

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

them, in money, black cattle, and other goods, upwards of 6000 merks; which was far more than any thing they could crave for their journey.

This oath coming to be advised, it was ALLEGED for the Lady,—That it sufficiently proved her libel; for it acknowledged he had wrote that letter, and had invited them home on his expenses.

ANSWERED,—The oath must not be divided, but taken complexly as it stands; by which it appears, his sole motive was the recovery of his son's health; and to come alone, (her company being unfit for him in these circumstances:) but this he did not obey for sundry years; and none can imagine his offer was to be perpetual, that he would bear the charges come when ye will. And, *esto* it were so, he has paid double, by remitting money and goods beyond what they could have demanded on their journey's account.

REPLIED,—It is true he did not come home at that precise time, not being then able to travel; and, by posterior letters, Bradisholm still continued to invite his son home; which must be understood with the same quality and offer made in his first letter, it not being expressly retracted. And, as to the other quality of the sums remitted, No regard thereto; because, *1mo*, Extrinsic, and must be proven *aliunde*, and not by his own oath. *2do*, Though *debitor non præsimitur donare*, yet this holds not in parents where there is an antecedent *debitum naturale*, to which it can be ascribed. *3tio*, Bradisholm sent his second son to London, who staid long with his elder brother; and so, the father being bound to aliment him, he must allow him compensation thereon.

DUPLIED,—The qualities adjected to his oath cannot be separate; for it is all one as if he had deponed, I owe my son nothing; for I paid him by money I sent him up: which undoubtedly would have been intrinsic.

The Lords stated the votes distinctly: *1st*, If their not coming on the first invitation exonerated and liberated him of his offer; or if, by the posterior letters, it was still continued? And the Lords found it was still obligatory. Then, *2do*, Whether the money and goods sent must be imputed to this debt, so as it needs no other probation, but is intrinsic? The Lords found it behoved to be otherwise instructed than by his own oath, and that it was an extrinsic quality. Then the Lords were proceeding, in the *third* place, to modify a sum on account of that journey. Bradisholm offered to prove his advancing the foresaid money *scripto*, and produced bills under his son's hand, acknowledging the receipt thereof: Which allegiance being new, the Lady's procurators did take them up to see.

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1707. July 4. CAVERS, Elder, *against* CAVERS, Younger; and DR SINCLAIR and CAVERS Punished for Insolence.

THE Lord Jedburgh having divided and tailyied his estate, part of it to my Lord Lothian's eldest son, and the rest to Cavers's eldest son, and, failing him, to his brother *ordine successivo*:—Cavers, elder, gives in this tailyie to be registrate in the record appointed by the Act of Parliament 1685, anent tailyies, and craves it may be, *per expressum*, burdened with the composition he had paid to the Duke of Douglas, superior, for changing the holding from ward to feu, and with the casualties which had fallen off before. Doctor Sinclair, as factor