

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 infestment 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

merks be so quickly after the bond, there is no incongruity in that; for any debtor, tender of his credit, if money come unexpectedly into his hand, will desire to relieve himself, though it was before the term of payment.

REPLIED,---The discharge given to the factor's heirs bears not to be after count and reckoning, but was given because no reimbursement was to be expected from them: and Bonnyton is willing to allow this payment to Lagg if he will give the least evidence or proof that it came to his behoof, or was *in rem ejus versum*. And if Bonnyton were pursuing Andrew Baillie's heirs for that 9000 merks, his discharge would cut him out and secure them; but if Lagg pursue them for repetition of it, their discharge will not defend against him: and therefore Lagg must be liable; reserving his recourse against Andrew Baillie's heirs, to whom he paid it without any just warrant.

The Lords considered, that *bona fide* payment, though to a wrong hand, is very favourable in law, and that *bona fides non patitur ut idem bis exigatur*. And though Baillie had no power to discharge it, yet, he having got his constituent's discharge and exoneration, it was a very dubious and problematic case: for payment to a factor has been sustained by the Lords, though the factory afterwards was improven and found false: And siclike, payment to a minister deposed was allowed for terms after his deprivation, because he continued to preach; and if there was real numeration of money made, it were hard to pay it over again. Yet, seeing the factory was so expressly limited, they resolved to hear the case farther reasoned in their own presence; but, to bring all parties in the field, they granted diligence for citing the heirs of Andrew Baillie, to see how they can defend themselves, or give any instruction that it was paid in to Bonnyton at their counting; and, if he had not given it in, it would have been extant when Andrew Baillie, so shortly after its receipt, died; and, though no waster, yet it is known he left not so much (counting his own estate at the full extent,) as 9000 merks.

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1707. June 28. ROSE FINCHAM, Lady Bradisholm, *against* JAMES MUIRHEAD of BRADISHOLM.

LADY Bradisholm against the Laird. Rose Fincham, Lady Bradisholm, younger, pursues James Muirhead of Bradisholm, her father-in-law, for payment of her own and husband's expenses, in buying coach and horses, and coming from London to Scotland, founded upon a letter inviting them home, and promising to be at the charge of their journey.

ALLEGED,---The letter was null, wanting both date and subscription. ANSWERED,---She offered to prove that it was his hand-writ, by his oath. He CONTENTED, He was not bound to depone, or supply the nullity of a writ by his oath. Yet the Lords overruling this, and allowing him to adject what competent quality he pleased, he deponed, That, in 1698, a little after his son's marriage, being advertised that he was ill, and like to fall into a decay and consumption, he wrote the letter now produced, desiring he might come home alone, without his wife, thinking his native air might recover him; but they did not comply with that invitation, and did not come till four or five years thereafter to Scotland, when they had spent all they had; and, during that interval, he had sent