wise that the Earl of Tullibardin, by whose rebellion the tack fell, was only assignee to the tack; and did not find that the prorogation of tacks, which were not liferent tacks, as said is, did make them fall under liferent escheat. No 34.

Gosford, MS. No 84. p. 30. & No 89. p. 32.

1675. *January* 5. BALLANTINE *against* EDGAR.

THE Laird of Empsfield having granted bond to James Ballantine and his spouse, the longest liver of them two in conjunct fee and liferent, and after their decease, to ——— Ballantine, their son; the father in his own time used inhibition, and now John Ballantine his son pursues reduction of all rights granted by the Laird of Empsfield after the inhibition, and insists against Margaret Edgar who had a liferent-right from her husband, and he a right from Empsfield after the inhibition. It was *alleged* for the defender, That the reason of reduction could not militate against her at the instance of this pursuer, because he neither hath nor could have right to this bond or inhibition; for the bond being granted to James Ballantine and ——— Ballantine his son, albeit the pursuer's name be now filled up in the blank, yet it could not belong to him, because he was not born at that time; and it is visible by the inhibition, that the son's name was blank in the inhibition, and John his name is filled up with another hand, and therefore the execution of the inhibition is only at the instance of the father, without mention of the son, who being only liferenter, the inhibition could extend no further but as to his liferent-right. It was *answered*, That the father was not liferenter but fiar, and the son a substitute, and therefore the father might assign the bond, or dispose of it at his pleasure; and albeit this son had not been then born, the father might fill up his name when he pleased, so that the inhibition used at the father's instance is effectual to his heirs of line or provision by substitution, or to his assignees; and this defender hath no interest to debate how his name came in the bond, that being *jus tertii*, seeing there is no other heir or child pretending right.

No 35.
A person took a bond payable to himself, and after his death, to —— his son. The name of a son, who was born after the date of the bond, was afterwards inserted in it. Found that it was *jus tertii* to the debtor, to debate how that name came into the bond, there being no other person pretending right.

THE LORDS sustained the inhibition as being done at the instance of the father as fiar, and found process at the instance of the son as substitute.

The defender further *alleged*, That the bond was satisfied in whole or in part, in so far as the inhibition thereupon affecting the whole estate of Empsfield, which was transmitted to many singular successors, after the inhibition they paid the whole or a part of the sum of the bond for clearing their lands of the inhibition. It was *answered*, That if it were alleged that they had given sums in payment and satisfaction of this debt, relevant, but if it was only a transaction with the inhibiter to restrict the inhibition to other lands, and pass from

No 35.

theirs no way in name of the debtor, or for his behoof, it could not be imputed in payment, for these persons were not bound for the debt, and as they might freely gift to this pursuer, so they might transact to free them from plea, which transaction if it bore expressly that it should not be imputed in the sum, it could not then be imputed, and the same is now done by a transaction upon the singular successor's account only. It was *replied*, That whatever was the intention of parties, or the terms of transaction, it was a sure ground in law *bona fides non patitur ut idem bis exigatur*; and therefore whatever the creditor obtain upon account of the debt, he cannot crave the same of the debtor; and this has frequently been found in the case of many cautioners, or *correi debendi*, that if a creditor discharge any of them without getting any thing therefor, it resolveth only in *pactum de non petendo*, and he may demand the whole off the rest who will get relief notwithstanding against that party so discharged; but if any thing be paid upon that account, it is ever imputed in satisfaction of the debt, whatever the terms be betwixt the creditor and cautioner, which cannot be on account that they are obliged and liable to mutual relief; for the mutual relief is unprejudged, and therefore the only ground is *ne idem bis exigatur*, which holds as well in this case, as in the case of cautioners; for suppose a creditor should arrest, and pursuing for making furthcoming, should get the party holden as confest who was not debtor, and yet should pursue the principal debtor for payment, who excepting, upon what was recovered by the arrestment, it should be offered to be proven by his oath, that he knew there was nothing due by the party in whose hand the arrestment was made, so that whatever was recovered that way upon the creditor's diligence, did not prejudge the debtor, and could not be imputed in his favours; this would certainly be repelled *ne idem bis exigatur*, and if the contrary were sustained in such cases as this, a party might obtain satisfaction of his whole sums by parcels, and yet crave the whole again.

THE LORDS found, that whatever was obtained by the debtor, and was not upon account of expenses wared out by him, was to be imputed in satisfaction *pro tanto*.

Fol. Dic. v. 1. *p.* 518. *Stair, v.* 2. *p.* 229.

*** Dirleton reports this case:

THE Laird of Hempsfield with certain cautioners for him, having granted a bond of 6000 merks to the deceased James Ballantine and his wife, the longest liver of them two, and after their decease to John Ballantine their son, whereupon inhibition was executed against the principal and cautioners; and the said John Ballantine did pursue a reduction and improbation against those who had acquired rights, after the inhibition.

It was *alleged*, That the pursuer had no interest, because the said bond was blank in the name of the substitute, and the pursuer could not be understood to be the bairn to whom the sum is to be payable after the death of his father and mother, seeing he was not born the time of the granting of the bond; and as to the inhibition it was not at the instance of the pursuer, but of his father and mother. No 35.

It was *answered*, That the bond was opponed, bearing the pursuer's name, and though the bond had been blank, and the pursuer not born when it was granted, the father might have filled up any of his bairns' names as he thought fit; and as to the inhibition, it was at the instance of the father James Ballantine who was fiar, and did accresce to the pursuer, being substitute in the fee after his decease.

THE LORDS repelled the allegeance.

It was thereafter *alleged*, That the pursuer was satisfied of the debt, in so far as either the debtor or cautioners had paid the same, at least a part thereof and did satisfy *pro tanto*; or some other persons, having acquired their lands after the inhibition, had given money to the pursuer or his father, to pass from the inhibition as to them, which ought to be allowed as payment *pro tanto*.

It was *answered*, That the allegeance is not relevant, unless it were in these terms, that the pursuer or his father had accepted what was paid by the said persons in satisfaction of the debt *pro tanto*; otherwise, that there is no *solutio*, but only a transaction betwict the persons foresaid and the pursuer, to free themselves from trouble and of a plea; and what was given, was not in satisfaction of the debt in whole or in part, but upon the account foresaid; and seeing the creditor having inhibited, so that his inhibition did affect divers lands, or having divers persons bound to him as cautioner, might warrantably pass from his inhibition as to some of the lands, and discharge such of the cautioners as he thought fit, he might also take a consideration for doing the favour foresaid.

THE LORDS thought, that if it should be allowed to creditors to make such transactions, and what they should get on account of the same should not be allowed in payment, they might get more than the double of their debt, at least more than principal and annualrent; and that it would be the occasion of usury. They found the defense relevant, that what should be proven to be given *eo nomine* should be imputed in satisfaction.

Clerk, *Gibson.*

Dirleton, No 213. p. 98.

1686. *November.* General GRAHAM of Glavers *against* LIN of Larg.

No 36.

CLAVERS, as donatar to a forfeiture, pursues for payment of a sum due to the rebel. *Alleged*, The rebel was only assignee by an executor, who being a