

No 65.

acquainted. The credit which Kinnear had, was only from merchants and dealers in linen, residing at a distance, who trade for profit, and are obliged to venture that they may gain. They did not (like the defender) trust him for any considerable time; but caused him make his returns always in a few days or weeks. And 3^{thio}, It does not appear that John Ker was a party to this transaction, or approved of it; but supposing he did, that cannot prejudice the pursuer.

The pursuer, kept ignorant of this transaction, and of all the other business of her family, was obliged to accept of the interest of this money for their immediate subsistence.—She gave a general power for receiving monies due to her husband, without knowing who was bound in Kinnear's bond; which having been necessary, cannot be construed into an approbation of the defender's conduct; and neither this, nor any other act of the pursuer, can disappoint the just claim of her infant children, for whom, as well as for herself, she is now prosecuting.

THE LORDS found James Graham of Methie liable to the pursuer in the sum of 10,700 merks lent to Thomas Kinnear, and annualrents thereof resting since Martinmas 1753, upon her making a valid conveyance to him of the bond for the above sum granted by Thomas Kinnear to Thomas Ker; without prejudice to the said James Graham's insisting against John Ker, or any other parties, as accords.'

Act. *Rae, Wedderburn, Lockhart.*Alt. *Advocatus, Geo. Brown.**D. Rae.**Fol. Dic. v. 3. p. 182. Fac. Col. No 20. p. 33.*

* * * This cause was appealed :

9th March 1758.—The House of Lords ' ORDERED and ADJUDGED, That the appeal be dismissed; and that the several interlocutors complained of be affirmed.'

1760. November 27.

CHILDREN OF DAVID LIZARS, *against* The REPRESENTATIVES of JOHN DICKIE,
Writer to the Signet.

No 66.

A factor *loco tutoris* having neglected to do diligence on a bond of the pupils, till three persons who were debtors in the bond, failed in their circumstances; the Lords found him liable to account for the sum.

JOHN DICKIE, writer to the signet, was, in 1744, appointed factor *loco tutoris* by the Court of Session, for managing the estate and effects of the children of David Lizars, who had died some time before, without naming tutors to them.

Among the debts due to Mr Lizars, was a bond granted to him, in January 1743, by Archibald Punton, Thomas Hay, and George Begbie, jointly and severally, for the sum of 2000 merks.

Mr Dickie continued to have the management of the childrens affairs till the 1754, when he died; and the children soon after brought a process against his Representatives, to account for his intromissions with their estate. The defen-

ders, in the account exhibited by them of Mr Dickie's intromissions, took credit for the aforesaid bond of 2000 merks, and annualrents due thereon; the whole three obligants having become bankrupt, and no part, either of principal or interest, having ever been paid.

Upon inquiring into the fact, it appeared, that all the three debtors in the bond had continued in good credit till the 1747; that Hay had failed about the end of that year, and Punton some time in 1748; that Begbie continued solvent till the 1754; and, that during all this time, Mr Dickie had taken no step, either to recover payment of the money, or get additional security from Begbie, upon the failure of the other two.

The pursuers, therefore, *objected* to this article in the account; and *insisted*, That the defenders, as representing Mr Dickie, were bound to make up this loss to them, which had happened through his supine negligence. Mr Dickie, by the nature of his office, and by the regulations laid down in the act of sederunt 1730, was bound to do exact diligence; and to take care, not only that the annualrents were punctually paid, but that the principal was properly secured. It was a most gross neglect in him, to allow the money to remain upon the security of Begbie alone, for so long a time after the bankruptcy of the other two obligants; more especially, as Begbie, though he had some little credit in the way of trade, was never known to be possessed of any solid or substantial fund. Mr Dickie ought not to have allowed the money to remain upon a worse security than that on which it was originally lent; and least of all ought he to have suffered it to lie in Begbie's hands, without ever receiving a penny of annualrent.

Answered for the defenders; After the bankruptcy of Punton and Hay, Begbie continued in good circumstances, and was not in the least suspected by any person till the 1754, when he gave way all of a sudden. The first intimation of his failure was given by himself, at a meeting of his creditors called for that purpose. The creditors agreed to take joint measures: His effects were vested in a trustee for behoof of all concerned; a dividend has already been made; and the share which the pursuers are entitled to, and which will be paid when called for, amounts to L. 69 Sterling: So that they will only lose an inconsiderable balance. Mr Dickie was guilty of no improper neglect, in allowing the money to remain in Begbie's hands; because his circumstances were reputed to be good. He acted with the same degree of diligence that he would have used in his own affairs; and therefore the defender cannot be liable.

' THE LORDS found the defenders liable to account for the debt.'

Act. *Montgomery.*

Alt. *Macqueen.*

Clerk, *Horne.*

I. C.

Fol. Dic. v. 3. p. 182. Fac. Col. No 251. p. 457.