

No 22.

A purchaser of lands became bound to pay certain debts of the seller, per list. Found, that he could not pay one in preference to another, but all proportionally.

1714. July 20.

WILLIAM BLAIR, of that Ilk, *against* THOMAS GRAHAM of Balgowan.

JAMES RAMSAY of Newtoun, as principal, and Mr Adam Campbell of Gargunnoch, and Mungo Campbell of Burnbank, as cautioners, granted bond to Dundas of Baldivie for the sum of 5000 merks; and thereafter, James Ramsay having sold his lands of Newtoun for 39,000 to Thomas Graham of Balgowan, to whom he gave in a list of his debts, of which that owing to Baldivie was one, and took him obliged to pay these debts to the extent of the price of the lands; Balgowan, at computing and clearing with James Ramsay, finding, that he had paid 5000 merks more to the creditors than the price amounted to, took assignation from Baldivie to the 5000 merk bond for securing of the super-advance, and got a discharge of the price from James Ramsay. Upon which, Blair of that Ilk, as representing Gargunnoch, raised a declarator of extinction of the said bond against Balgowan, upon this ground, that he being obliged to apply the price of the lands for payment of that and other debts contained in the list, he was bound to pay it at least proportionably with the rest, there being *jus quæsitum* by his obligation to every creditor in the list who have action against him for payment of their debts.

*Answered* for the defender, *imo*, There being no diligence done at any creditor's instance, and none of them preferred in his obligation for their payment before another, it was optional to the defender what creditors to pay; and so, as he had paid any of these creditors to the extent of the price, his obligation became void, being implemented *in terminis*. Nor could there be *jus quæsitum* to any particular creditor in the list given up by Mr Ramsay, unless the whole debts therein contained did not exceed 39000 merks, which was the price of the lands to the extent whereof the defender stood obliged only to them. *2do*, There could be no *jus quæsitum* to the creditors, because there was no direct contract betwixt the defender and them, but only betwixt him and Mr Ramsay, without their intervention or knowledge. Therefore, Mr Ramsay could have discharged the obligation, or altered it at his pleasure; and as he could have left out at first any of the creditors in the list, so afterwards, upon discovery that the price would not pay the whole debts, he might expunge any out of the list he had a mind; there being no difference whether this choice was made before giving the list to the defender, or after.

*Replied* for the pursuer, *imo*, It cannot be understood how the defender could exclude any of the creditors in the list from the benefit of his obligation, which was equally conceived in favour of all of them. It is an argument against him, that no diligence was done at the instance of any of the creditors, for then they should have come in all equally; whereas, had diligence been used, they ought to have been ranked conform thereto. After the agreement, they had a real right to the price, as effectually stated in their persons,

as if it had been assigned to them by Mr Ramsay ; and the applying it otherwise than was appointed by the contract, was just giving away so much of the creditor's money. It matters not whether the cautioners knew of the bargain, or were ignorant of it ; seeing *solutione invito et ignorantes liberari possint*, and *ignoranti et invito acquiritur obligatio*. And by our law, obligations conceived in favours of third parties, though not directly granted to them, cannot be discharged without their consent. It doth not follow, that because it was in Mr Ramsay's power, to have conceived the defender's obligation in favours of any creditors he pleased, therefore he could alter the list after it was made, and the bargain completed, when the creditors were invested in the right of the price. For what was *meræ facultatis* before, became then entirely *necessitatis*.

THE LORDS found, That Balgowan was not *in bona fide* to pay the whole price of the lands purchased by him from Mr Ramsay to his other creditors, in prejudice of Baldivie's debt, which was in the list received by him from Mr Ramsay ; and found, that the said debt ought to be paid proportionably with the other debts in the said list.

*Fol. Dic. v. 1. p. 513. Forbes, MS. p. 90.*

When a bond or assignation is taken in name of a third party, in what cases there is a *jus quæsitum* ; see PRESUMPTION.

See APPENDIX.