No 84.
bond to pay or denude. He attempted to retain till paid a debt due to him by the cedent. Being a trust, or deposite, compensation found not competent or receiveable.

to himself, and likewise on bonds due to James Scot of Bowhill, and others, to whom he gave back-bonds declaring the trust, and obliging himself to hold compt, reckoning, and payment for what he should recover, or denude. Bowhill having assigned Sir Francis to Bristo's back-bond, and he craving him to denude; he *alleged*, upon compensation, that Bowhill was owing him as much by clear liquid bonds, and which he advanced him on the faith of the trust he had of Hartwood-myres' adjudication, and that he would retain till he were paid.—*Answered* for Sir Francis, 1*mo*, This is not liquid, neither being *inter eosdem*, nor a compensible sum, but only an obligement to denude, which is the prestation of a fact.—*Replied*, That it was an alternative obligation, either to pay or denude, in all which cases *electio est debitoris*; and if he elect to pay, then compensation is in construction of law equivalent thereto. Yet the LORDS considered this was a trust, and that *reddere depositum*, was *juris gentium*, and compensation was neither competent nor receiveable against a *depositum*; and Sir Francis being an assignee for an onerous cause, they repelled the compensation in so far as proponed on Bowhill's debts against him. Yet Bowhill's discharge would have precluded Sir Francis; and it has been oft found, that back-bonds qualify and affect not only personal rights, but even apprisings and other real rights, till either infeftment be taken upon them, or the legal be expired; and even against singular successors and third parties, whereof there is an eminent case, 5th February 1678, Mr Rory M'Kenzie against Watson. *See* PERSONAL and TRANSMISSIBLE.

Fol. Dic. v. 1. *p.* 164, *Fountainhall, v.* 1. *p.* 770.

1709. *July* 16.

No 85.
A legacy being left to two brothers, the share of one them who had died, was deposited in the hands of the other. Found, that he could not retain for a debt due to himself, in competition with other creditors of the defunct.

The EXECUTORS-CREDITORS of JOHN STUART, Merchant in Edinburgh, *against* MR ROBERT STUART, Professor of Philosophy in the College of Edinburgh.

JAMES STUART advocate, one of the town clerks of Edinburgh, having, before his decease in January 1704, disponed and made over all his means and effects in trust to Sir James Stuart of Goodtrees his uncle, and Sir Hugh Cunninghame of Craigend his father-in-law, for the ends mentioned in the disposition; with a clause ordaining what remained of his estate, after payment of his debts and legacies, to be made furthcoming to his two brothers, John and Robert Stuarts, equally betwixt them; and John Stuart chancing to die a little after James, before the trustees had executed his will; they, the trustees, the 25th March 1705, ordered L. 6029, the superplus balance of James's free gear, to be put in Mr Robert's hands, to be kept and made furthcoming by him, to such as should be found to have best right. John Stuart's creditors confirmed his share of the money as executors-creditors to him, and pursued Mr Robert for payment.

No 85. *Alleged* for the defender; He being creditor to his brother John in a liquid bond of L. 730 of principal, and some bygone annualrents, ought to have retention in his own hands for his payment; especially considering, that the share of James Stuart's estate falling to his brother John, was never *in bonis* of John, but in the person of the trustees, who had the absolute disposal thereof after John's death, and were only liable to an action of trust at the instance of his creditors or representatives. And these trustees having put the money in the defender's hands, to be furthcoming to John's creditors, he might justly pay himself in the first place, by virtue of the delegation; as well as the trustees might have immediately paid the creditors with the money, as far as it would go, without necessity of confirmation.

Replied for the pursuers; Their debtor's share of his brother's means, was *in bonis* of the debtor, at his decease, and not then in the defender's hands; so that whatever way thereafter he attained possession, he could not retain for his own payment, without establishing a title, by confirming himself executor-creditor. Creditors cannot, by any indirect means, prefer themselves to other creditors, doing diligence after the common debtor's decease, 8th February 1662, Crawford *contra* Earl of Murray, No 63. p. 1613.; and 14th February 1662, the Children of Mouswell *contra* Laurie, No 64. p. 2614. And the trustees could not transmit any title to John Stuart's effects, from whom they had no trust or powers to pay his debt. Besides, whether the right of John's share was *in bonis ejus*, or in the person of the trustees, they could never evacuate the trust, by giving his share, after his death, to any person wanting a title.

Duplied for the defender; Creditors cannot, indeed, by indirect means prefer themselves to others, and it is certainly a most indirect method, for a debtor to take an assignation to his deceased creditor's debts, in order to compense against the defunct's other creditors doing diligence, which is the case of the cited decisions; seeing this course would open a door to any creditor to operate his own preference, by colluding with a debtor. But here there is no such practice; on the contrary, the defender got the money fairly in his hands by the trustees, who had the only right thereto, and did truly apply it for the use they received it; *2dly*, Suppose John Stuart had lodged in Mr Robert's hands, a sum to be expended by him, in paying John's creditors, is it to be imagined that Mr Robert could not in that case have paid himself, after the debtor's decease, without confirmation? seeing, *qui suum recipit, condictione non tenetur*; much more must retention be allowed in this case, where in effect the money was never *in bonis defuncti*, but the trust flowed from others. Again, as, had the money been put by the trustees in Mr Robert's hand, while John was alive, he, Mr Robert, would have good right of retention; so he must be allowed the like *jus retentionis* against John's executors-creditors.

Triplied for the pursuers; The disparity is manifest; for putting the money in Mr Robert's hand in John's lifetime, would, *ipso facto*, have made an ex-

tinguishing *concursus debiti et crediti*, which could not happen by his getting the money after John's decease, which nothing but a legally established title could effect. No 85.

THE LORDS found, That Mr Robert Stuart had no right of retention for his own payment; and that the Creditors of John Stuart ought to be preferred to his share of the deposited money, according to the diligence used by them to affect the same.

Fol. Dic. v. 1. p. 164. *Forbes, p.* 348.

SECT. XIII.

Real and Personal Rights, Whether Mutually Compensable.

1611. *March* 23. BUCHAN *against* SEATON. No 86.

IN an action betwixt Christian Buchan and Marion Seaton, anent the violent profits within burgh, THE LORDS admitted an exception of compensation against the wife for an annualrent, disponed furth of the same land by her and her umquhil husband.

The like betwixt William Napier and M'Murray.

Kerse, MS. Fol. 245.

1611. *June* 4. AGNES HAMILTON *against* WILLIAM M'CARTENEY. No 87.

A liquid sum for a house mail cannot be suspended upon compensation, founded upon the tenant's right of retention of any annualrent wherein he is infeft furth of the tenement, he having no decree for poinding the ground, nor personal liquid decree against the heritor or liferenter.

A liquidated decreet for a house-mail cannot be suspended by compensation founded upon the tenant's right of retention of an annualrent, wherein he is infeft furth of the tenement; he having no decreet for poinding of the ground, nor personal liquid decreet against the heritor or liferenter.

Fol. Dic. v. 1. p. 165. *Haddington, MS. No* 2192.

1629. *March* 25. E. BUCCLEUGH *against* YOUNG and KER. No 88.

A reverser having consigned the wadset sum upon an order of redemp-

THE Earl of Buccleugh pursuing redemption against Young, who had a redeemable wadset of him, mentioned, *voce* REDEMPTION; and in this redemption, one Ker, who was creditor to Young the wadsetter, had, for sums owing to him by the said Young, comprised the said Young's right of wadset and infeftment, and who upon that comprising, had charged the Earl to enter him,