

The Lords found, that the Earl's infesting his son during the dependance of their process could not prejudice them ; and therefore preferred the creditors, legatars, to this present Earl's right. *Vol. II. Page 416.*

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1708. *January 13.* PATRICK FLETCHER *against* ALEXANDER REID.

PATRICK Fletcher, factor at Rotterdam, pursues Alexander Reid, merchant in Dundee, for the price of some goods he sent him from Holland.

ALLEGED,---I must have retention and compensation for the price of a parcel of salmon I sent, by your order and commission, in January 1703 ; and, though they were taken into Dunkirk by a French privateer, yet *unaquæque res perit suo domino* : They were upon your risk, and I must have allowance for them.

ANSWERED,---The hazard must lie upon Reid himself ; for you did not observe the terms of my mandate, which was, to send them with that fleet which sailed with the Zeland convoy : but so it is, they came not then, but long after, when the lent-market of fishes was over ; it *fnes mandati sunt in terminis custodiendi*. And my letter had an alternative, either salmon or plaiding ; and therefore you might have sent the last if you could not get the first.

REPLIED,---I acted for you as I did for myself ; for I had a cargo of salmon in the same ship, which was lost as well as yours. And I gave you advice of their coming, which you did not countermand : and, though I had wanted a commission, yet it was *negotium utiliter gestum* upon my part, though, eventually, they were seized ; for which the most prudent merchants, acting *bona fide*, cannot be answerable, otherwise all faith should be at an end : and mandates may be fulfilled by equipollents.

The Lords finding he gave no evidence, by bills of loading, that these salmon were shipped for Fletcher, as the proceeds of his goods, nor produced his letter-book to show that he had advertised him thereof, and that it seemed to be a story made up *ex post facto* ; they repelled the compensation.

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1708. *January 27.* ANNE NAIRN *against* BARCLAY of COLLAIRNY.

By contract of marriage betwixt Sir David Barclay of Collairny and Dame Anne Riddel, he secures her in a jointure out of his lands of Pitblado ; and, because the mansion-house on these lands is not sufficiently repaired for her accommodation, therefore he obliges himself and his heirs to build and repair it sufficiently, with the office-houses, for her use during her lifetime. He dies in 1655, and she outlives him for thirty-one years, and dies in 1686, at Newcastle, in Doctor Nairn's house ; and, for onerous causes, assigns to Anne Nairn, his daughter, the bygones of her jointure ; and particularly that clause of making her jointure-house habitable. Whereupon Anne Nairn raises a process against Barclay, now heir, by progress, to Sir David, to pay her 500 merks yearly during that time, as the house-maill she was forced to pay for the want of it : and, for

her damage, at least so much as the Lords shall think reasonable at their modification.

ALLEGED,---She had no inclination, after her husband's death, to live in that country, but choosed to dwell in burgh-towns; and so no action can be sustained at the assignee's instance, unless it can be proven that she required her husband's heir to repair it: and, on their delay or refusal, she should have pursued a visitation, and cognition of the condition of the house, and what expense the necessary reparations would require; which never having been done in thirty-one years' space, and now twenty years after her death, it is more than prescribed. And it is impossible now, *post tanti temporis intervallum*, that the damage of not repairing that mansion-house can either be known or liquidated: neither were they *in mora* till required, which was never sought: and she had several transactions with the heir after her husband's death; but not the least insinuation that she intended to dwell there.

ANSWERED,---The obligation is clear and positive; and acknowledges the house was not then habitable; and there was no necessity of requisition, but they were bound to repair it. What if he had obliged himself and his heirs to build her a house on her jointure lands? They behoved to pay her house-rent so long as she wanted it, aye till performance,—*damnum et interesse* succeeding *loco rei*; and the case is the same here, unless they say the house was made habitable and repaired.

The Lords found the libel not relevant after so long a time; there having been no requisition used; and refused to sustain action now.

It was ALLEGED, indeed, That the Lady had raised a process for it in her own lifetime; which showed her plain design to crave it. But the Lords did not regard it, because it was not produced. *Vol. II. Page 423.*

1708. *January 31.* The REVEREND MICHAEL POTTER *against* the HERITORS of KIPPEN.

MR Michael Potter being admitted minister at Kippen, in Stirlingshire, in 1700, and the manse being very ruinous, there is a visitation made by the presbytery of Dumblane, who gave it as their opinion, that the minister ought to have sixty pounds Scots yearly for a house-maill, aye till he be provided by the heritors in a sufficient habitable manse; and that he ought to have L.20 yearly as the value of grass for two kine and a horse, conform to the 20th Act, 1663, till he get as much grass allocated to him; and recommended to the civil magistrate and judges to interpose their authority thereto. Upon this act Mr Potter raises an action against his whole heritors; and obtains a decret before the Lords for the said L.60 Scots of house-rent aye till the manse be rebuilt, and the L.20 for the grass aye till he be furnished and allocated. And having charged Stirling of Cairden, Graham of Buckleyvie, and others, for payment, they SUSPEND on thir reasons: *1mo*, The decret was in absence, and was a while under submission, and yet extracted before up-giving of the communing. *2do*, The presbytery's act is null; for, though they be empowered by Acts of Parliament, in relation to the building and repairing of manses, yet not for modifying da-