

No 68.

Answered; The line of conduct to be pursued by the defender was prescribed with sufficient accuracy. He was directed to use those measures which were necessary for putting his constituent on an equal footing with the other creditors. But even although his instructions had been less precise, still, as he must have known, that, after the greater part of the creditors had proceeded to adjudge, those who did not would be altogether excluded, nothing but the most explicit orders from his employer could justify his doing what was equivalent to a renunciation of every hope of payment. *Kilkerran*, 8th February 1740, *Macaul contra Vareils*, No 61. p. 3524.

THE LORD ORDINARY sustained the defences. But the question having been brought under the review of the Court, the Lords altered that judgment. The circumstance which seemed chiefly to weigh with the Court was this, that the defender had not given his employer an opportunity of judging for himself as to the expediency of leading an adjudication.

'THE LORDS found the defender liable in payment of a sum equal to that which the pursuer would have received, if an adjudication had been led.'

Lord Ordinary, *Alva*. Act. *Dean of Faculty*. Alt. *Solicitor-General, Blair*. Clerk, *Sinclair*.
C. *Fol. Dic. v. 3. p. 182. Fac. Col. No 307. p. 474.*

SECT. VIII.

Diligence of Trustees properly so called.

No 69.

A trustee was found not liable to do diligence, though he did possess, but only for his actual intromission, he being bound to denude whenever the truster pleased.

1666. December 18. CHARLES CASS against MR JOHN WATT.

DR CASS having taken infeftment of an annual rent out of the lands of Robertland, in name of Cockpen and Adam Watt, Charles Cass, as heir to the Doctor, pursues Mr John Watt, as heir to his father, for count and reckoning of the mails and duties; and charges him with the hail rental, being intromitted, or which ought to have been intromitted with by him and his father, by virtue of the trust in their person; and also Adam Watt took a gift of tutory to the pursuer, and so is liable as his tutor. The defender *answered*, That his father's name being borrowed on trust, could lay no obligation on him to do any diligence but what he thought fit, seeing, by his back-bond, he was obliged to denude himself whenever the Doctor pleased; and the pursuer has reason to thank him for what he did, and not burden him with what he omitted, seeing he had no allowance therefor; and as for the tutory, there was a multiplepointing all

the time thereof depending among five or six parties, pretending right by the dependence whereby the tutor was excluded. The pursuer *answered*, That the defender's name was not borrowed without his knowledge, but that he accepted thereof, and entered to possession; and as an appriser is not obliged to possess, but if he possess, must be answerable for the rents of the lands, conform to the rental, so must the defender.

THE LORDS found the defender not liable to diligence, by virtue of the trust, albeit he did possess, but ordained him to count for his intromission, and to condescend what diligence his father did as tutor, that if he be found deficient therein, there might be an additional account to what he intromitted with.

Fol. Dic. v. 1. p. 243. Stair, v. 1. p. 415.

No 69.

1672. July 18. JANET WATSON *against* Mr WALTER BRUCE.

UMQUHILE Mr Robert Bruce granted an assignation to Mr Walter Bruce, bearing to be for relief of his brother's cautionry, and for relief of his wife Janet Watson, whereupon she pursues Mr Walter to relieve her of certain sums, wherein she was engaged for her husband. The defender *alleged*, That this assignation being for his own relief, and for her relief, it behoved to import his relief in the first place, and her's in the next place; and that her engagement could import no distress, because she being a wife, as to her, they were null.

THE LORDS repelled both these allegiances; and found, that the pursuer might forbear to make use of her privilege as a wife, and insist for her relief: And found the clause imported proportionable relief to either party, according to their engagements.

The defender further *alleged*, That he could be no further liable than to transfer the right assigned to him proportionably, and that he was obliged for no diligence thereby.

THE LORDS found, That the accepting of the assignation did not oblige the defender to diligence, unless the pursuer had required him either to do diligence, or to transfer it to her, that she might do diligence for herself.

The pursuer then *alleged*, That the defender had transferred the right assigned, and so was liable to her proportionably. It was *answered*, The defender would make retrocession to the pursuer.

THE LORDS found the allegiance for the pursuer relevant, and that she was not obliged to accept of a retrocession, seeing the defender had once denuded himself.

Fol. Dic. v. 1. p. 243. Stair, v. 2. p. 106.

No 70.

A cautioner accepting of an assignation, bearing to be for relief of his own, and another's cautionry, was not found obliged to do diligence for benefit of the the other cautioner, unless he were required either to do diligence, or to transfer.