

was paid on their account; they have no claim, but to have their real damage made up: And as they could not have refused to repay him their proportions, if he had adjudged on their account; so neither can they now, if he is to be held as if he had adjudged. *Fictio in casu ficto tantum valet, quantum veritas in casu vero.*

No 62.

THE LORDS repelled the defence founded on the septennial prescription introduced by act of Parliament in favours of cautioners; and found, that this case did not fall under that act: But found, that the assignation by William Innes and Richard Murray, to Sinclair of Barack, being expressly made, to the end that he might operate his and their relief, and the relief of the other co-obligants; and he having omitted to do diligence for the operating their relief, when he did diligence for the separate debts owing to himself; that he could not now seek relief off the other co-obligants, in so far as they might have been relieved by the diligence, in case he had done diligence for relief at the time he did it for his own payment.

Reporter, Lord Arniston. Act. Lockhart. Alf. W. Grant. Clerk, Forbes.
Fol. Dic. v. 3. p. 183. D. Falconer, v. I. p. I.

1748. July 8.

CLARK contra Sir JOHN HALL.

No 63.

THE question stated, but not determined, How far a creditor, taking decree of mails and duties, and even possessing in consequence of it, is obliged to account by a rental, except where he debars another creditor?

One thing is plain, that he debars the debtor; and although, where the debtor has had a promiscuous possession, another creditor cannot oblige him to account by a rental, yet, if the debtor has had no promiscuous possession, it is thought another creditor may oblige him to account in that manner.

Kilkerran, (DILIGENCE.) No 1. p. 166.

1757. January 4.

JOHN GOLDIE, Trustee of HENDERSON'S CREDITORS, against KATHARINE
MACDONALD, Relict of George Keir.

No 64.

ANDREW GARDEN died in Dumfriesshire in 1742. His nearest of kin were George, William and Janet Keirs, the children of his sister.

William Keir set up a claim to the whole executry, founding upon a letter wrote by the defunct; which induced George, who lived at Alloa, and acted as a writer, to come to Dumfriesshire; and, on the 19th August 1742, he granted a power or factory to John Henderson of Broadholm, who had been educated as a writer, and was then living in Dumfriesshire as a country gentleman, and acting as factor to the Marquis of Annandale.

A person accepted a factory, empowering him to procure the constituent confirmed executor to a distant relation. He neglected to obtain the confirmation, and in the mean

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time, the constituent died, by which his relict was excluded from the executry. The Lords found the factor liable to the relict in damages to the amount of the loss sustained by his neglect.

By this factory, he empowered Henderson, either to procure him conjoined with his brother William as executor, and to receive his share of the effects, or to call William to account, if he should be confirmed alone; and the factory mentioned a reasonable gratification to be allowed him for his trouble.

Upon the 11th August 1742, he wrote to Henderson, and sent him a bond of cautionry in the confirmation, signed by Alexander Abercrombie; desiring, 'That if any other thing occurred to Henderson that was incumbent upon him, he would please take the trouble to write him thereupon.'

Henderson employed a procurator at Dumfries; who, upon the 21st December 1742, obtained George conjoined as executor with his brother William. Of this sentence William obtained an advocatation; but, in January 1744, the cause was remitted *simpliciter*, and the act and remit sent to Henderson. A petition was then given in to the commissary, by Henderson's direction, for a warrant to value the defunct's books; and, upon the 10th May 1744, two persons were appointed; who, upon the 13th June 1744, made their report. On the 17th April 1744, Alexander Abercrombie, the cautioner, became bankrupt and left the country.

In September 1744, a letter was wrote to the commissary of Dumfries, in name of George, inquiring why the confirmation stopped; and the commissary wrote an answer, That he knew no reason, and that George's doer might force it when he pleased.

Upon the 8th January 1745, George assigned to Katharine Macdonald, his wife, all his debts and effects, and particularly his share of Andrew Garden's executry.

In July 1745, George died; and, as no confirmation had been taken out, his brother and sister became the nearest of kin, and his relict was excluded from his share of the executry. She brought an action of damages against Henderson; and obtained decret in absence for L. 212, as one-third of Garden's executry, said to have been lost to her by his negligence.

The Creditors of Henderson brought a reduction of this decree; and *argued*, That a factor could not be subjected to damages of this kind, of which it was impossible to say he was the necessary cause; for that, if George had thought him negligent, he had it in his power to have recalled the factory, and to have appointed another; or he might have acted himself, as he was apprised of the delay by the commissary's letter; and that, in this case, it was a chance whether the delay might not have proved advantageous to George, by the predecease of William or Janet. Besides, Henderson was not properly an agent acting before the courts at Dumfries, but had employed another; and, it was probable, the delay was owing to George himself, either because he did not furnish money, or provide a new bond of cautionry, or chose to run the risk of sur vivance.

Answered; The negligence is apparent from the dates of the different steps. The anxiety of George that the confirmation should be immediately taken out

after the remit upon the advocation, is proved by the letter wrote in his name to the commissary; and the commissary's answer proves, that the delay was to be imputed to George's doer alone. Though George might have recalled the factory upon the suspicion of negligence, he was not bound to recall it; Henderson, who undertook the office, not gratuitously, was bound to execute it; and his negligence, in this case, was similar to that of a factor neglecting to insure a ship, or a messenger to execute a caption. The want of money, or of a new bond of cautionry, cannot be an excuse for the delay, unless Henderson had acquainted George that these were wanted.

' Upon the 1st July 1755, the Lords repelled the reasons of reduction of the decret quarrelled, and assoilzied.'

Upon a reclaiming petition, a diligence having been allowed to the Creditors for recovering writings, the cause came again to be advised.

' THE LORDS adhered.'

Act. *Johnstone, Th. Hay, Ferguson,* Alt. *Bruce, And. Pringle.* Clerk, *Kirkpatrick.*
W. 7. Fol. *Dic. v. 3. p. 182.* Fac. *Col. No 2. p. 3.*

1757. *March 4.*

ELISABETH MAULE, Widow of Thomas Ker, *against* JAMES GRAHAM of Methie.

THOMAS KER farmer at Ovenstoun, died, leaving Helen Fotheringham his widow, and Thomas Ker his son, a minor, in possession of his farm and stocking.—The widow, and James Graham of Methie, were chosen two of the son's curators, and acted accordingly during his minority.

In the 1746, while Thomas Ker was yet under age, he, with consent of his curators, intermarried with Elisabeth Maule; and, by contract, became bound to provide her in a jointure of 400 merks Scots.

In December 1747, Thomas Ker having come of age, discharged his curators of their intromissions; but, as he was of so weak a mind as to be totally incapable of all business, and particularly of judging as to the import and propriety of deeds which he signed, when desired by his friends; so his mother continued to manage the farm after his majority till her death, in the 1749; and Mr Graham of Methie took the charge of his other affairs.

Upon the death of the mother, the farm was given up, and the stocking roused. The proceeds were received by Mr Graham; who accounted for the same, and obtained a discharge from Thomas Ker, at the sight of his uncle John Ker, who had also been one of his curators. About the same time, Thomas executed a bond of interdiction of himself to the said James Graham and John Ker; but, as he had no heritable estate, it was not used nor recorded. Mr Graham, without any express factory or commission, continued in the management of Thomas Ker's affairs.

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A person who had been curator to a man who was weak in his judgment, continued to manage his affairs after the curatory expired, and lent out his whole funds on personal security to a shop-keeper, who dealt in smuggling. The shop-keeper having become bankrupt, the Lords found the *negotiorum gestor* liable for the sums lent, tho' his interference was gratuitous, and the uncle of the fatuous person had subscribed as witness to the bond.