

who did all declare that the bonds were granted and delivered for the behoof of the Lord Salton; but if the true cause thereof was for confirmation to be obtained of their several feus, they found that the sums could not fall under escheat, they being conditional; and the counter-bonds being of the same date, and granted by the Lord Salton's commissioners, whose faith he had followed, so that they were affected with the counter-bonds, and the vassals secured who had never delivered the same to the Lord Salton, and most of them subscribed blank in the creditors' name, and so were in the case of *obligatio ad factum prestandum*, which, until the deed be performed, is not obligatory in law, the condition not being purified; specially seeing the wadset granted to the Master of Salton was not burdened with the feuars' confirmations, but the commission for agreeing with the feuars was only excepted out of the warrandice, whereby he could not recover, and distress the Lord Salton. But his right of wadset was not burdened therewith, neither could that hinder him to acquire Kinminity's prior right, whereby he might bruik the lands without being obliged to confirm the vassals' feus, which he might do or not as he pleased. But the Lords did reserve to the Lord Lyon, in case he should obtain confirmation to the vassals, to pursue for these bonds, as accords of the law.

No 12.

Gosford, MS. No. 541. p. 288.

1675. February 9. VEITCH against The EXECUTORS of JAMES KER.

SIR ROBERT STUART in Ireland being debtor to James Sanderson in a considerable sum, the said James did assign the same to James Ker, and Robert Brown; and Sir George Maxwell, as friend to Sir Robert, having compted with the assignees, there was found L. 300 Sterling resting, for which Sir George gave bond to the assignees, bearing this condition, that they should deliver up Sir Robert's first bond, with a discharge thereof to Sir George, who being examined upon oath, when and how the first bonds were delivered to him, deponed that they were delivered to him in *anno* 1670, and that he desired no discharge, in respect that he got up the bonds unregistrated; Sanderson being at the horn in *anno* 1653, David Rodger obtained a gift of his escheat and general declarator thereupon, and assigned the same to William Veitch, who took a second gift upon the same horning in *anno* 1674; whereupon there arose a competition betwixt Veitch the donatar, and the Executors of Ker the assignee, which of them had best right to the sum of Sir George Maxwell's; and after a full debate *in presentia*, the LORDS, upon the 10th day of December 1673, found that creditors obtaining satisfaction of their debts contracted before rebellion, and satisfied before the declarator, were thereby secure, and never obliged to repeat the same to any donatar, whether the satisfaction were obtained by payment made by the rebel, by pointing of his goods, or disposition thereof in satisfac-

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A new bond granted by a debtor of the rebel to an assignee, before declarator, secures against the donatar.

No 13.

tion, or by decreets for making furthcoming of his sums, or goods, or precepts, or assignations granted by the rebel, and thereupon payment made by the rebel's debtors; which being of new again debated, and the donatar having *alleged*, that albeit payment obtained could secure the creditor, yet he must be preferred, because here the creditor hath not gotten payment, but a new bond, which bearing expressly to be the remainder of a bond due to the rebel, it is rather a corroboration than either payment or innovation, and so is in the same case, as if Sir Robert Stuart upon sight of the assignation had given to Ker a new bond for the remainder of what he was due to Sanderson, though he had taken up the old bond; yet seeing the new bond shews that it was for the same cause, it is not equivalent to payment, much more when the old bond is neither discharged nor cancelled, but only delivered to Sir George Maxwell; and the LORDS by their former interlocutor, found that the donatar is preferable to the assignee, unless the assignee had recovered payment, as in this case he hath not, but the sum is yet extant. It was *answered*, That neither the interlocutor, nor the ground thereof is founded solely upon payment; but upon satisfaction, which may be by payment, innovation, delegation or compensation; for when an assignee craves satisfaction from his cedent's debtor, he is not obliged to go through all the registers to try, whether his cedent was at the horn; but he may lawfully and securely take satisfaction of his debt, either by the actual delivery of money, which he cannot be hindered to lend to the same party, and take a new bond thereupon, or by taking from him a new security, whereby the creditor being changed, the assignee becoming debtor in place of the cedent; it is equivalent to payment; but here the old bonds are retired and extinct, and in this new bond there is an entire change, for instead of Stuart the debtor, now Maxwell is debtor, and instead of Sanderson who was creditor, now Ker becomes creditor, which is fully equivalent to actual payment; and albeit this satisfaction be after the declarator upon Rodger's gift, yet that gift could only extend to what the rebel had then acquired; but Sir Robert Stuart's bond was granted long after, and so cannot be carried by the first gift; and being satisfied to the rebel's assignee before the second gift or declarator, the same doth only belong to the assignee and his executors.

THE LORDS adhered to their former interlocutor, and having considered the oath of Sir George Maxwell, they found, that before Veitch's gift or declarator, the debt due by Sanderson was satisfied and extinct, by this new bond granted by Sir George Maxwell to Ker as Sanderson's assignee; and therefore preferred the Executors of Ker the assignee to the donatar as to the sum due by Sir George Maxwell. See No 159. p. 1073. and No 91. p. 2874.

Stair, v. 2. p. 318.