

assoilyie from the reduction upon any alleged error in extracting of the decret : but repon the Laird of Gight, notwithstanding of the decret, to be yet heard upon the disposition and seazine now produced, if thereby he could make an undoubted right to the teinds of the lands disponed, and thereby fulfil all his part of the articles of agreement ; to which they were moved upon these reasons :— That this decret was *sententia comminatoria*, and that by our law, both upon emergencies and *noviter veniens ad notitiam*, the party purging himself that he did not of purpose keep up any writs founded upon, *animo protelandi litem* ; and that he being truly ignorant where the writs were, he had recovered the same by exact diligence, in all conscience and reason they ought to be reponed against so severe a sentence ; where it being impossible for a time to perform an article of so inconsiderable a value, the punishment was no less than the forefaulter of a great and ancient estate, where the law defines that *loco facti imprestabilis succedit tantum damnum et interesse* ; and it was clearly made appear, that the Laird of Gight was neither *in culpa* nor *in mora*, his whole evidents during his minority being intrusted by his father, when he durst not own his estate.

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1675. January 5. The EARL of NORTHESK *against* The LAIRD of PITTARRO.

THE Laird of Pittarro being charged, at the instance of Northesk, for payment of two thousand merks, contained in his bond, did SUSPEND, upon these two reasons :—*1st.* That he ought to have compensation for a thousand merks, and annualrents since 1667 year of God, because he was assignee to a back-bond granted by Northesk to Mr James and John Arbuthnots ; whereby he being assigned by them to a bond granted by the Laird of Craigie, and Earl of Dundee, did thereupon lead a comprising in his own name, of their estate ; and did dispone the same to the Lord Hatton : and, by the back-bond, being obliged to make payment as soon as he should recover payment, he is now debtor in those sums, which ought to compensate the bond charged upon, *pro tanto*. *2d.* He ought to have compensation for eight hundred merks, because Gray of Bracko, being infest in the lands of —————, which were bought by Northesk, Bracko, by his missive letter, did write to Northesk, that Pittarro might make use of eight hundred merks thereof.

It was ANSWERED to the first, That the back-bond could be no ground of compensation, because Northesk had never gotten payment of the sums assigned, contained in the back-bond ; but, on the contrary, the estate of Craigie and Dundee being affected with several apprisings and infestments, prior to that apprising ; for which sum assigned, and several others, he had led a new comprising ; unless it could be subsumed that he had gotten payment, the back-bond could not oblige him : but so it is, that if the sums of money paid to Northesk for his whole right were calculated, which were prior to that apprising, it would be found that he had received no payment thereof : likeas by the back-bond he was not bound not to dispone that last apprising ; but only in case he should be paid of that sum assigned to him by the debtor, in that case he should make payment to the cedent.

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-