same witnesses, this was a correspective obligation, and of the nature of a mutual contract, and so behoved to be implemented, either before, or at least *simul et semel* with Bailie Telfer's heirs' fulfilling the bond, seeing it was the true and immediate cause of his granting that bond.

ANSWERED,—Telfer had given a clear simple bond for a liquid sum to Janet Potts, her heirs, executors, or assignees, without any clog, quality, or condition; and he, as Janet's creditor, having arrested it, was not concerned to notice any private latent obligement she had given, seeing the bond had no relation thereto, nor made any mention thereof; otherwise simple bonds were never secure, because a back-ticket might qualify, annul, and restrict them; which was a great inconvenience and stop to commerce, seeing there was no register of such back-bonds to certiorate us; and such back-bonds ought to have no more force than an assignation, which, if not intimated, does not affect the right.

REPLIED,—*Surrogatum sapit naturam ejus in cujus locum subrogatur*; and therefore Margaret Alcorn not having transferred Lanton and Cockburn's bond, Bailie Telfer's obligement is *causa data causa non secuta*; and till he get that right, he cannot be forced to pay: and as to the inconvenience, parties in such cases must rely on the warrandice of the parties against whom only they have recourse. And Dirleton, in his Doubts and Questions, *voce Correspective Obligements*, states this question,—How far such back-bonds may prejudge an assignee or an arrester? but does not determine it: But Stair has two decisions that such back-bonds militate against singular successors;—*13th December* 1672, *Lord Lion* against *the Feuars of Balvenie*; and *5th February* 1678, *Mackenzie* against *Watson*.

The Lords generally thought a back-bond militated against singular successors, where the right was personal without infeftment, (albeit this proves very hard and uneasy:) but in regard it was not clear that the one was the cause of the other in this case, therefore, before answer, they ordained the writer and witnesses to be examined what was *actum et tractatum* at the time: and if he granted bond on the account of the said Janet Potts's obligement to him.

It were both clearer and sincerer in all such transactions to make them relative to the other. *Vol. II. Page* 146.

1702. *February* 21. The EARL of NORTHESK *against* CARNEGY of KINFAUNS.

PATRICK Carnegy of Kinfauns having engaged in sundry debts for the late Earl of Northesk, his brother, and having paid the same, and acquired right thereto, there is a declarator raised by the present Earl of Northesk against this Kinfauns and his mother, for extinction and restriction of these rights; and, in the *first* place, he craved a communication of all the eases and compositions he got of the debts he paid, in respect he was one of the trustees and managers of his fortune, by a commission to him and sundry other friends; and which he not only accepted, but, by many missive letters produced, he declared the bargains he was making with the creditors were for his nephew's behoof, and so he was plainly *negotiorum gestor*, and could exact no more than he gave.

ANSWERED,—The Earl has no prejudice; for as the creditor might have ex-

acted the whole sum, so may he, as assignee, though cautioner; as was found, *8th July* 1664, *Nisbet* against *Leslie*; and a *negotiorum gestor* is where one acts *pro absente et ignorante*, which was not here; and Kinfauns makes a fair offer,—if the Earl will communicate the eases he has got in purchasing in the debts upon Kinfauns, he will quit in the same manner all the eases his father got.

REPLIED,—There is no parity here to compel me to this unequal bargain, unless I had been your father's trustee as well as he was mine.

The Lords found Kinfauns obliged to communicate the eases; but the great question remained, How they should be proven? Northesk moved, That the creditors on life should be examined thereon.

Kinfauns ALLEGED,—That our law had suspected probation by witnesses in many cases, and particularly repudiates them in taking away writ, it being hard that my debt should depend on the lubricity of their memory; and much more in this case, where each creditor would be only a single witness *quoad* the ease he gave; and that lately, in the case of *John Binny* and *Mr Rory Mackenzie*, the Lords found the eases he got from Dalvennan's creditors only probable *scripto vel juramento*. But the reason there was, because Mr Rory was on life; but here, Kinfauns being dead, there is no other imaginable way left but only to expiscate the ease by the creditors' oaths.

The Lords thought this a very dangerous trial; but, having no other way to extricate it, they appointed the creditors, before answer, to depone what they gave down of their sums, when Kinfauns transacted with them.

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1702. *February* 24. SIR JAMES FLEMING of RATHOBYRES *against* HAY of DRUMMELZIER and GEORGE CALDTON.

PHILIPHAUGH reported Sir James Fleming of Rathobyres, late Provost of Edinburgh, against Hay of Drummelzier and George Caldton, merchant in London. Sir James Rochead being infeft in Cockburn's estate, for security of 44,000 merks he had lent him, and having disponed it to Dame Magdalen Kinloch, his lady; and she having transferred a part of it to Sir James Fleming, and he insisting for payment against Drummelzier, who bought the lands at a roup, compearance is made for George Caldton, an English merchant, and John Plenderleith, writer, his factor; who produce a disposition to the same money, made to the said George, by James Rochead of Inverleith, as heir to his father, and an infeftment following thereon.

Against which it was ALLEGED, for Sir James Fleming, that they offered to prove, by Plenderleith the factor's oath, that he not only received the factory, but even Caldton's disposition and seasine from Inverleith; and so, they having come back to the debtor's own hands, it was *instrumentum apud debitorem repertum*; and so presumed to have been *solutum* or retired.

ANSWERED,—*Esto* it were so, (as was denied,) yet that brocard had many exceptions in law, *ubi alia conjectura sumi potest*; as, if the creditor trust the debtor with his bond to cause take infeftment, or when he has it from another than the creditor. That it is only *præsumptio juris*, and admits of probation in the contrary; and real rights on lands are not extinct by retirement, without renuncia-