

No 60. he deponing before the Ordinary, that after search he could not find the same ; as also, that he never received any payment of the said bill.

Reporter, *Lord Grange* Act. *Ipsc.* Alt. *Graham, sen.* Clerk, *Gibson.*
Fol. Dic. v. 3. p. 181. Edgar, p. 115.

No 61. 1740. February 8. M'CAUL against VAREILS.

A FACTOR must either do diligence, or acquaint his constituent with his not doing diligence, and with his reasons : And where he did give such notice, and his constituent gave no orders for diligence, but left it to the discretion of the factor, it was found the factor could not be reached as negligent, merely because the debtors proved in the event insolvent.

Fol. Dic. v. 3. p. 182. Kilkerran, (FACTOR.) No 4. p. 183.

No 62. 1744. November 9. SINCLAIR of Barack, against SINCLAIR of Duren and MURRAY of Pennyland.

A cautioner, who had a bond of relief for himself, and other co-cautioners, having neglected to do diligence thereon against the debtor, when he did it for other debts of his own, was found not entitled to relief against his co-cautioners, on payment of the debt in which they were jointly bound.

JAMES SINCLAIR, clerk to the bills, was creditor by decret to Murray of Clarden, in a considerable sum ; and insisting for his money, Clarden himself, and several of his friends, viz. Sinclair of Barack elder, Sinclair of Duren, Murray of Pennyland, Mr — Oswald minister at Dunnet, William Innes writer to the signet, and Richard Murray merchant, became bound conjunctly and severally to pay it in certain proportions, and at terms mentioned in the bond ; but John Sinclair younger of Barack not having opportunity to sign alongst with the rest, gave a separate obligation to William Innes, (who had previously bound himself to James Sinclair to procure to him this security,) subjecting himself to the prestations contained in the bond, and obliging him to sign it when it should come to hand.

Clarden gave his friends separate bonds of relief, which were not intimate to Mr Sinclair the creditor ; and he, on this recital, ' that William Innes and Richard Murray, (two of the obligants) had made payment to him of the sum contained in the foresaid decret against Murray of Clarden, at least he had received security for the same, assigned and transferred to the said William Innes and Richard Murray, the said sum, as contained in the said decret, grounds and warrants thereof, and diligence thereon ; and delivered up the writs relative to the debt.'

These transactions were all much about the same time ; and thus things remained, till Innes and Murray granted a back-bond, acknowledging that the right stood in them, for the behoof of all the co-obligants ; and therefore ob-