

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.

It was *answered*, That the bond was opposed, 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 accresse to the pursuer, being substitute in the fee after his decease.

THE LORDS repelled the allegiance.

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 allegiance 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 betwixt 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:

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

No 35.

No 36.

No 36.

mere fiduciary for the behoof of legatars, creditors, and nearest of kin, he could not validly assign or transmit the right of the inventory of the testament; and by the executor's civil rebellion no more could fall but his own part. *Answered*, The executor was a creditor, and likewise one of the nearest of kin; and so his assignation is good, at least *quoad* his own interest. *2do*, This is *jus tertii*, and not competent to the debtor. THE LORDS found it *jus tertii*, and so repelled the defense.

Fol. Dic. v. 1. p. 518. Fountainhall, v. 1. p. 426.

*** This case is reported by Harcarse, No 87. p. 3899, *voce* EXECUTOR.

No 37.

1688. *July 17.* HOGG against JEAN DOBIE and her HUSBAND.

HOGG, as heir served to William Hogg his cousin, pursues a reduction and improbation of Jean Dobie his mother's adjudication of some houses and acres. She repeated a reduction which she had depending of his retour, on this reason, that her son was but a young man, and went abroad some ten or twelve years ago, and so *præsumitur vivere donec probatur contrarium*; as found, 25th June 1622, Erskine, *voce* PRESUMPTION. *Answered*, They had searched for him, and put him in all the foreign gazettes, and there was no account of him; but he was *tentus habitus et reputatus* dead, and that it was *jus tertii* to her, seeing there was not a nearer heir quarrelling the retour; and they offered to count with, and pay her. THE LORDS repelled the allegiance proponed for her, and sustained process at the pursuer's instance upon the retour produced, in regard there is no nearer heir quarrelling the same, and of the pursuer's offer to make payment to the defender of what shall be found due to her after count and reckoning.

Fol. Dic. v. 1. p. 519. Fountainhall, v. 1. p. 511.

*** Harcarse reports this case:

1688. *July 19.*—A PERSON as heir served to one who had been abroad seven years, without any account from him, having questioned an adjudication against his predecessor's estate;

Alleged for the defender; No process, because the pursuer's service and retour is null, there being no certainty that his predecessor is truly dead; and *semel vivus semper præsumitur vivus*.

Answered for the pursuer; The retour cannot be questioned after 20 years, conform to the act of Parliament; 2. The defender pretends not to be a nearer agnate, who can question the retour.

“THE LORDS sustained proces, and repelled the defences against the retour.”

Harcarse, (INFESTMENT.) No 613. p. 170.