

tive's goods; *arg. p. 2, institutionibus, de successione libertorum*; but the parallel is farfetched. See him *questione 2. Vinnius, ubi supra*, says, *Nunc inter milites ut plurimum menstruo stipendio definitur*. See Joannes Voet, *de jure militari, cap. 5, page 276.* *Advocates' MS. No. 376, folio 155.*

1672. *December.* The LORD LYON *against* The FEUARS of BALVENY.

IN the special declarator pursued by My Lord Lyon, as donatar to the single and liferent escheat of the deceased Lord Salton, against the Feuars of Balveny, for making payment to him, as donatar foresaid, of sundry sums of money, contained in bonds granted by them to the said Lord Salton, rebel; compearance having been made for Arthur Forbes, it was ALLEGED the said bonds could not fall under the late Lord Salton's escheat, because this gift and pursuit was only taken by my Lord Lyon to his brother-in-law, the Master of Salton's behoof: to the which Master of Salton the said sums sought by the donatar to be adjudged to him, do properly belong, and not to the deceased Lord Salton, under whose escheat it is craved they may be declared to have fallen: in so far as the Master having acquired the right of the Lordship of Balveiny from the Lairds of Blackhall and Kinminnity, in whose persons the same stood; he, at the same time, did grant a backbond and reversion to the said Blackhall, wherein he declares, all he paid for his said right was allenary L. 38,000, and that the same should be redeemable from him upon the re-payment of that sum; and declares that, seeing most of the vassals of the lordship were componsing for confirmation of their feus, and for new rights, and from whom considerable sums of money were expected, that he should, for his own better security of payment, do exact diligence to transact with such of the vassals for new securities to be given them who had not yet transacted, and to perfect the rights and confirmations of such as had transacted already, and from both should uplift their compositions in part of payment to him of the aforesaid sum of L.38,000 of wadset; and whatever he received upon that account he obliges himself to deduct it from the said sum of L. 38,000, and impute it in payment thereof *pro tanto*. To this backbond and reversion Arthur Forbes having acquired right, is confident the Master is well near paid by his intromission with the said sums paid to him by the vassals for rights; and hath a count and reckoning depending against him for that effect: and which backbond the Master would, in a most disingenuous manner, altogether evacuate and render ineffectual, by this method and unhandsome contrivance,—that the Lyon takes a gift of the late Salton's escheat, though truly to the Master's own behoof; and under that most unjust and unworthy conveyance, should enhance and absorb the said sums payable by the vassals for their compositions, (and which were destinate for his own payment of the foresaid wadset sum, and most of them so applied, and who has sole and best right thereto,) under the late Lord Salton's escheat, forsooth, that so the Master may still have power to clog and affect the said lands and Lordship of Balveiny with the foresaid whole sum of L.38,000, as though none of it were paid; suffering by collusion the said sums to be abstracted and carried away by the donatar, though

the sole benefit of all will return ultimately to himself; that so his wadset may stand entire, and may thereby engross that whole estate by his moyen, and artifices, and dishonest trinketings, to the utter ruin of the whole creditors of the late Lord Salton.

This being the true state of the design, though the master of Salton most unjustly colludes with this donatar, that so he may frustrate the effect of his own backbond, yet Mr. Arthur Forbes, who is assigned to the same, *videt rem suam agi*, and is unanswerably grounded in law to allege and propone all that either the Master or the vassal's debtors in the bonds, and the trustees to whom they were committed in trust, should say, and which they by collusion omit; and to impede the misemployment of those sums that were appointed for the Master's satisfaction, and see them turned into the right channel for disburdening the said lands (conform to their destination) of the said L.38,000; and which being once satisfied, he hath the undoubted right of property of the said lands.

Upon which most rational interest, it is ALLEGED for him, that the bonds contraverted, granted by the vassals of Balveny, cannot fall under the late Lord Salton's escheat: *1mo*, Because the said bonds are all conditional, and were given by them in contemplation *et intuitu* of confirmations they were to receive for the same of their several feus, (*vide infra*, November 1677, No. 647,) and were so affected, some of them by the very bonds, and others of them by express backbonds and counter obligations of the same date, and before the same witnesses, with their bonds, for procuring confirmations to them from the Laird of Blackhall; and which being *pacta incontinenti adjecta*, are, by all who have the least paratitle of law, reputed *pars contractus, insunt contractui illumque informant*, and militate against singular successors. And all these bonds, by the express depositions of the vassals, are acknowledged to have been given upon that sole account, and for that cause; and therefore the sums contained in these bonds can in law belong to none but those who can purify the conditions thereof, and fulfil their cause upon which they were granted: and which this donatar, nor any else, cannot do, but allenary the Master of Salton, who hath the only power to do it, in virtue of his wadset-right, which carries the superiorities; and the vassal's debtors in thir bonds can pay to none else but him, because they are expressly destinate by the late Lord Salton, for payment of a part of his L.38,000, and he empowered to confirm their rights as come in Blackhall's right; and whenever he confirms the same, it must be in the terms of his backbond, that he have right to the compositions, and which sums and compositions he can ascribe to no other use but for extinguishing his own right. And, therefore, since the bonds were, *1mo*, conditional, at least affected with correspective obligations; *2do*, destinate for Salton's payment; they can never belong to the donatar, but *cum suo onere reali* of purifying the condition, or of satisfying Salton: neither of which he either will or can do. But, *2do*, The same vassal's debtors, upon arrestments laid on in their hands by Bailie Mercer, as a creditor to the late Lord Salton, having been pursued to make forthcoming, they, upon oath, denied they were debtors to the Lord Salton; and that it was only a naked communing; and that any bonds they gave were never delivered evidents, but consigned and depositate till mutual performance, viz. till they got confirmations from Blackhall, and which was the cause of their granting these bonds; and so, not being debtors to him, they cannot fall under his escheat.

Whereunto it was REPLIED, for the pursuer, that the Lords, before answer to the debate, having ordained all the parties to be examined in whose hands the bonds were; the granters, writers, and witnesses, of the whole bonds; for what cause the bonds were granted, to whose behoof, if they were depositate, and upon what terms: and they having accordingly deponed, it is hoped they have cleared, though the bonds were blank in the creditor's name, yet that they were truly granted for the late Lord Salton's use and behoof, and that Alexander Abernethy did, in his name receive them; *ergo*, beyond all question, they must fall under the said Lord's escheat. And though, in the report of Bailie Mercer's commission, the vassals seem to have deponed otherwise, yet there is no such discrepancy or incompatibility betwixt them but they may be easily agreed; and *esto* there were, this last ought to preponder, and merits more faith. *2do*, Albeit the said bonds had been granted *intuitu* of their confirmations, and the sums of them destinate for the Master of Salton's payment, neither of these can prejudice his Majesty and his donatar, but the same must be paid to him without taking any notice of these extrinsic burdens; for thir reasons, *1mo*, The vassals rested upon a naked personal obligation from Blackhall's commissioners, for procuring them his confirmation; and which was neither correlative nor real, but the feuars followed the faith of them who gave them these counter-obligements, and who had not the least design that there should be such a relation and correlative betwixt their bonds and thir counter-obligements as that the one could not be performed without the other, and that the mutual tie should be real, and follow the thing, and transmit to singular successors. *2do*, It was not in the power of the late Lord Salton to destinate the sums paid by the vassals in composition, in payment of any part of the sums due to the Master of Salton: and any transaction being made *stanti rebellione*, could give the Master no right to these sums; seeing no voluntary right or destination thereof made by the rebel, after rebellion, can prejudice his majesty or his donatar. *3tio*, That the backbonds, or counter-obligements, are but extrinsic to the vassal's bonds, and the king or his donatar are not obliged to take any notice thereof, unless the bonds had *in corpore juris* borne that condition; (See Stair, *Tit. Obligations Conventional*, Nos. 17 and 18, where he cites Dury, 26th July, 1622, *Davidson* and *Buckie*, as also *Hope*;) and, therefore, no singular successor coming to the right of these bonds can be tied by these counter-obligements; but may crave exact performance, without being obliged to offer implement to the party bound for that other part. And as this holds infallibly in all singular successors, so much more must it be true in the case of donatars to escheat, who are favourable and privileged in law, but, in this point, plead no privilege but what is their due upon their common interest of a singular successor. That otherwise a thousand inconveniences shall happen in our country, where, by reason of our poverty, most part of things are done by transaction; wherein I being assigned to a simple bond, knowing no other but it is such, I shall be eluded and mocked by some backbond and counter-obligement granted to the said debtor by my cedent, and which I must either fulfil, in this absurd opinion, or lose the benefit of my transaction. (*Vide infra*, No. 722, [*Mackenzie* against *Watson*, 6th February 1678.] That a donatar of forfaultry will not be liable to fulfil such backbonds; but without regard thereto, hath right to what was the traitor's. That the law hath prescribed certain methods of relative or correlative obligations for making them

real, effectual, and transmissible, *contra tertium*, that is, against singular successors; *viz.* mutual contracts or declarations in the writ, that the right of the one shall not be valid till the other be *simul et semel* performed, or a backbond of the same date, and relating the bond and other writ; which are the known roads of law for such as choose rather *inhæerere rei quam personæ*, and will the thing to be affected: but thir feuars took none of thir ways, but rely on the faith and personal obligements of the granters, against whom they have action for implement, but can never obtrude them against his Majesty, or his donatar, who, as singular successors, are not affected or concerned therewith. *4to*, This pursuit and gift is not to the master's behoof, because that defence having been proponed in the general declarator, my Lord Lyon, who is donatar, hath deponed thereon *negative*; and so being *res jurata et veritas jurata, nihil amplius quæri debet nisi an juratum sit necne*. *5to*, Though the master, by the quality of his backbond, may ascribe the vassals' compositions in payment of his own debt *pro tanto*; yet, in law, he is not obliged to it but if he please, but may ascribe it to what he please.

Whereunto it was DUPLIED for Arthur Forbes, that, as to the vassals, they have prevaricated most grossly in their second deposition, only upon the subornation and instigation of the Master of Salton; and they came with their depositions all written, and would not answer one interrogatory, yea, not one syllable more than what was taught them; and gross disingenuity appears in Duff of Drummoor his oath; and seeing the two depositions choak and interfere, it is *certissimi juris*, beyond all cavil, *standum est semper priori: ita* Clarus and all lawyers; and which point is excellently enlarged in the informations. *2do*, There cannot be a more frivolous and ridiculous allegiance than the pretence which is used, that thir counter-obligements given to the vassals are merely personal, and so cannot meet the donatar, nor any other singular successor: seeing they are *pacta incontinenti adjecta*, and are most correlative as any ever was; and, therefore, *sibi mutuo insunt, et nemo potest agere upon them nisi paratus sit quod sibi incumbit implere*, and therefore they must meet this donatar. And where it is affirmed that, as in gifts of forfaulture, backbonds are rejected, so here it is admired how any who pretend to law will argue from things so grossly disparate. *3tio*, Where it is urged that a rebel could not destinate, it is utterly vain, seeing here the rebel having borrowed sums for acquiring of a right, *viz.* L.38,000 from the Master of Salton for relieving the lordship of Balveny, he destinate the sums he is to get by virtue of that right so acquired, for payment and satisfaction of the monies borrowed, and by which he acquired them, *pro tanto*; than which there can be nothing more rational nor more consonant to law. As to the *fourth*, the Lyon ought to be most severely re-examined, seeing his first oath was hurried and huddled up at the side bar by my Lord Newbayth (against whom the informations are very bitter) most partially; and the gift, and all the expense since, and much of the solicitation is all by the master; so that it is nothing but an exuberant trust in the Lyon's person. As to the *fifth*, that he may ascribe or not, it is most false, and the backbond is opposed.

Many more excellent grounds of law were insisted on, which may be seen in the informations. But after great heat and many debates and hearings, and much moyen used by the Lyon and the Master of Salton, with which they thought to have oppressed the poor gentleman, the Lords generously, as I think, resenting the insolent encroachment, and pitying the weaker party, they found, after ma-

ture deliberation upon all the writs and testimonies produced, the bonds in question were partly conditional, and partly for one and the same cause, *viz.* for granting confirmations to the feuars of their feus; and that the bonds can have no effect, nor belong to this donatar, till the condition be purified, and the cause performed; and, therefore, assoilyie the defender from this present process of declarator; but prejudice always to this donatar, upon performance and purifying of the conditions of the bonds, to pursue a new action of declarator, as accords.

After which, the pursuers having made their address to the advocate, who was then sick, and came not to the Session; he seemed to be extremely stumbled at the decision, and boasted, after the yule vacance, he would come to the house and show the Lords such invincible grounds for his Majesty's interest (which he said was horridly wounded and misregarded thereby,) that would make the Lords, if not alter, at least resume and demur on what they had done. But he was not so good as his word, and came not abroad all that Session; but, to supply his absence, and to do something, he wrote a letter to the Lords to reconsider the cause, in regard his opinion was contrary to their Lordships: and which magisterial way of dictating to the rest of the Lords, Sir George Lockhart hectors furiously in his informations. But however, the Lords complied so far with him, as to allow them a new hearing: wherein the pursuers insisted much to make it appear that the counter-obligements were not correlative nor real, and which is fully represented by us formerly; yet the Lords advised it of new, and adhered to their former interlocutor.

Sir George Lockhart, in his last information in this affair, was very bold and severe against the advocate, with whom only he hath the vanity seriously to contend, looking upon him alone as his equal, though he thinks him mightily crazed and bruized by his winter's fever. In the end of it he tells the Lords, that *desultoria illa levitas* in fixing or altering interlocutors after full deliberation, were most derogatory to and a prostitution of their honour and Majesty. The Lords would judge thir expressions petulant and reflecting, and censure them in ordinary advocates; but they stand in some awe of him.

The pursuers were so much the more damped, that by their moyen they had flattered themselves a certain victory; and the Lords' deportment was so much the more commendable, that they held justice so fixed, where they had so great temptations to waver. Vide the decision *supra*, at the 8th of December 1671, *Mr. Arthur Gordon* against *Laird of Drum*.

*Advocates' MS. No. 377, folio 156.*

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1672. *December.* SIR JO. YOUNG of Leny against ISAAC BRAND.

IN the same month of December 1672, in a competition between Sir Jo. Young of Leny and Isaac Brand, baxter in the Canongate, about twenty-eight bolls of wheat, of the growth of the lands of Grothall, once appertaining to Mr. Jo. Smith, alleged sold by the said Mr. Jo. to the said Isaac, and who obtained a decret against William Young, tenant of these lands, upon a pretended promise made by the said William to deliver the said bolls to him: this promise the