the anterior creditors. But the question was, If Lilly's debt could come in *pari passu* with the father's and son's creditors prior to William's disposition in 1693? And the Lords, by plurality, found, by the conception of the right, they were preferable; and Lilly could not come in equality, but only after they were paid, and before the sisters, if the subject disponed was able to pay them all.

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1704. *December* 5. SIR PATRICK HOME, Advocate, *against* LIONEL TALMASH, Earl of Dysart, and his TENANTS at BRUNTSTANE.

THE late Duchess of Lauderdale, mother to the said Earl, dispones to Sir Patrick Home, for his services, the dwelling-house, yards, orchards, and braes above and below the bridge of Bruntstane; whereon Sir Patrick pursues a removing against the said Earl and his Tenants, from these grass-braes.

ALLEGED,—No process against the Earl of Dysart; because he is not legally warned, in so far as it is neither executed against him personally, nor at his dwelling-house, nor by letters of supplement at the market-cross of Edinburgh, pier and shore of Leith, he living out of the country; and so, the warning being null, the removing must fall in consequence.

ANSWERED,—The warning was due and legal, in so far as it was executed on the ground of the lands, and at the church-door of the parish wherein the lands lie, forty days preceding Whitsunday last; which was sufficient certioration to the Earl, especially seeing he is cited on 60 days in the process of removing, at Edinburgh and the shore of Leith: and this is all the law requires; for that excellent statute in 1555 anent removing tenants, makes no distinction whether the party warned be out of the kingdom or in it, but only appoints warning to be upon forty days preceding Whitsunday; and *ubi lex non distinguit, nec nos distinguere debemus.* And this is both the opinion of lawyers, the analogy of our law, and the current of decisions; as appears from Stair, *tit. Tacks, sec.* 40; and from Dury, 11*th January* 1622, *L. of Faldonside* against *Bymerside*; 17*th July* 1630, *Laird of Lee* against *Porteous*; and 20*th February* 1666, *Macbriar* against *Creighton*, where the Lords sustained the warning, without letters of supplement, against one out of the country.

REPLIED,—The decisions adduced did not meet the case in hand, but contained sundry diversifying circumstances, sufficient to alter the decision.

It was started among the Lords, that there was no necessity of warning the Earl of Dysart at all, because, he being heir served to the Duchess, Sir Patrick's author, there is no need, in removings, to call either the granter of the right or their representatives, but only the tenants, to give them time to provide another house, or singular successors: as Stair insinuates *ubi supra*, and cites the 26*th of March* 1622, and 18*th January* 1623, *the Earl of Lothian* against *Sir John Ker.*

Others thought all who mus tbe called in the process of removing, behoved also necessarily to be warned; therefore the Lords superseded to determine the first point till the parties were heard on this last allegeance, that Sir Patrick was not

obliged to warn the Earl of Dysart at all: he being heir to the disponer, and being cited in the removing upon sixty days, as use is, was sufficient.

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1704. *December* 7. BAXTER, Merchant in Glasgow, *against* CAMPBELL of SILVERCRAIGS.

BAXTER, merchant in Glasgow, against Campbell of Silvercraigs. There being a bill for £50 sterling, drawn by Silvercraigs on Thomas Weir, payable to Baxter, Weir suffers it to be protested; whereupon Baxter recurs upon Silvercraigs, the drawer, for payment; who ALLEGES,—That Baxter, three months after this bill was in his person, states counts with Weir, and takes a general discharge from him, bearing expressly, in the narrative, that it was after count, reckoning, and payment made betwixt them; from which it necessarily was to be presumed that the bill now charged for was included and allowed him in that account, unless Baxter instructed the contrary by production of the account then fitted, bearing no such article as this bill; and so he is *in pessima fide* to seek twice payment.

ANSWERED,—This general discharge by Weir to Baxter proves that Baxter paid all that Weir could crave of him, but by no presumption of law can it ever prove that Weir then paid all he owed to Baxter; for this were to make it equivalent to a mutual discharge; and whatever counting was betwixt them, was only verbal. And this discharge was taken by Baxter, because Weir breaking at that time, he was harassed by Weir's creditors arresting in his hands, and pursuing him in forthcomings, as if he had been Weir's debtor; for preventing of which trouble and expense, he took this discharge from Weir to free him at his creditors' hands. And if this were construed to be a general discharge of all betwixt them, it would cut off not only this bill but £500 sterling of more debt Weir owed him at the time, and for which Baxter has adjudged; so that, without a discharge from Baxter to Weir, to suppose it included by Weir's discharge, was absurd and unreasonable.

The Lords found Weir's discharge did not prove this bill was paid, unless Silvercraigs offered to prove, by Baxter's oath, that, in the account then stated betwixt Weir and him, this bill was expressed as an article, and allowed; and to depone what was the subject of that account then made. And the Lords remembered, that, the last winter-session, in a case betwixt *Steven*, *Tough*, and *Finlay*, a general discharge being founded on, they found, the same not being mutual, it could not take away a bond due by the granter, on the presumption that it bore a previous count and reckoning, and so that it was included therein: only in that case, because there were circumstances of fraud and circumvention founded on, they, before answer, ordained the writer of the discharge to be examined what was *actum et tractatum* betwixt the parties; but here, in Baxter's case, the writer and witnesses are dead, and so no light can be got that way.

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