

No 17. parties, even for the terms intervening, after the general declarator, and before the special citation.

A& Mowat.

Alt. —

Fol. Dic. v. 1. p. 113. Durie, p. 336.

\* \* The same case is observed by Spottiswood :

A GENERAL declarator puts not the rebel's tenants in *mala fide* to pay their farms to him, found in a special declarator pursued by Cleghorn younger against his father's tenants, who alleged that they had paid *bona fide* their farms to his father the rebel, as they were wont to do, and that before the mention of the pursuer's special declarator : Which exception was sustained.

Spottiswood, p. 99.

1628. December 9.

MACKIE against DUMBAR.

No 18.  
A relict having no direct action against her husband's debtors, unless confirmed, it was found unwarrantable to pay her a third without sentence; and the debtors were obliged to pay the whole, notwithstanding, to the executor.

IN an action Mackie against Dunbar, the executors of a defunct pursuing the intromitters with the goods and gear of another defunct, for payment to them of a debt owing by that defunct to him, to whom the pursuers were executors, and they *alleging*, That they had paid the third of that debt to the relict of the defunct, to whom they were executors; for the which they craved defalcation : This allegation was repelled, and no defalcation was admitted for the relict's third, seeing no sentence was obtained by the relict against them therefor, without which they could not have been compelled to pay the same, seeing the debtor remains only obliged to the executor, and the executor to the relict, in those things which she hath not in possession in her own hands, and the relict hath her direct action against the executors, and not against the debtors to her husband. See EXECUTOR.

Fol. Dic. v. 1. p. 113. Durie, p. 407.

1661. December 14.

HOMES against JOHN BONNAR.

No 19.  
A debtor having transacted with the supposed creditor, and obtained his discharge, his *bona fides* was found relevant only for what was truly paid.

MARY and — Homes, as donatars to the escheat, and liferent, of umquhile John Home, pursued John Bonnar, for count, reckoning, and payment of the sum of 16,000 merks due to the rebel, for the price of a house. The defender *alleged* absolutor, because he had *bona fide* made count, reckoning, and payment to Mr Alexander Home, assignee constituted by the rebel, before any citation or diligence done against him, to put him *in mala fide* so to do, and produced the assignee's discharge, bearing, that the defender had made count with

the assignee, and that there remains only the sum of 1100 merks, which he acknowledges to have received, and therefore discharged him of the whole. The pursuers *alleged*, the discharge, not bearing payment of the whole sum, but only of 1100 merks, nor yet bearing, that the instructions were given up to the assignee, cannot exoner the defender; but he must yet reproduce the account and instructions thereof; likeas he has produced a great part thereof in this process; because no discharge could be relevant to liberate this defender, but only payment made *bona fide*.

THE LORDS found the discharge sufficient to liberate the defender; mainly, because, albeit the discharge mentions not the instructions to be given up, yet the defenders were not obliged to preserve the same, or be at the hazard thereof. The pursuer further offered them to prove, that the defender had yet in his hand the account and whole instructions, and therefore ought to reproduce the same, that the Lords might consider, whether the rebel's assignees had allowed any thing to him, which ought not to be allowed, and did belong to the donatar; which the Lords sustained.

*Fol. Dic. v. 1. p. 114. Stair, v. 1. p. 70.*

1662. July 19.

MONTGOMERY of ——— against ———.

MR WILLIAM WALLACE having obtained a disposition of the lands of Haggburn from Thomas Hunter, he gave a back-bond, obliging him to sell the same at the best avail, and, as a part of the price, to pay a bond of provision to Thomas's sisters and brother, granted by their father, and having retained his own sums, and such as he was cautioner for, was obliged to count for the rest; and being first pursued before the *Englishes*, and now before the Lords, he was decerned to take the lands at sixteen years purchase and a half, and to count accordingly. It was *alleged*, He could not have allowance of the sums paid to the brother and sister, because these could not exclude lawful creditors. It was *answered* for Mr William, He had paid *bona fide* a part, and had given bond for the rest, and could not now be called in question. It was *answered*, he was *in mala fide*, because the payment was made after intenting of the reduction against his right, at the pursuer's author's instance. Mr William *answered, non relevat*, unless there had been a reason libelled in that reduction against these bonds. The pursuer *answered*, It was sufficient that reduction was used against the whole right, to which any reason might be added.

THE LORDS found this allegiance not relevant to put Mr William *in mala fide*, unless there had been a special reason of reduction filled up, and shown to Mr William against these bonds particularly.

*Fol. Dic. v. 1. p. 113. Stair, v. 1. p. 131.*

No 19.

No 20.

Payment *bona fide* of a particular bond, was sustained, though after intenting of reduction, as there was no special reason of reduction libelled.