

name, should operate and take no effect against him, the debt being paid in manner above expressed.

Against this it was ALLEGED by Sir George Lockhart, That the bond can never be declared extinct, but the assignation taken thereto by the cautioner must stand good, in so far as the said bond was satisfied by the sole moyen and credit of the cautioner, who borrowed the money owing in the bond from Johnstone of Hiltoune; for which a bond was again granted by Foulden, as principal, and the said Sir James, (who was cautioner in the first bond) as cautioner; and so as to him it was just alike as if he had remained cautioner in the first bond.

REPLIED,—By the payment, the first bond was wholly taken away, and though money was borrowed for paying thereof, yet it must be reputed to have been satisfied by the principal, since he continued principal in the new bond, and liable to the cautioners by an express clause of relief.

The Lord Newbayth inclined to sustain the declarator; and thought the taking the assignation to the first bond, *ad majorem cautelam*, and for better recovering of his relief, unwarrantable.

Yet Sir George contended he might, since he continued still debtor for the sum by becoming cautioner in the second bond.

*Advocates' MS. No. 240, folio 109.*

1671. *November 10.*

A CERTAIN person pursuing a woman to relieve him of some ministers' stipends paid by him for his possession of some lands set to him in tack by this woman; ALLEGED absolvitor from this, because the time she signed it, she was *vestita viro*, and so it cannot oblige her. REPLIED,—She cannot be heard, because he offers him to prove she has homologated the said tack since her husband's decease, by accepting of the tack-duty, and granting discharges thereupon. DUPLICATED,—What payment she has got must never be reputed ratihabition of the tack, because she ascribes it to another cause, *viz.* her liferent infertment.

*Advocates' MS. No. 242, folio 110.*

1671. *November 10.* ——— *against FRAZER of Middeltly.*

FRAZER of Middeltly being pursued on a registrate horning to pay the annualrent of the principal sum, since the date of the denunciation, conform to the act of Parliament made in anno 1621; it was EXCEPTED that he could not be liable in annualrent, because the horning whereupon it was sought was most unwarrantable, in so far as it did not bear any previous precept of the sheriff's, who pronounced the decret, to have been raised, at the least no charge nor execution given thereon; which ought first to have been done, conform to the 177th act *in anno 1593*, compared with the 10th act, in 1606, and to the constant practise of