

chants debtors to him ; and as he might have received payment from the merchants, and applied the sum to his own use, so he might discharge them ; and this sum might have been arrested, and affected for Lyall's debt, and therefore was *in bonis* of Lyall, and behoved to be confirmed ; and seeing the defenders cannot be secure, they were not obliged to accept of caution to put themselves to two actions. The pursuer answered, That albeit payment made to Lyall would have been sufficient, as being made *bona fide* ; yet if Lyall had discharged without payment, his discharge would not have excluded Street the pursuer, neither would arrestments for Lyall's debt have excluded him, especially the same having been posterior to the missive produced.

The Lords repelled the defences, and found the same not to be *in bonis* of Lyall, nor to be confirmable as his goods, but to belong to the pursuer Street ; and seeing Street offered caution to warrant the defenders, they ordained him to grant the same accordingly.

*Fol. Dic. v. 2. p. 412. Stair, v. 1. p. 616.*

\* \* \* Gosford reports this case :

1669. June 10.—Mr. Street having sent a parcel of sheep skins to one Mr. Lyall, who was his factor, which were sold to Bruntfield and his copartners for £.140 Sterling ; the said Lyall, by a missive letter, did signify to the said Mr. Street, that he had sold the same for the foresaid price to the said persons, and was to take security in his own name for Street's behoof, but did take the bond in his own name, payable to himself and his heirs, without making mention that it was to the use of Mr. Street ; likeas, thereafter in his count-book, he states himself debtor to Street, by granting a receipt of a part of the said sum. Thereafter Mr. Lyall being dead, Mr. Street did recover a decret of declarator against Lyall's nearest of kin, finding that the said bond was granted for the price of the said sheep skins, which did belong to him, and thereupon did pursue the debtors for payment of the sums contained in the bond. It was alleged, that this was not *habilis modus* to establish the debt in the pursuer's person, but he ought to confirm himself executor creditor, without which the debtors were not *in tuto* to make payment. The Lords, notwithstanding, did decern the debtors to make payment, the pursuer finding caution to warrant them at all hands, seeing no creditors of Lyall's had confirmed themselves executors, or did compear for their interest ; which, if they had done, or should yet do, the Lords thought that the question would be more difficult.

*Gosford MS. p. 48.*

1669. June 9. COUNTESS of DUNDEE against MR. JAMES BIRSBIN.

The Countess of Dundee being possessed in an annual-rent out of the Mains of Dudhope, *in anno* 1650, and having consented to the infestments of other creditors

No. 5.  
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 infestments of  
 creditors, in  
 consequence  
 of obtaining  
 other security  
 for her own  
 claims.

in the said Mains, *in anno* 1659, she is provided to ten chalder of victual out of the said Mains, and to certain other lands, and the provision bears expressly in satisfaction of the contract of marriage, and any prior infestments; whereupon she pursues a pouding of the ground. Compearance is made for Mr. James Birsbin, who produces an infestment of an annual-rent *in anno* 1648, and offers to prove possession conform, prior to the Lady's infestment *in anno* 1659, whereupon she now pursues, and which infestment she has accepted in satisfaction of all that can befall to her by her husband's death. The pursuer answered, That she was infest in an annual-rent out of the Mains *in anno* 1650, which doth exclude Birsbin, unless he had attained possession before that time; and albeit this infestment *in anno* 1659, being in satisfaction, &c. yet that right whereby she accepts the same, is not in favours of Birsbin, but of other rights to which the Lady consented, and not to Birsbin's, to which she never consented, and therefore it must be limited to be only in so far as concerns those rights related therein. Birsbin answered, That be the motive or narrative what it would, my Lady having simply and absolutely accepted this infestment in satisfaction of her former infestments, the former infestments were thereby extinct in the same way as if she had renounced them simply to my Lord, whence there is *jus acquisitum* to Birsbin, deriving right from my Lord.

The Lords having considered the last provision, found that albeit the narrative related to rights consented to my Lady, yet the dispositive words were absolute, and so did extend to Birsbin. It was also alleged, that this last security, in so far as it bears to be in satisfaction of all others, the acceptance thereof was a donation betwixt man and wife revocable, and my Lady did now recall it. It was answered, My Lady had homologated the same after my Lord's death, by pursuing thereupon; in which it occurred to the Lords, whether my Lady might recal any part of this last provision, and make use of it in so far as it quadrated with the former infestments, or whether she might recall it after she had made use of it after her husband's death, which not being debated fully, the Lords did not decide therein.

*Stair, v. 1. p. 617.*

\* \* \* Gosford reports this case :

The Countess of Dundee being provided by her contract of marriage, extending to 40 chalder of victual, and consented to the alienation of several parts thereof, did *in anno* 1650 and 1657, get infestments of several grants in satisfaction thereof out of the Barony of Dudhope. Thereafter, *in anno* 1659, in respect she had consented to the infestments given out of the lands of the Barony of Dudhope to several creditors, she got a new infestment in satisfaction of all her former provisions out of the lands of Innerkeithing, and some rooms out of the Barony of Dudhope; whereupon she did pursue a pouding of the ground; wherein compearance was made for Mr. James Birsbin, who craved preference, as being infest *in anno* 1658, and by virtue thereof in possession; which the Lords did sustain, notwithstanding

it was replied for the Countess, that her infestment *in anno* 1659 was remuneratory; and was qualified, that it was accepted only by her as having consented to the infestments of several creditors, whereof Birsbin was now one; and notwithstanding thereof, she might make use of her infestments 1650 and 1651, which were prior to Birsbin's, and were public by her husband's possession; for that qualification being only in the narrative, and the dispositive clause being general as to all provisions whatsoever preceding, which the Countess renounced without any qualification; the Lords would not sustain the reply, albeit by the last infestment she was a great loser.

*Gosford MS. p. 49.*

No. 5.

1672. January 24 BOYLSTOUN *against* ROBERTSON and FLEMING.

Boylstoun, merchant in London, having employed one Makelwood in Halifax, to buy linen cloth to him, and given her money for that effect; she employed — Palmer, who accordingly went to Glasgow and bought a pack of linen cloth, and left it in the hands of Nicol Robertson; which being arrested there, at the instance of some merchants in Glasgow for a debt of Makelwood's, they obtained a decret for making the same forthcoming; whereof Boylstoun having raised suspension and reduction, alleged that this linen cloth could not be made forthcoming for Makelwood's debt, because it was bought for the use of Boylstoun's husband, and with his money, so that it could not belong to Makelwood, who was but a servant, or a person entrusted for the behoof of another.

In this process the Lords ordained the oaths of the parties who sold the linen cloth at Glasgow, and witnesses to the bargain, and Robertson in whose hands it was left, and also the oaths of the said Mackelwood and Palmer to be taken, in whose name and for whose use the linen cloth was bought and delivered; of which there were two witnesses taken at Glasgow, who deponed that Palmer bought the cloth, and that in the bonds given for the price thereof, he designed himself servant to Makelwood, and that he bought and received the cloth in the name and for the use of Makelwood. Makelwood deponed that she was employed by Boylstoun to buy the cloth, and sent his money for that effect with Palmer, who deponed that he bought the cloth for the use of Boylstoun.

The Lords found, that by the testimonies of the witnesses, it being proved that the cloth was bought and received by Palmer, servitor to Makelwood, in her name and for her use, that the property of the cloth was thereby stated in the person of Makelwood, and not in the person of Boylstoun, albeit she had a mandate or trust from him, which is but a personal obligation; but property or dominion is only constituted by possession, and Boylstoun had got no possession of the linen cloth, either by himself or by any in his name to his use.

*Stair, v. 2. p. 52.*

No. 6.

A person receiving money to buy goods for another, having bought and received them in his own name, without mention of the truster, the property was found to be in him, and his creditors arresting were preferred.