of so much debt, as being *indebite solutum*. *2d.* If this should be sustained, it would open a door to a general prejudice and suffering, by all debtors and others having right from them ; seeing the whole lands which were under inhibition, being divided and sold in parcels to many purchasers, the creditors getting several sums, which might near amount to his whole debt ; if, notwithstanding, he should have right to affect the rest who did not agree with him, nor the common debtor, who is bound in warrandice ; then he would have right to double payment ; which is against the principles of law,—*Nemo potest exigere plus quam debetur* : Against which law provides, that there is *condictio indebiti* ; so that unless the creditor, who served inhibition, could attribute his payment of any part of his debt to a just and lawful cause, besides his interest as creditor ; by a necessary consequence that just and necessary principle of law would be evacuated ; and debtors, whose cases are always favourable, would be ruined by the contrivance of creditors who could pretend no loss.

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1675. January 12. DALKEITH and His LADY, *against* GEORGE SWINTOUN, Writer.

DALKEITH and his Lady being charged upon a bond of borrowed money granted by her to William Caldwell, and assigned to the said George, there was a suspension raised, upon this reason :—That the assignation did bear, that the money was gotten for the price of so much coal of Wollmett, which the said William had intromitted with as factor, by Andrew Ker of Moristoun, who was tutor to the children of Wollmett, who had a tack of the said coal, which was burdened with twelve loads of coal weekly, to the Lady ; which not being delivered, the price thereof would compensate the sums contained in the bond ; and as the compensation would meet the cedent, so ought it the assignee.

It was ANSWERED, That the compensation being founded upon a tack, wherein there was only an obligation to deliver coal, which were not liquidated by any decret, the same could be no ground of compensation ; which is only allowed where a debtor and creditor are *hinc inde* bound *de liquido in liquidum*.

It was REPLIED, That the suspender had an action depending against Caldwell and Moristoun's son, who was made liable for his father's debt, to whose