

*January 20, 1758.*—The Lords reduced the decret, and pronounced, in terms of the Ordinary's interlocutor.

1758. *January 25.* HENRY GALLOWAY, Merchant in Stirling, *against* BLACK and COMPANY, Merchants in Glasgow.

*November 1752.*—THE pursuer consigned 39 pieces of linen, and 6 pieces of sheeting to the defenders, to be sold by them, as his factors, for his behoof.

1753. *March 21.*—Of this date the pursuer wrote to the defenders, desiring to know what was become of these goods. They wrote him in answer, (*March 26,*) that 26 pieces were sold; but without mentioning to whom, or in what manner. The pursuer afterwards wrote different letters to the defenders, inquiring after his goods. These letters were not produced, but it was proved that they had been written, and had been received by the defenders.

1754. *March 13.*—Of this date the defender Black, in answer to a positive demand from the pursuer, to be informed of the fate of the linens, wrote as follows: "That the parcel sold in December 1752, had been sold to Alexander Smith, and that he had stopped payment.—That the rest of the linens were sold; but he thinks some of the buyers will be good and some of them not."

In answer to this letter the pursuer wrote to the defenders, complaining that they did not tell him when Smith had stopped payment, how much had been bought by him, or when the price was payable; and concluding that they ought to be liable to him for Smith's debt: And further, desiring them that they would send him a particular account of the sales of the whole of his linens.

*March 18, 1754.*—Of this date the defender Black wrote That fifteen pieces had been sold to the said Smith, 13th December, 1752; twelve pieces to James Bruce, the 16th March, 1753; and eighteen pieces to William Mitchell and James Bruce, on the 18th August, 1753.

*March 28, 1754.*—Afterwards, of this date, Black informed the pursuer that Bruce had failed in his circumstances, and had involved Mitchell so much as to make him also stop payment.

It appeared that before the defender sold a part of the goods to Smith he had obtained a *supersedere* from his creditors, and that the defenders were aware of this. They ALLEGED, however, that notwithstanding this he was still in good credit.

With regard to the parcel sold to James Bruce, on 16th March, 1753, it appeared that the purchaser had granted bills for the price, payable at six and nine months, which, consequently, became due in September and December 1753.

The third parcel again sold to Bruce and Mitchell, in August 1753, were sold upon twelvemonths' credit.

ed is more pregnant for the pursuer's construction of it, that after this letter of the pursuers fell, in the course of post, to have come to the defender's hand, he employed persons to keep a look out for the ship, and how soon she appeared, to send off a boat, and which was accordingly attempted to be done when the ship appeared, though, by reason of the storm, the boat could not go to sea, than it is for the construction put upon it by the defender, reduces the decree, and finds the defender liable for the price of the goods in question," &c.

It further appeared that the defenders had taken all the bills for the price of the different parcels, in their own name.

In these circumstances the pursuer brought an action against the defenders, concluding that they should be found personally liable for the value of the goods, on the ground that they had not done their duty as factors, or commission agents, in the disposal of them.

Pleaded by the pursuer, *1mo*, That as the bills produced had been originally taken payable to the defender Black, and, for value of him, they could not now be turned over upon the pursuer after the acceptors had failed; *2do*, That the defenders were liable for the loss arising to the pursuer from the failure of Smith, Bruce, and Mitchell, because they had not in due time acquainted the pursuer of the sales, and had neither done diligence against the purchasers of the goods, nor put it into the power of the pursuer to do diligence, by sending him the bills and an account of the sales.

*3tio*, That they behoved to be liable for the value of the goods sold to Alexander Smith, because he was so far from being in good credit at the time of the sale, that he was under *supersedere* from his creditors; and that this was well known to the defenders at the time of the sale.

ANSWERED for the defenders,—To the *first* ground, that it was the universal practice for factors to take the bills for the prices of their constituent's goods in their own name; to the *second* ground, that the defenders gave the pursuer information as to the disposal of his goods as soon as he applied for it, and that they were bound to do no more; to the *third* ground, that Bruce and Mitchell were both in good credit when the sales were made to them, and that, in regard to Smith, although he had obtained a *supersedere* from his creditors, he was nevertheless in good credit, and was trusted both by the defenders themselves and by others.

*March 15, 1757.*—The Court found “That Gavin Black & Company are not liable for the price of the goods sold to William Mitchell and James Bruce, and assoillyie as to these: But in respect that they trusted Alexander Smith when he was under *supersedere* from his creditors, without notice to Henry Galloway the pursuer, Find them liable for the price of the goods sold to the said Alexander Smith, and decern.”

Lord Kilkerran says, “It would appear sufficient to subject the defenders that they gave a twelvemonth's trust to one who had a *supersedere*.”

Both parties complained of this interlocutor. The defenders petitioned against that part of it which found them liable for the goods sold to Smith. The pursuer, on the other hand, now admitted that he could make no claim for the value of the last parcel of the linens sold to Bruce and Mitchell, on 18th August, 1753, because it appeared that the purchasers were in good credit at the time of the sale, and also, that the defenders had given the pursuer notice of the sale of this parcel before the bills for the price became due. But in regard to the parcel sold to Bruce, on 16th March, 1753, and the price of which became due in September and December thereafter; the pursuer maintained that the defenders were liable, because, although repeatedly applied to by him, they had given him no notice of the sale until after the price had become due. If such notice had been given to the pursuer, he might have recovered the price from Bruce, who did not fail till a considerable time after the bills had become due.

Lord Kilkerran gives the following statement of what passed on the bench on advising the petition for the pursuer, and the counter petition and answers for the defenders.

“ It is a practice for a factor to take bills in his own name, and that is not enough to subject the factor to the debt due by Bruce.

“ *2dly*, It is not enough to subject the factor that he did not timeously give notice of the sale, as factors seldom give notice till the whole is sold; but what subjects the factor to Bruce’s debt in this case is, that he does not answer and preserve letters whereby the pursuer desired to be told what sales were made.

“ *January 25, 1758.*—Altered as to Bruce’s debt, and find the defender liable for it.” The counter petition of the defenders was refused.

1758. *June 30.* HAY *against* LORD CHARLES HAY.

This case is reported in *Fac. Coll. (Mor. 14,369.)* It was reported to the Court by Lord KILKERRAN. The report is as follows:

“ IN the 1685, Sir James Hay then of Linplum, father of the late Sir Robert, in the contract of marriage of John his eldest son, granted procuratory for resigning the baronies of Linplum and Carfrae, which he held of the crown, and Tenendry of Baro, which he held of the family of Tweedale, for new infestment in favours of the said John his eldest son, and the heirs male to be procreated of the marriage, whom failing, the heirs male to be procreated of the said John’s body, of any other marriage; whom failing, to the said Sir James himself, and the heirs male procreated or to be procreated of his body; which failing, to the heirs whatsoever to be procreated of the said John his body; whom failing, to the heirs whatsoever, procreat or to be procreat of Sir James his own body; which failing, to John Earl of Tweedale and his heirs male and of tailyie contained in the charter of the Earldom of Tweedale.

“ This marriage dissolved by the death of John in the year 1686, leaving issue only one daughter, Margaret, thereafter married to Lord William Hay; whereby, in terms of John’s contract of marriage, the succession devolved upon Sir James himself, and as no seisine had followed on the precept, or in consequence of the procuratory contained in the said marriage contract, no more was necessary for Sir James to establish the right in him, than a general service as heir of tailyie and provision to his son, to carry the procuratory and precept in the marriage contract; and accordingly he appears to have expedite a general service as heir of tailyie and provision, before the bailies in the Canongate in February 1694, but whether this service was properly expedite, is the question which I am to state.

“ But to proceed to the fact, it appears that in the 1699, Sir James and his son Robert concurred in a tailyie, containing procuratory for resigning the lands in favours of Sir James himself in liferent, and of Robert and the heirs male of his body in fee; which failing, to the Marquis of Tweedale and his heirs male contained in the charter of the Earldom of Tweedale, whereby not only Margaret, the only child of his eldest son John, but his own daughters, who were in num-