

grange, which hold of Hamilton of Dalziel, they present to him a charter and a year's rent, and crave to be admitted vassals in these lands, for stopping the casualty of nonentry, &c; as was found, *9th February 1669, Black against French.*

ANSWERED for Dalziel, the superior,—They being a community and corporation, he was not bound in law to receive them; and they never dying, it was to cut him off from all the casualties of his superiority in time coming; *et nemo debet lucrari cum alterius jactura.*

And they having taken instruments on his refusal, applied to the Lords for letters to charge him, ALLEGING,—That the laws, and Acts of Parliament, obliging superiors to receive apprisers and adjudgers for a year's rent, made no distinction whether it was a community or private party; and sometimes were bound to receive more than one as vassals, which stopped their casualties to the death of the last of them.

The Lords considered this as a general case, where the road was not yet pathed. Therefore resolved to hear and determine it in June. Stair, *Instit. book 2, tit. 2, § 41*, states the case, and shows it yet undecided; and proposes an overture and remeid, that the corporation name a person to be their feoffee and trustee, whom the superior shall receive, and by his death the casualties shall open: and this I find to be the French practice, as is observed by Molineus *ad Consuetud. Paris.* and Basnage, in his Commentaries on the Customs of Normandy; and which they call *un homme vivant et mourant*, who represents the corporation, and salves the superior's right from being wholly extinct and absorbed.

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1707. June 19. JOHN STEWART OF BLACKHALL *against* THOMAS MACGOWAN and OTHERS.

MR John Stewart of Blackhall against Thomas Macgowan, provost of Irvine, and Others. In the ranking of the Creditors of Cuninghame of Corshill and Robertland, Blackhall craved preference, on this ground, That he, being cautioner for them, had got a disposition for his relief, and thereupon stood infest long before any of the other creditors had done diligence.

ALLEGED for the Adjudgers,—That the disposition produced bore this express clause,—That the granting thereof should be nowise derogatory nor prejudicial to any former rights granted by Corshill to his lawful creditors their just and true debts owing by him to them;—which being the precise words of the reservation, sufficiently saved all the true and lawful creditors, though only secured by personal bonds.

ANSWERED,—The said clause could never be strained to that sense; but alienarily reserved the real rights, and creditors to whom Corshill had given heritable bonds and infestments prior to this disposition; else Blackhall got nothing at all; and *verba debent aliquod operari.* And how idle would it have been with the one hand to get a security for his cautionaries, and with the other to bring in all the creditors *pari passu* with him; which rendered his right not worth a sixpence: and the sense of the words can go no farther, declaring this right shall not prejudice the rights of other creditors. These words must be understood of rights of the same kind and nature in both parts of the clause, *viz.* of real rights, that they may be homogeneous and analogical to one another.

REPLIED,—This, being a right granted by a nephew to his uncle, must be strictly interpreted; especially *contra proferentem, qui poterat legem apertius dicere*; and there is no taxative word restricting it to real rights: and it would have been superfluous nonsense to have done it; for prior real rights were secure however, and needed no such clause in their favours, being preferable without it. And RIGHT is a word applicable to both real and personal rights; it is the *genus*, and these two branches are the *species* into which it is subdivided. And *jus*, in the common law, arises *tam ex obligatione quam ex dominio*,---obligation being defined to be *vinculum juris quo necessitate astringimur*. So the word RIGHT comprehends personal creditors as well as real; and Blackhall has understood it so, else what needed he adjudge for thir very same debts for which he got this infertment of relief. And to make this subsist, is to ruin a multitude of poor innocent creditors, who, by this seclusion, will not get a farthing.

DUPLIED,—Nothing hinders a creditor having a valid security to lead an adjudication *ad majorem cautelam*.

Some of the Lords thought, however, Blackhall might design a preference by obtaining this right; yet Corsehill has been resolved to secure his creditors, that it might not prejudge them; and so, by a plurality of eight against seven, the Lords found the clause not taxative, but behoved to extend even to the personal creditors. Many thought this was a stretching the clause beyond what it could bear, though it had the favour of bringing in the creditors *pari passu*.

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1707. June 20. SIR JAMES CARMICHAEL of BONNYTON *against* SIR ROBERT GRIERSON of LAGG.

SIR Robert Grierson of Lagg, being debtor to Sir James Carmichael of Bonnyton in a bond of 20,000 merks; and, being pursued, he craved allowance for 9000 merks, contained in two partial payments, by discharges granted by Andrew Baillie, writer to the signet, as factor for Bonnyton.

ALLEGED,—No regard to thir discharges; because Andrew Baillie's factory in 1686 empowered him to uplift only the sums contained in an inventory signed by them of the same date, and whereof Lagg's sum could not be a part; for his bond is not granted till 1688, two years after the date of said factory. And Lagg is a subscribing witness to the said factory, and likewise one of Bonnyton's tutors; and so could not be ignorant that it was only a qualified limited factory, restricted to particular sums, whereof this of Lagg's could be none. And it is very suspect, seeing one of the receipts, viz. for 6000 merks, is within two weeks of the date of the bond; and such payments by anticipation, and before the term of payment, are very extraordinary and unusual.

ANSWERED,—Though the factory bear relation to an inventory, yet it cannot be so strictly taken as to be taxative; seeing Bonnyton reposed an exuberant trust in Andrew Baillie, to manage all his business. Likeas, Sir James Carmichael, after the said Andrew Baillie's death, has given a full, ample, and general discharge to his heirs, of all sums the said Andrew had received for him, as factor, from any persons whatsoever; which certainly must include this sum, though it do not mention the same. And though the partial payment of 6000