

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

behoof this assignation was taken ; which was referred to the charger's oath, and the liquidation of the coal to Moristoune's.

The Lords did supersede to find the letters orderly proceeded upon the bond, until the charger and Moristoune had declared and deponed ; That thereafter, the price of the coal being liquidated, the compensation should be allowed *pro tanto*.

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1675. January 19. THOMAS INGLIS *against* The COLLECTOR of the TAXATION.

THOMAS Inglis of Stratyrum, being obliged, by bond, to pay the taxations due since the year 1633 to the collector, or to enter his son prisoner in the tolbooth at a certain day ; being charged for payment, did suspend upon this reason,—That the obligation being alternative, *et electio est debitoris*, and he is content to produce his son ; but, if he were produced, he could not now be imprisoned for the said debt ; because the late act of grace and proclamation discharges all these taxations in favours of the subjects.

It was ANSWERED, That, the day for entering his son prisoner being long since past, the suspender did lose the benefit of the alternative, and so was liable in payment. To the second it was answered, That there is an exception in the proclamation of all bonds granted for taxation.

The Lords did find, That, the day being long since elapsed, the offer to make the son prisoner was not receivable, albeit the charger had not required him upon the special day, nor taken instruments upon their refusal ; because, in law, *dies interpellit debitorem* ; and he ought to have presented to the bailie, or keeper of the tolbooth, his son, and taken instruments thereupon, that it was not his fault that he was not imprisoned. And, as to the second, they found the charger was in the case of the exception of the proclamation, the bond being prior thereto ; as likewise, that there being a reservation in favours of Duke Hamilton, that he might pursue and uplift until he should fit his account, and it were found he were paid, the charge, at the collector's instance, was well founded, notwithstanding of the proclamation.

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1675. January 22. SIR ALEXANDER M'CULLOCH *against* GEORGE MOSSMAN.

SIR Alexander being charged, at Mossman's instance, to relieve him at the hands of William Lockhart, for the sum of £1000, he did suspend upon this reason,—That the charger was never distressed, neither could be distressed at this time, William Lockhart being dead, and no person representing him had any right established in their person, whereupon the charger could be pursued, or, upon payment, could grant a discharge to Mossman of his bond ; so that it was *factum imprestable*, and no damage or interest could be craved for not performance ; which is all the law allows, seeing the charger hath never been distressed : likeas, the suspender offers to find caution sufficient to relieve him whensoever he shall be distressed.

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