

acted the whole sum, so may he, as assignee, though cautioner; as was found, 8th July 1664, *Nisbet* against *Leslie*; and a *negotiorum gestor* is where one acts *pro absente et ignorante*, which was not here; and Kinfauns makes a fair offer,—if the Earl will communicate the eases he has got in purchasing in the debts upon Kinfauns, he will quit in the same manner all the eases his father got.

REPLIED,—There is no parity here to compel me to this unequal bargain, unless I had been your father's trustee as well as he was mine.

The Lords found Kinfauns obliged to communicate the eases; but the great question remained, How they should be proven? Northesk moved, That the creditors on life should be examined thereon.

Kinfauns ALLEGED,—That our law had suspected probation by witnesses in many cases, and particularly repudiates them in taking away writ, it being hard that my debt should depend on the lubricity of their memory; and much more in this case, where each creditor would be only a single witness *quoad* the ease he gave; and that lately, in the case of *John Binny* and *Mr Rory Mackenzie*, the Lords found the eases he got from Dalvennan's creditors only probable *scripto vel juramento*. But the reason there was, because Mr Rory was on life; but here, Kinfauns being dead, there is no other imaginable way left but only to expiscate the ease by the creditors' oaths.

The Lords thought this a very dangerous trial; but, having no other way to extricate it, they appointed the creditors, before answer, to depone what they gave down of their sums, when Kinfauns transacted with them.

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1702. February 24. SIR JAMES FLEMING of RATHOBYRES against HAY of DRUMMELZIER and GEORGE CALDTON.

PHILIPHAUGH reported Sir James Fleming of Rathobyres, late Provost of Edinburgh, against Hay of Drummelzier and George Caldton, merchant in London. Sir James Rothead being infest in Cockburn's estate, for security of 44,000 merks he had lent him, and having disposed it to Dame Magdalen Kinloch, his lady; and she having transferred a part of it to Sir James Fleming, and he insisting for payment against Drummelzier, who bought the lands at a roup, comppearance is made for George Caldton, an English merchant, and John Plenderleith, writer, his factor; who produce a disposition to the same money, made to the said George, by James Rothead of Inverleith, as heir to his father, and an infestment following thereon.

Against which it was ALLEGED, for Sir James Fleming, that they offered to prove, by Plenderleith the factor's oath, that he not only received the factory, but even Caldton's disposition and seasine from Inverleith; and so, they having come back to the debtor's own hands, it was *instrumentum apud debitorem reperitum*; and so presumed to have been *solutum* or retired.

ANSWERED,—*Esto* it were so, (as was denied,) yet that brocard had many exceptions in law, *ubi alia conjectura sumi potest*; as, if the creditor trust the debtor with his bond to cause take infestment, or when he has it from another than the creditor. That it is only *præsumptio juris*, and admits of probation in the contrary; and real rights on lands are not extinct by retirement, without renuncia-

tion or discharge, though personal rights are so. *2do*, Sir James craved preference to Caldton, on this ground, That, before Inverleith's disposition to him, Sir James had intented a process against Inverleith, to denude of the said right, in terms of his father's conveyance of it to his mother; and, seeing *alienatio rei litigiosæ prohibetur, pendente illa lite nihil erat innovandum*.

ANSWERED,—Sir James Rothead's conveyance to his lady being only general and personal, any process against Inverleith, raised thereon, to implement and fulfil that personal obligation, can never, under the pretence of litigiousity, compete with Caldton's real right, now completed by infestment.

The Lords having, in answer to the *first*, ordained Plenderleith, the factor, to be examined from whom he got the papers, and he declining to tell the person who brought them to him, they called him into their own presence; and, having examined him, he declared that Inverleith had sent them to him by one Wilson, whom he had never seen before, but thought he was David Lauder the writer's man, and that the factory was blank; and, before he would suffer his name to be filled up therein, he had taken a bond of warrandice from Inverleith; and which being produced, it bore that unusual clause to secure him, in case it were quarrelled in a reduction and improbation. And Inverleith being likewise sent for, and interrogated, he could not condescend to the person's name that brought Caldton's papers, but craved a time to recollect his memory; and declared he had letters of Caldton's, which he had received from him, lying at home in his cabinet, which the Lords ordained him to produce in the afternoon. And the young man Wilson being called for, it was found he was not the person who brought the factory to Mr Plenderleith; so, from their variation, there arose a suspicion against the verity of the factory: and, till farther inquiry, the Lords committed Mr Plenderleith to close prison, as he who had used a factory suspected of falsehood, and who gave no sufficient account how he received it and the rest of the papers.

The Lords having considered what Mr Plenderleith's malversation in this affair deserved, they fined him in 500 merks, and deprived him from being a writer to the signet.

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1702. July 21. ELIZABETH FULLARTON *against* HUGH WALLACE of INGLISTON.

ELIZABETH Fullarton, Lady Cairnhill, being fined in 1682, in £100 sterling, for conventicles and other church irregularities, she grants bond to one Ogilvie, the procurator-fiscal, with her brother Dreghorn, as cautioner for £50 sterling of it, and gets a discharge of the date of the bond: and, thereafter, pays in the said £50 to Hugh Wallace of Ingliston, then cash-keeper, and obtains his discharge of the bond; and now pursues him for repetition of the said sum, on the 25th Act of Parliament 1695, ordaining all these fines to be restored.

ALLEGED for Ingliston; *1mo*, That the bond bears borrowed money, and so *non constat* it was for a fine; *2do*, The said Act founds only repetition of such fines as were paid to donatars, but here there was no donatar; *3tio*, Ingliston counted for all these fines to the Treasury, and obtained their act of exoneration and discharge.

ANSWERED,—To the *first*, Though the bond bear no relation to a fine, yet it