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of, it could only be of sums to be acquired within a year after the gift, and not within a year after the horning, because sometimes gifts are not taken within a year of the horning.

THE LORDS found the gift to extend to the sum in question, being acquired by the rebel within a year after the gift, and that the general clause of goods to be acquired, did extend no further than to goods acquired within a year after the gift.

*Fol. Dic. v. 1. p. 347. Stair, v. 1. p. 629.*

1672. December 13. LORD LYON *against* The FEUARS of Balveny.

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A donatar of escheat cannot enforce payment of bonds granted to the rebel under conditions unperformed, altho' these conditions do not appear *ex facie* of the deeds.

SIR CHARLES ARESKINE having obtained a gift of the escheat of the late Lord Salton, and general declarator thereon, pursues a special declarator against some feuars of the barony of Balveny, who had granted several bonds; of which some were *ab initio* in the name of the Lord Salton, which were conditional, bearing, that the sum should be paid so soon as they should obtain confirmations of their feus from the Laird of Blackhall, who then stood in the title of the barony of Balveny; and others were blank in the creditor's name; and being produced by Alexander Abernethy, he deponed that he had received the bonds for the use of the late Lord Salton, and that they were granted for confirmations to have been obtained to the feuars of Balveny, which also was deponed by the debtors in the bonds, and by Blackhall's commissioners who had power to componse with the feuars for new confirmations of their rights, which were under reduction; whereupon the donatar now insists against the feuars for payment of these sums, who made no opposition; but compearance was made for Arthur Forbes, whose interest was founded in this manner: The barony of Balveny did belong to the house of Salton; and, for shunning to be heir, the late Lord Salton granted a bond to Blackhall, whereupon he apprised the barony to the behoof of the Lord Salton, and did grant commission to the Laird of Philorth, Cromarty, Achmedden, and the said Alexander Abernethy, to componse with the feuars for giving them new confirmations, and thereupon they did agree with him, and got the bonds in question from them, which were delivered to the said Alexander Abernethy for the use of the Lord Salton; likeas, the said commissioners granted bonds of that same date, obliging them to cause Blackhall grant confirmations, and thereafter the Lord Salton did borrow from Philorth younger, now Master of Salton, L. 38,000, and gave him a disposition of the barony of Balveny; likeas, the Master gave a back-bond of that same date, bearing, that the Lord Salton had procured to him a disposition of the barony of Balveny from Blackhall, and another disposition thereof from Kinminnity; and therefore, at my Lord's desire, he became obliged to denude himself in favours of Blackhall, upon the payment of L. 38,000, and likewise obliged himself to use all diligence for componsing with the feuars at such rates,

and to impute the compositions in his sum, and for the said feuars who had componed before, that what he should receive of their compositions might also be imputed: This back-bond was assigned by Blackhall to the Lord Salton, and by the Lord Salton transferred to Arthur Forbes, who compeared and produced the same, and alleged that the sums contained in the feuars bonds, could not fall under the Lord Salton's escheat, but behoved to belong to the Master of Saltoun, and being imputed by him in part of the L. 38,000 in his wadset conform to his back-bond, or otherwise the bonds were void, the condition upon which they were granted, and the cause for which they were granted, being the confirmations of the feus never having been performed; in which case, it would be free to him, as deriving right from the Lord Salton, yet to compone, or otherwise the sums would be imputed in the wadset; and alleged that these sums could not fall under escheat; *first*, Because albeit they were moveable at the time of granting thereof, and before the term of payment of annualrent, and so the Lord Salton being then at the horn, they would have fallen under his escheat; yet, by the Master of Salton's back-bond, it is clear that these sums were destined by the Lord Salton for satisfying an heritable right of wadset, and so they became heritable by destination, and would not have fallen to Salton's executor, but to his heir, who had the right of reversion, and consequently to Arthur as his assignee. *2do*, These bonds cannot fall under the escheat, because a part of them are conditional, and another part is for a cause which hath failed, viz. the confirmations; and, if the Lord Salton himself, his executor, or assignee, were pursuing for them, the debtors had a good defence, viz. that the condition was not purified, which as it would be relevant against an assignee or arrester, much more against the fisk, who is far more unfavourable. The pursuer *answered*, That these sums did fall under the escheat, notwithstanding of the defences; for as to the destination for a heritable effect, whatever it might have wrought if the destination had been in the bonds, or of the same date with them, or at least before the rebellion, it can have no effect here, where the bonds were granted during the rebellion, and fell under the escheat at the very date, and this destination is several years thereafter, and is noways equivalent to an assignation, which would not be sufficient after the rebellion against the fisk, much less the destination: And as to the mutual cause of the bonds, viz. the confirmation, it was *answered*, *imo*, That seeing a confirmation may be done in any writ, expressing the superior's consent and obligation to confirm, which is in effect a confirmation, as well as an obligation to assign is an assignation; so that Blackhall having granted a commission to compone with the vassals, their obligations to procure assignations from him, being by his warrant, is equivalent as if he had obliged himself immediately to confirm, which is in effect a confirmation; *2do*, In obligations for mutual causes, the sums may befall to the fisk, or to the executor, without performing the mutual cause, as is ordinary in this case, when parties dispone lands, and for the price get bonds, if these be moveable, or the credi-

No 12. tor die before the term, they belong to his executor; who, if he should pursue, it would not be a good defence that the cause of the bond was a disposition and obligation to infest, which was not performed, neither could be performed by the executor; but the debtor would be remitted to pursue the heir for implement; and, it cannot be said *causa non secuta*, except the mutual cause did absolutely fail, and were imprestable; and in this same way the fisk pursuing for the sums, is not obliged to perform the cause, but the debtor must insist for performance thereof against the party obliged, viz. against the Master of Salton, who by his back-bond is obliged to confirm; 3<sup>to</sup>, Extrinsic back-bonds, not being by way of condition, but only a mutual obligation, can neither exclude an assignee nor the fisk; 4<sup>to</sup>, The mutual cause is, the bonds granted by the commissioners, obliging them to purchase confirmations, and the feuars may pursue them upon their bonds. It was answered, That albeit an executor, or the fisk, might obtain payment of a bond granted for land, where there is an heir that is clearly obliged, and may be pursued to perform; yet, if the heir were not obliged, or were denuded and could not perform, the cause of the bond would absolutely cease, and so be *causa non secuta*; as in this case; for the Master of Salton's back-bond can never oblige him to grant confirmations, unless these sums were paid to him for the confirmations, conform to his back-bond, and so they would not belong to the fisk, but be imputed in his sum; neither can the commissioners counter-bond be called the cause of granting these bonds, but the confirmations, which is the thing obliged to thereby; unless the commissioners bonds had borne, that they should either procure confirmations, or pay a sum equivalent, at their option; so that unless the confirmations can be obtained, the cause ceaseth.

THE LORDS did not find that the destination, *ex intervallo*, during the rebellion, did exclude the fisk; neither did they find that the commissioners of the superior, their obligation to procure from him confirmations, were equivalent to a confirmation; but they found that the bonds in question, which were conditional, could have no effect till the conditions were purified; and that the bonds that were granted for the confirmations, as a mutual cause, ought not to have effect while the mutual cause were performed; and therefore assoilzied from the declarator, but prejudice to the pursuer to insist, so soon as the condition should be purified, and the cause performed, as accords. It was not here proponed or considered, whether a conditional bond, whereof the condition was not performed during the rebel's life, could fall under his escheat, if it were purified after his death.

1673. *January 28.*—SIR CHARLES ARESKINE, the Lyon, being donatar to the escheat of the late Lord Salton, did pursue in a special declarator against the Feuars of Balveny, for payment of certain bonds granted by them to the Lord Salton or to his behoof; wherein compearance was made for Arthur Forbes, to whom the Lord Salton had disposed the barony of Balveny, who *alleged* that these bonds

could not fall under the Lord Salton's escheat, because the Lord Salton, or Blackhall who stood infeft in trust for him, did wadset the barony of Balveny to Philorth younger, now Master of Salton, for L. 38,000; and, by the contract of wadset it is provided, 'That the compositions of the Feuars of Balveny should be uplifted by the wadsetter, and should be imputed in his sum;' and now the Lyon, by a gift of the escheat, intends to absorb the sums, and let the wadset lye on, whereas either the Feuars should be freed of the sums, and so the barony freed of their feus; or otherwise, if they must pay the sums, it ought to be for the confirmations of their feus to be granted by the wadsetter, and so he must receive and impute the money in the wadset. And upon this interest it was *alleged*, That all bonds and obligations which are either conditional, or granted for a mutual cause, if that condition be not purified and the cause performed, the bonds become void, and can have no execution; but, in this case, a great part of the bonds bear expressly, 'That the sums shall not be paid, till confirmations of the feus be obtained;' and the rest have a back-bond, obliging the Lord Salton's commissioners who received the bonds to obtain confirmations, whereby it is evident that the cause of these bonds is the confirmations, and the donatar cannot seek payment of these bonds till the confirmations be obtained.

This cause being disputed at length upon the 13th day of December last, the LORDS found that the donatar could not have access to these sums, till the conditions were purified, and the cause performed by obtaining confirmations, and therefore assolizied the Feuars, ay and while confirmations were obtained.

After which the King's Advocate desired, for the King's interest, a further hearing, and *alleged* that this interlocutor would be very prejudicial, not only to the King's interest, but to the interest of all singular successors, as to that part thereof which concerns the allegiance founded upon the not performance of the mutual cause of the obligations; for by this means if upon that pretence, that the mutual cause is not performed, bonds bearing borrowed money, and clogged with no condition, should be ineffectual, it would mar all commerce; for no man could safely take assignation to any bond against which it could ever be pretended, that the cause of granting the bond was not performed, which the assignee or donatar could not possibly perform. But for clearing of the point, it was *alleged*, That sometimes obligations for sums are contained in contracts, which express the cause of these obligations; and, even in that case, assignees getting right to sums for onerous causes, if they insist for payment, and if it be objected that the mutual cause is not performed, the ordinary reply always sustained is, that the obligation not being conditional ought not to be stopped, but the assignee ought to use diligence against the cedent for performance of the mutual cause, which the assignee is neither obliged nor able to perform; as in the case of contracts of alienation, where sums are payable for the price of lands, the seller is obliged to infeft, to purge incumbrances, and to warrant; in which case, if the seller himself were insisting for pay-

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ment of the price, it were a just personal objection against him, that he could not crave the price, till he performed so far of his obligements as could be presently performable; and so till he obtained defeasment and purged incumbrances; but the warrantice would make no delay, unless a distress were found; but, if the seller's assignee were insisting for payment of the price, he could not be delayed upon the seller's not performance, but the buyer would be remitted to do diligence against the seller; or if he had not done diligence, his negligence would be imputed to himself; nor could it be pretended that the seller's not performance was *causa data, non secuta*, because the law never interprets *causam non secutam*, but where the cause becomes imprestable, and so the obligation ineffectual; but where it is prestable by the cedent, albeit it be not presently performed, it never stops the assignee's execution; and if this were otherwise, it would be a stop to all commerce, and the raising of sums of money upon such pretences; and it cannot be denied but an obligation conceived conditionally upon performance of the cause, is more than when the mutual cause is expressed, but not when by way of condition; and the difference can be no other than this, that when the obligation is conditional, it can have no effect even as to an assignee, till the condition be purified by performance; but when there is only the cause expressed, the effect is, that if the cause be prestable by the party obliged, it is sufficient as to the assignee, though it be not actually performed. The next case of obligations is, when the obligation bears 'borrowed money,' and is in a bond apart, but by the date and witnesses it appears to have been granted for a disposition of lands, or any other onerous cause not yet performed, or where by another writ apart it is declared what the cause of the bond is, much less when the mutual obligements are in one contract, and cannot be thought to have been so ordered by accident, but that the true intent of the parties was, that the bond should not be stopped, either upon pretence of not prestability of the mutual cause, or not prestation thereof; but that the granter of the bond by that form betook himself to the faith and trust of the obligement he had for performance, *et non incumbere rei sed personæ*; which is the case here, for the bonds in question are simple bonds bearing 'borrowed money;' and there is a back-bond of the same date, bearing, 'The bonds were granted for confirmations of the feus and obligements to confirm them,' but no ways bearing that the bonds shall not be payable till the confirmations be obtained. 3tio, There is a third form when bonds granted for a disposition, or any such onerous cause, are made blank in the creditor's name; for thereby all pretence of stop is taken off as to persons whose names are filled up, against whom compensation hath been found not competent by the Lords, as being for that very purpose conceived blank; and yet compensation is equivalent to a discharge, and takes away the debt *ipso jure*, and is unquestionably sufficient against an assignee upon the cedent's debt, and some of the bonds in question are blank in the creditor's names. And as this is the case of assignees, and all singular successors by apprising, arrestment, &c. so the

fisk is in the same case, for *tantum possumus delinquendo quantum cedendo*; it cannot be imagined how the fisk should be incapacitated to perform the cause of any obligation, or to force the rebel to perform, but the debtor should insist against him, his heirs, and estate; and therefore the defenders ought to be decerned to make payment; and the truth is, they make no opposition, and Arthur Forbes hath no interest to oppose; and the most that could be pretended is, that the donatar's right should be declared, superseding extract or execution, till the Feuars might insist for obtaining confirmations. It was answered for Arthur Forbes, That he opposes the Lords interlocutor done upon most just grounds, for all mutual or co-respective obligations *sibi mutuo insunt et se mutuo ponunt et tollunt*; and there is no more clear ground in law or equity, than *deficiente causa deficit effectus*, so that wherever there is a *synalagma*, the deficiency of the one part stops the effect of the other, either simply or for a time, unless the contrary be expressly agreed; and there is no difference whether the co-respective obligations be in the same writ, or in different writs relating one to another; albeit it be not a sufficient probation, but a presumption, that bonds of borrowed money are for a disposition or the like cause, because they are of the same date and before the same witnesses; which is not alike as if by a mutual writ the cause were expressed and obliged to be performed, as in this case; neither doth it import any material difference that the creditor's name is blank in some of the bonds, especially seeing they were never delivered to any other, or any other name filled up.

THE LORDS found that there was no material difference, whether their sentence were to declare conditionally not to be extracted till the condition were purified and the cause performed, or at least shown to be performable, or that the defenders were assolized from this instance till the condition were purified, and the cause performed; upon performance whereof, the pursuer might insist in this same process for sentence; especially seeing it did not appear to the Lords whether the cause was prestable or not, which behoved to be debated amongst other parties, viz. the Feuars and Master of Salton, and therefore the Lords adhered to their former interlocutor in these last terms.

*Stair, v. 2. p. 134. & 160.*

\* \* \* Gosford reports the same case :

THE Lord Lyon, as donatar to the escheat of the deceased Lord Salton, after a general declarator, did pursue a special against several feuars of the Lordship of Balvenie, who had granted bond to the Lord Salton for sums of money therein contained, without any condition or provision. Arthur Forbes, as having right to the reversion of Balvenie from the deceased Lord Salton, who had granted a wadset to the young Laird of Philorth, now Master of Salton, did compare for his interest, and *alleged*, That all these bonds were granted for a special cause, viz. for the confirmation of their several feus, for which many of

No 12. them got back-bonds from the commissioners of the Lord Salton and Laird of Blackhall, who had then the right of the estate of Balvenie in his person; for they were blank in the creditors' name, and were never delivered to the deceased Lord Salton, but were put in the hands of Alexander Abernethy, until their confirmation should be expedite;—but so it is, that the Lord Salton, was denuded of the right of the estate of Balvenie in favours of the Master of Salton, by a wadset-right, redeemable by payment of L. 38,000, in the first end whereof he was to allow the whole compositions to be paid by the feuars for their confirmations; so that the sums being destinate for an heritable right, could never fall under escheat; neither could the donatar or the Lord Salton, if alive, force the new Master of Salton to grant these confirmations, he not being obliged thereto by the wadset; but, on the contrary, the Master had another right to the lands, flowing from the Laird of Kinminity, which was prior to his own right of wadset. *2do*, The Lord Lyon's gift was to the behoof of the Master of Salton; being acquired upon the Master's charges, and the Lord Lyon's name only inserted therein of purpose, that upon that pretext the whole compositions due by the vassals might belong to the Master, and yet this wadset remain entire for L. 38,000, contrary to the express terms and provisions of the wadset. *3tio*, It were against all law and justice that the feuars should pay the prices of their confirmations, who had granted bonds only *intuitu* thereof, they being in the case of *causa data causa non secuta*; and that if they were pursuing Alexander Abernethy for delivery of their bonds, upon the reasons foresaid, undoubtedly they would prevail. It was *replied* to the *first*, That the bonds being delivered to Alexander Abernethy for the Lord Salton's behoof, they were undoubtedly his, and so fell under his escheat; and counter bonds granted to the feuars were not subscribed by the Lord Salton, but by his commissioners, who had not his warrant; and the bonds being granted for liquid-sums of money, as they might have been assigned, and the assignee would have forced them to make payment, so the feuars had no remedy left them but to pursue upon their counter-bonds, the subscribers thereof, for obtaining their confirmations, which the Master of Salton might be compelled to grant, who had received his wadset with the burden thereof, and out of which there was a commission granted by the Lord Salton to his friends for composing with the vassals and granting confirmations. It was *replied* to the *second*, That the donatar's gift was in his own name, without any back-bond; and that it was in trust, could not be proven, but *scripto vel juramento*. It was *replied* to the *third*, That they were not in the case of *causa data causa non secuta*, the bonds being pure and simple, and bearing no such cause; and albeit bonds bearing sums of money be for the price of lands, yet that not being contained in the bond, but in an obligation apart, that will not hinder the same to be arrested for the creditors' debt, or to be assigned by him, and the debtors thereupon forced to make payment. THE LORDS, before answer, having taken the deposition of Alexander Abernethy and the rest of the commissioners of the Lord Salton,

who did all declare that the bonds were granted and delivered for the behoof of the Lord Salton; but if the true cause thereof was for confirmation to be obtained of their several feus, they found that the sums could not fall under escheat, they being conditional; and the counter-bonds being of the same date, and granted by the Lord Salton's commissioners, whose faith he had followed, so that they were affected with the counter-bonds, and the vassals secured who had never delivered the same to the Lord Salton, and most of them subscribed blank in the creditors' name, and so were in the case of *obligatio ad factum prestandum*, which, until the deed be performed, is not obligatory in law, the condition not being purified; specially seeing the wadset granted to the Master of Salton was not burdened with the feuars' confirmations, but the commission for agreeing with the feuars was only excepted out of the warrandice, whereby he could not recover, and distress the Lord Salton. But his right of wadset was not burdened therewith, neither could that hinder him to acquire Kinminity's prior right, whereby he might bruik the lands without being obliged to confirm the vassals' feus, which he might do or not as he pleased. But the Lords did reserve to the Lord Lyon, in case he should obtain confirmation to the vassals, to pursue for these bonds, as accords of the law.

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Gosford, MS. No. 541. p. 288.

1675. February 9. VEITCH against The EXECUTORS of JAMES KER.

SIR ROBERT STUART in Ireland being debtor to James Sanderson in a considerable sum, the said James did assign the same to James Ker, and Robert Brown; and Sir George Maxwell, as friend to Sir Robert, having compted with the assignees, there was found L. 300 Sterling resting, for which Sir George gave bond to the assignees, bearing this condition, that they should deliver up Sir Robert's first bond, with a discharge thereof to Sir George, who being examined upon oath, when and how the first bonds were delivered to him, deponed that they were delivered to him in *anno* 1670, and that he desired no discharge, in respect that he got up the bonds unregistrated; Sanderson being at the horn in *anno* 1653, David Rodger obtained a gift of his escheat and general declarator thereupon, and assigned the same to William Veitch, who took a second gift upon the same horning in *anno* 1674; whereupon there arose a competition betwixt Veitch the donatar, and the Executors of Ker the assignee, which of them had best right to the sum of Sir George Maxwell's; and after a full debate *in presentia*, the LORDS, upon the 10th day of December 1673, found that creditors obtaining satisfaction of their debts contracted before rebellion, and satisfied before the declarator, were thereby secure, and never obliged to repeat the same to any donatar, whether the satisfaction were obtained by payment made by the rebel, by pointing of his goods, or disposition thereof in satisfac-

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A new bond granted by a debtor of the rebel to an assignee, before declarator, secures against the donatar.