

S E C T. XII.

Error rather presumed than Donation.

1631. January 28. GRAHAME against STUART.

IN a contract betwixt the L. of Lethindie and John Grahame, proorting the wadset of divers lands, disponed by Lethindie to John Grahame under reversion, and because some of these lands wadset were possessed by Scrymgeor of Fordel, who had a right thereof to endure for three years after this contract, therefore Lethindie obliged himself to pay to the said John Grahame 40 bolls of victual yearly, during these three years, ay and while Fordel renounced his right and possession, and that the said John Grahame entered thereby to the possession of these lands. After the expiring of the three years of Fordel's right, Mr John Stuart, and William Stuart his brother, who had after the fore-said contract acquired the right of reversion of these lands, which were wadset by the contract to the said John Grahame, grants a bond to the said John Grahame, in the narrative whereof mention is made of the above-written contract; which narrative proports, that by that contract Lethindie was obliged to pay the said 40 bolls of victual to the said John Grahame yearly, during the not redemption of the wadset; albeit the contract itself bore only as said is, That the same should be paid during the three years of Fordel's right; and, after this narrative, the said Mr John and William Stuarts ratify that contract, and further, for divers pleasures, gratitudes, and good deeds, paid to them by the said John Grahame, they bind and oblige them to pay the 40 bolls of victual yearly, during the not redemption and paying of the sum, whereupon the lands were wadset to him by Lethindie: Thereafter the L. of Drumkillo being made assignee by the said John Grahame to the said bond, and whole preceding securities granted to him, pursues the said Mr John for payment of the said victual of all years preceding, not only during the space of Fordel's right, but ever since and in-time coming, during the not redemption; wherein the defender *alleging*, That the last bond depending upon the first contract, and being relative thereto, ought not only to be obligatory, according to the tenor of the prior contract, and no further, which being only for the said space of three years of Fordel's right, whatever other relation is made in the last bond, differing from the truth of the said prior contract, the obligation given upon that false cause ought to be no further effectual, but according to the truth of the said contract; especially seeing after the expiring of the three years of Fordel's right John Grahame became in peaceable possession of the lands, which before were possessed by Fordel, wherein he, and others in his name, have

No 189.

A ratification of a contract, narrating the contract differently from what it was, found to be no farther obligatory than according to the true renor of the contract.

No 189.

continued possessors since ; and the pursuer *answering*, That whatsomever narrative be inserted in this posterior contract, that ought not to derogate the force of this obligation since, granted to John Grahame, which bears to be granted for gratitudes, and good deeds done, and so for onerous causes, and done *scienter & inter majores*, which cannot be inverted upon the alleged narration therein contained, whether true or false, this being a new security made by another party, and for onerous causes, as said is ; and whatever possession he has had of the lands, that ought not to be respected, seeing he bought the rights of the lands from divers parties, viz. one from the donatar to the liferent, and a comprising and infestment following thereon, from another party condescended on, either of which rights were of that strength which would ever in law debar him from his possession, and would have been preferred to the right acquired by that prior contract ; these rights being anterior thereto, and whereon he is content to dispute, and which, if the party can yet elide, he is content that decret be given against him. THE LORDS, notwithstanding of this reply, found the exception relevant, and that the last obligation should be no further extended, but according to the tenor of the prior contract, in respect of the narration which is inserted in the bond, which repeats a different tenor from the writ which is therein related ; and which the LORDS found ought to be ruled as the writ proported, whereto it made reference, and that the parties' bond following thereon ought to be thereby ruled and limited : And sicklike sustained the allegiance upon John Grahame's possession, albeit the rights which he acquired had been more valid in law than the wadset procured by Lethindie, seeing he was never pursued thereon by them in law, nor was ever excluded nor debarred by these rights.

Act. *Advocatus & Nicolson.*Alt. *Stuart & Lermonth.*Clerk, *Gihson.**Fol. Dic. v. 2. p. 150. Durie p. 560.*

No 190.

The heir being tutor to the executor, did, among the other goods, confirm an heritable bond in his pupil's name. This was found not to be meant a donation, but rather presumed to be an error *juris*. See No 192.

1637. July 8.

DICKSON against ORKHILL.

THE Laird of Orkhill being debtor to umquhile John Dickson, flesher, in the sum of 200 merks, by a bond bearing to pay annualrent, and the said creditor living until the said term of payment was bypast, whereby the bond was of the nature of an heritable bond, and the said Laird of Orkhill, debtor, suspending upon double poinding, being distressed by the heir and executor of the said umquhile John, who both claimed the right of the sum, viz. the heir, as belonging to him, the bond being heritable, as said is, and the executors claiming the same as due to them, in respect the heir, who was eldest brother to the executors, was their tutor, and that he had confirmed the defunct's testament, wherein he, as their tutor, had confirmed the same bond controverted, as pertaining to them as executors ; likeas, since he as their tutor had recovered de-