

## MUTUAL CONTRACT.

### SECT. I.

Retention until the other party perform.

1662. February 18. EARL OF BEDFORD *against* LORD BALMERINO.

THE Earl of Bedford, for satisfaction of his tocher, due by his father-in-law, the deceased Earl of Sommerset, caused adjudge, in the name of a person intrusted, all right competent to the Earl of Sommerset, of the estate of Jedburgh; and being assigned to the adjudication, pursues the Lord Balmerino, for denuding himself of two apprisings of the estate of Jedburgh, conform to three back-bonds produced, granted by umquhile Balmerino to Sommerset, acknowledging that he had acquired right to these apprisings with Sommerset's own money, and therefore obliged him to denude himself thereof.—The defender *alleged*, That his father being intrusted by the late Earl of Sommerset to acquire the estate of Jedburgh, and having the fee thereof in his person, the defender is not obliged to denude himself, until he be reimbursed and satisfied of all sums of money, which, after the said back-bonds, he paid for Sommerset, or advanced to Sommerset, which can only be accounted to have been in contemplation of the trust, and is particularly so expressed in Sommerset's letters produced, bearing, that Balmerino should be satisfied of what was due to him out of Teviotdale, where the said estate of Jedburgh lies. The pursuer *answered, non relevat* against him, as a singular successor; *2do, Non competit*, by way of exception; but the defender hath only action therefore, especially this trust being *fidei commissum*, which is a kind of disposition in which

#### No 1.

A person disposed his estate, and took a back-bond in trust. In a pursuit at the instance of an adjudger against the trustee to denude, the trustee was allowed to detain until he should be satisfied of all sums of money advanced by him for the truster's behoof.

No 1. there is neither compensation nor retention competent ; *3tio*, There can be here no compensation, because the debt is not liquid. The defender *answered*, His defence stands most relevant, which he founds not upon compensation, but upon the exception of retention, which is competent in all mandates and trusts, by which, as there is a direct action in favour of the mandant against the mandatar, or person intrusted ; so there is a contrary action in favours of the mandatar, for satisfying of all that he hath expended by reason of the trust, and which he may make use of by way of exception of retention, if he be pursued ; and whatsoever be in relation to compensation, *in deposito*, by the civil law, or of the difference of action and exception, yet, thereby they, and by our uncontroverted custom, whatever is competent by way of action, is competent by exception ; and if this be not receivable by exception, it is utterly lost, because there is none to represent Sommerset.

THE LORDS considering that Balmerino's estate was disposed and appraised by his uncle, the Lord Couper, and William Purves, the reversion whereof was shortly to expire, which they would not lengthen ; and that by an account running to the expiration of these reversions, the pursuer, being a stranger, might be frustrated ; therefore they repelled the defence ; but declared that estate, or benefit that Bedford should make thereby, should be liable to Balmerino for what debt he should instruct to be due by Sommerset ; and withal superseded the extract for a time ; that if, in the mean time, Balmerino should cause Couper and Purves restrict their rights to as much rents as would pay their annualrents, and secure Bedford in the rest of his estate, and in a certain bond produced, for what should be found due ; they would sustain the defence by exception, and ordain count and reckoning.

*Fol. Dic. v. I. p. 594. Stair, v. I. p. 101.*

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No 2. 1664. July 20. PETRIE against PAUL.

PETRIE pursues a removing against Paul, who *alleged absolvitor*, Because she possessed, by virtue of her infestment. It was *replied*, The infestment was null by exception, as following : upon a contract of marriage, which marriage was dissolved within year and day. It was *duplied*, That the infestment behaved to stand valid, being in recompence of her tocher, until her tocher was repaid.

Which the LORDS found relevant, unless it were alleged, that the tocher was not paid to the husband, but in her own hands, or her debtor's.

*Fol. Dic. v. I. p. 595. Stair, v. I. p. 220.*