1716. *November* 22. The Heirs of NEWTOWN-JOHNSTONE *against* JOHNSTON of Corehead.

THE estate of Newtown being under sequestration, and Newtown himself bankrupt, a declarator of non-entry is pursued by Johnston of Corehead, the superior: whose grandfather, sixty-six years ago, obtained charter and precept of seisine under the great seal, upon the resignation of the then proprietor; but no infeftment followed thereon till the year 1714, when the present Corehead was infeft in the terms of the Act of Parliament 1693, allowing such infeftments, even *mortuo mandante*. No compearance being made for the common debtor, the real creditors, though not called, compeared: and the Lords, after hearing parties, having inclined last July to decern for the full rents from the time of the citation, and having repelled all their objections against the superior's title; they now, in a reclaiming petition, ALLEGE, That the non-entry ought to be restricted to the retoured duties, to the date of the Lords' last interlocutor, sustaining the pursuer's title: and this because processes of non-entry for the full duties being penal and unfavourable, therefore, where there is but any doubtfulness in the pursuer's title, the Lords use to restrict the effect of the declarator to the retoured duties till the title be sustained. And that there was great ground to doubt in the present case, appeared, 1*mo*. That in this process neither the real creditors nor factor were called; 2*do*. The right itself (though now sustained by the Lords,) was very doubtful whether valid or not; it being apparently prescribed, since no infeftment was taken, and is sixty-six years after its date; 3*tio*. The act 1693, seems only to relate to precepts granted by subjects; but the King cannot die.

ANSWERED for the pursuer.—That it is a known principle, that the full duties are due from the citation in the declarator: nor is this odious, since it is inherent in the nature of all fees. And this the Lords found, the 25th *July*, 1666, *Harper* against *his Vassals*, and 12th *June*, 1673, *Faa* against *the Lord Balmerino and Pourie:* nay this the Lords found, in the case of the *Earl of Argyle* against *M'Leod*, though there the non-entry arose from the reduction of a retour, and so the defender had much stronger pretensions to a *bona fides* till the sentence in the reduction than here the defenders can pretend to. 2*do*, Since here the common debtor's representative makes no objections against the pursuer's title, (neither can he without disclamation,) so the creditors can make none, except in the right of the said apparent heir; and consequently it was in vain for them, whom the superior is not bound to notice, to pretend to any other ground of *bona fides*, except such as would have been competent to the apparent heir himself. In short, the casualty does not arise from theirs, but the heir's non-entry; and therefore no *bona fides* can defend against it, but his alone by whom it falls. And therefore, 3*tio*, Since Newtown could not mistake his superior, or be in *bona fide* to quarrel his right, neither can the creditors. Besides, that the creditors being real by infeftment, how could they be so without knowing the condition of their author's right, (who infeft them,) and consequently who was his superior? since *unusquisque scire debet conditionem ejus cum quo contrahit.* And as to precedents and the Lords' practice, the pretence to *bona fides* and dubiety was sustained only in case of a singular successor to the superiority, but never where there was no change

of the superior. *4to*, It is scarce possible to find out habile circumstances for finding such a pretext.

The Lords found the creditors liable for the full rents, from the time that their objections against the pursuer's title were repelled.

Act. Ro. Dundass. *Alt* Ila. M'Kenzie *Clerk.*

Vol. II. No. 36. *page* 46.

1716. *November* 30. WILLIAM M'ILLMORROW *against* WHITEFOORD of Dunduff, and others.

THE said William M'Illmorrow having accepted a bill payable to Whitefoord of Dunduff, he obtains the suspension; but, before the suspension arrived, Dunduff had put the bill out of his person, by indorsing it to his baron-officer Gilbert Kennedy, only so far in trust for the indorser, that it was for taking off a debt due by the said indorser to a third party: yet the suspender having intimated the suspension both to Dunduff and Kennedy, the said Kennedy nevertheless registrates the bill, and charges; and a poinding is made in his name, at which Dunduff was present, and gave orders. Whereupon M'Illmorrow gives in a complaint to the Lords against them both, for contempt of their authority, in poinding after a suspension was intimated.

ANSWERED for the defenders,—No contempt, because the suspension did not meet the diligence; for the charge being at the instance of the indorser, a suspension against Dunduff, who was denuded by the indorsation prior to the suspension, could not stop diligence at the instance of the indorsee, more than the indorser had never been creditor in the bill. For, when a bill is indorsed, the indorsee is not only a procurator *in rem suam*, as in the case of assignations, but is vested in the right itself, in the same case as a bag of money had been delivered to him; and no right remains in the person of the indorser more than the bill had been accepted directly payable to the indorsee: to whom, though the suspension was intimated, yet this could not, upon the foresaid ground, put him *in mala fide* to do execution on the bill.

REPLIED for the complainer,—That the indorsee being to uplift the money, and apply it for extinguishing a debt due by Dunduff to a third party, it was plain that Dunduff stood still in the property, as he in whose favour it was accepted; and having indorsed it to Kennedy for no onerous cause respecting the said Kennedy, he clearly remained Dunduff's trustee, to this effect, that he should uplift the money, and therewith extinguish the debt due to the third party by Dunduff. and Dunduff's creditors arresting would have been preferable to the said third party: as was found in the like case, 17th *Jan.* 1706, the *Lord Ross* against *Gray of Newton*, which was yet more favourable; for there the creditors in the bill had ordered the indorsee verbally to pay to a third party; whereas here there is nothing to instruct the third party's right.