they should be liable for an escape when acting in conformity to the construction which the Court put upon its own act; and if any alteration in the mode of proceeding in cases of this nature is necessary, it is more fitting that it should be made by act of parliament operating in future, than to say that those who were acting on the law as laid down twenty-two or twenty-three years ago by the Court of Session without question till this time, should be held liable for the debt as in case of an escape. It appears to me therefore that upon both grounds the judgment ought to be *affirmed*.

June 27, 1817.

LIABILITY OF MAGISTRATES IN CASES OF LIBERATION OF DEBTORS UNDER ACT OF SEDERUNT, 1671.

Judgment *affirmed*.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MACDOWAL (ANDREW)—*Appellant*.
BUCHAN (JOHN)—*Respondent*.

June 2, July 2, 1817.

PACTOR NOT LIABLE, UNDER THE CIRCUMSTANCES OF THIS CASE, FOR RENTS LOST BY HIS NEGLECT TO ENFORCE PAYMENT BY ULTIMATE DILIGENCE.

A PERSON employed as a gentleman's general law agent in purchasing lands, making payments, in conveyancing and expeding titles, receives, in behalf of his employer, the rents of a small detached property let to inferior tenants, without any written commission as factor, and under circumstances which showed that it was not expected that he should compel payment of the rents by ultimate diligence, as in the case of a country factor, though he charged factor's fees. A considerable arrear of rent having accrued due, and several of the tenants having become insolvent, the son of the original em-

June 2,
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FACTOR NOT LIABLE, UNDER THE CIRCUMSTANCES OF THIS CASE, FOR RENTS LOST BY HIS NEGLECT TO ENFORCE PAYMENT BY ULTIMATE DILIGENCE.

ployer calls upon the agent for payment of the amount of the rents lost during the time of his management by such insolvency; as he might have compelled payment by incarceration, sequestration, and a roup of effects, but neglected to do so. Held by the House of Lords, affirming a decision of the Court of Session, that, under the particular circumstances of the case, the agent was not liable for the rents so lost.

But the agent having been called upon by his employer for a general account, and not having kept his accounts in such a state that they could be readily produced, and the delay having been the immediate cause of bringing an action for an account, though the sum justly due was less than the sum claimed, and the decision below in favour of the agent was affirmed above, it was so affirmed without costs.

Mr. J. Macdowal lets Bankton to small tenants.

JOHN MACDOWAL, of Logan, in 1773, became proprietor of about 110 acres of land, called Bankton, in East Lothian. At that period these lands were occupied partly by old servants of Lord Bankton, from whom Mr. Macdowal had the property, who were considered as kindly tenants; and the remainder was let by Mr. Macdowal in small patches to labouring people, who earned their subsistence chiefly as carriers of the produce of the neighbouring potteries, salt-works, &c. to Edinburgh.

The Respondent, Mr. Buchan, was nearly related to Mr. John Macdowal, and was, for many years, employed by him as a conveyancer and cashier, in paying claims against him, in lending his money, in making purchases of land for him, and in expeding titles to his different estates. The general employment of the Respondent was of a more important nature than that of a country factor, and it

did not appear that he would have accepted of the factorship of Bankton, with the obligation to enforce payment of the rents from the small tenants by the use of ultimate diligence. But Bankton being at no great distance from Edinburgh, the tenants were directed to pay their rents to the Respondent; and he continued for several years to uplift such of the rents as could be obtained without a strict administration, which Mr. John Macdowal did not insist upon. The Respondent had no written commission as factor, and the property was managed chiefly by Mr. Cadell, a friend of Mr. John Macdowal, who resided in the neighbourhood. The Respondent, however, charged factor's fees.

From the description of tenants who occupied Bankton, and the lenient administration adopted in regard to them, the rents were not regularly paid; but the Respondent did not execute ultimate diligence against them by incarceration, sequestration, and a roup of effects; and when he settled accounts with Mr. John Macdowal, in 1781, the arrear of rents for Bankton amounted to 266*l*. The same system of management was however persisted in by Mr. John Macdowal till 1785, when he determined to adopt a plan of strict administration with respect to this property, and granted a written commission or factory to Mr. Adam Bell, writer in Edinburgh, for that purpose.

It appeared from some correspondence between Mr. John Macdowal and Mr. Buchan, that the former imputed some blame to the latter for his loss of his Bankton rents, but that he at the same time considered these arrears, which it became impossible to recover, as lost to himself, and not as money

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Mr. Buchan, the general law agent of Mr. John Macdowal, uplifts the rents of Bankton, without being bound to a strict administration.

Settled account in 1781. Rents in arrear.

1785. Another factor appointed for Bankton.

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which the Respondent was bound to make good. The Respondent, for some time subsequent to 1785, continued to act as the agent of Mr. Macdowal in his general and more important concerns. Some years afterwards, Mr. John Macdowal called upon the Respondent for a general settlement of accounts. It appeared that the Respondent had not kept his accounts in such a way that they could be immediately prepared; and a considerable delay having taken place, Mr. John Macdowal, in 1794, raised an action against the Respondent, calling upon him to account "for the sums put into his hands "and intromitted with by him."

Mr. J. Macdowal calls upon Mr. Buchan for a general settlement of accounts. 1794. Action for an account.

The account was at length produced, and the admitted balance paid, after which the process fell asleep. In 1799, Mr. John Macdowal died; and his son, the Appellant, having intimated an intention to waken the action, the Respondent consented that it should be considered as wakened. Objections were then given in, and the accounts and objections were referred to an accountant, who made a report, to which no objection was made for two years by either party. The Appellant then again wakened the process, and gave in objections to the Report, the chief of which was, that the Respondent had not been charged with such of the rents of Bankton as had been lost, during the time of his management of the Bankton property, by the insolvency of the tenants. The ground of this objection was, that the Respondent, having been factor on the property, had neglected to use the proper means to compel payment of the rents. The answer was, that the Respondent was factor only, in the sense of agent or receiver, and not in the sense of administrator;

Account produced. 1799, Death of Mr. J. Macdowal, succeeded by his son, the Appellant, who objects to the account. The account and objections referred to accountant. Report objected to by Appellant, because Respondent was not charged with rents of Bankton lost by insolvency of the tenants. Ground of objection, that Respondent had the power

that it was clear from all the circumstances of the case that the Appellant's father never intended, during the time of the Respondent's management, that the tenants who occupied Bankton should be subject to a strict administration, and was well aware, from the general nature of the Respondent's business, that he never would have undertaken the management on such terms; also, that the summons called for an account of such sums only as the Respondent had received. The following authorities were quoted with respect to the duties of factors.

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to have enforced payment, and neglected to do so. Answer, that Respondent was factor only in sense of agent or receiver, and not as administrator. Book iii. tit. 3. sect. 37.

Mr. Erskine says, "In improper mandates, when "salaries are either expressly given or presumed "from circumstances, the mandatory, conformably "to the general rule of the Roman law, *præstat "culpam levem*, is obliged to act with the diligence "and discretion which a man of prudence uses in "his own affairs:—Macbridge, January 1, 1680; "Gibson, July 18, 1710:—and consequently if, "through any neglect in the execution of his commission, a damage shall arise, he is liable to make "it up to his employer, or other person who suffers "by it. New Coll. II. 2.—This is the case of "factors, whether granted by the Court of Session "on sequestrated estates, or by private persons with "salaries annexed to them."

"A factor must either do diligence, or acquaint "his constituent with his reasons for not doing it; "and in a case where a factor gave such notice, and "his constituent *gave no orders for diligence*, but "left it to his discretion, the Lords found that the "factor could not be held negligent in the event of "the debtor's insolvency:—Kilk. February 8, 1740; "*Mac Caul contra Vareils*."

Dict. vol. ii. p. 132. *Voce* Diligence.

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Harcarse.

" A merchant whose estate consisted of accounts " and book debts to the value of 20,000*l.*, having " left Balbedy tutor-testamentary, the Lords found " this defence relevant to purge the tutor's negli- " gence to pursue all the debtors in the account- " books, viz. that he had employed the defunct's " nephew, who had been his apprentice, to draw " out a list of such of the debts as he thought were " resting, which list was acquiesced in by the relict, " who had a share of the free gear; and that he had " pursued on the said list, and that many of the " persons inserted therein as debtors had assoilzied " themselves by their oaths, which was the only " means of probation then competent, whereby the " pupil saved much unnecessary expense that would " have been laid out in pursuing more of the debtors, " whom there was no probability to overtake:— " *Pirias and Garpin against Balbedy*, Feb. 1682.

June 26, 1812. Judgment below for Respondent, Buchan.

The Court, by interlocutor, 26th June, 1812, repelled the objections to the Report, and, upon reclamation, adhered to that interlocutor. From that judgment Mr. Macdowal appealed.

The case was heard in the House of Lords on the 2d June, 1817. *Sir S. Romilly* and *Mr. Brougham* for Appellant; *Mr. Leach* and *Mr. Adam* for Respondent.

Judgment. July 2, 1817.

Lord Eldon C. (after stating the case). The items are many in number, which rendered it necessary to take some time to examine them with attention. I have done so, and it is my humble advice that the judgment should be affirmed; for, under the particular circumstances of the present case,

I think Buchan is not answerable as he would have been if he had been acting strictly in the character of factor, and had not on the contrary been acting on principles which displaced the obligation, that would attach upon him by the general principles of law as applicable to factors.

But it was insisted also that the judgment should be affirmed with costs. I cannot, however, concur in that; for though the just demands against Buchan were less than the claims insisted upon by the other party, yet from the relation in which he stood with respect to the father, he ought to have kept accurate accounts always ready to be produced; and the contest has, in some measure, arisen from his failure in that duty. I propose therefore that the judgment be affirmed, but without costs.

Judgment *affirmed* accordingly.

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FACTOR NOT LIABLE, UNDER THE CIRCUMSTANCES OF THIS CASE, FOR RENTS LOST BY HIS NEGLECT TO ENFORCE PAYMENT BY ULTIMATE DILIGENCE.

Buchan not acting strictly in character of factor, and not liable in payment of the loss. Costs.

Judgment affirmed.

ENGLAND.

IN ERROR FROM THE EXCHEQUER CHAMBER.

DORAN—*Plaintiff in error.*
O'REILLY and others—*Defendants in error.*

March 7, 1817.

ERROR.—DEBT.—FOREIGN JUDGMENT.—WRIT OF INQUIRY.—COSTS.

Debt in K. B. and demand made in lawful money of Great Britain, founded upon a judgment of the supreme Court of Jamaica obtained in an action of assumpsit in that Court for so much Jamaica currency,—the declaration in K. B. stating that this amounted to so much in British money. Final judgment by default against the Defendant, and error brought in the Ex. Ch.; and there, the errors not being argued, judgment affirmed, and thereupon error in Dom. Proc. Held that