

1714. December 1.

The RELICT and CHILDREN of JAMES SMITH *against* The EARL of WINTON.

THE said James Smith having served the late Earl of Winton for many years, in quality of factor or chamberlain, the present Earl being beyond seas when his father and brother died, and not having even then returned, it was concerted, at a meeting of some of his Lordship's friends, that Seton of Tough, and, upon his declining the office, Sir Walter Seton, one of their number, should go abroad in quest of the Earl, in order to inform him of the state of his affairs, and to acquaint him, that there was an absolute necessity of his Lordship's presence to manage his own business. At which sederunt, they also resolved Sir Walter should have L. 100 Sterling for defraying the charge of his journey, out of the first and readiest of the rent of the Earl's estate. After James Smith's decease, his children, as having right by a general disposition, pursue the Earl for payment of the L. 100 Sterling, and annualrents thereof, advanced by the bailie, in manner, and for the end foresaid.

*Answered* for the Earl; That Sir Walter had no mandate from his Lordship, nor was he under any character that could found such a repayment. *2do*, A *negotiorum gestio* must be necessarily and profitably done, otherwise the negotiator hath his labour for his pains, and he that set him on work must pay him his expenses. And if a man undertake what is *insolitum* or unusual, he runs the risk thereof himself if it miscarry, negotiations of this nature requiring the most exact diligence that can be proposed; so that, if Sir Walter had no other errand but to give an account how matters stood, this might have been done to as good purpose by a letter.

*Replied* for the defenders; That they did not contend there was any express mandate, but a *negotium utiliter gestum* for the Earl, and that not undertaken by Bailie Smith at random, but with concurrence of the friends of the family; and, therefore, (in answer to the *2d*.) this advance of money was both necessary and profitable, as well in the effect as in the design, the design having been to give his Lordship a particular account of his circumstances, and to solicit his home-coming. And the effect, (though it did not immediately follow, yet) that the friends, by Sir Walter's journey, got knowledge where his Lordship was, so as to communicate with him by letters, and send him bills, which effectuated his return. And as to this *negotium*, its being *insolitum*, *answered*, That when a person absent falls to a considerable heritage, and it not being known where he is, and he keeping no correspondence, his affairs going to confusion without orders, that those interested should take rational methods to prevent these inconveniencies, which may turn to the ruin of the absent's affairs, is not at all *negotium insolitum*, though it may rarely fall out; but it is a necessary procedure, when fallen out, for the right administration; for *insolitum* is not what rarely falls out, but the undertaking of a new sort of business, not in the way of usual administration.

No 2.

A sum of money being advanced by the manager of an estate to one of the proprietor's friends, who by advice of other relations of the family, went abroad to acquaint him with the state of his affairs, and to solicit him to come home, the Lords found the proprietor himself after coming home, bound to allow the money so advanced, though the friend's journey proved at that time ineffectual.

No 2. THE LORDS found the Earl liable to refund the L. 100. Sterliug advanced by Bailie Smith to Sir Walter Seton.

Act. Falconer.

Alt. Horn.

Clerk, Gibson.

Fol. Dic. v. 2. p. 4. Bruce, v. 1. No 11. p. 17.

1725. July 20.

JAMES CAMPBELL of London, Merchant *against* The CREDITORS on the Equivalent

No 3.

A person who had acted as solicitor for the creditors on the equivalent, in carrying through some acts of parliament, found entitled to his commission, not only from those who had subscribed a commission to him, but from those also who had not dissented, not however from indorsees to debentures onerously purchased.

By the fifteenth article of the Treaty of Union between Scotland and England it was agreed, that an equivalent should be paid by England to Scotland, for such parts of the revenues of excise or customs, &c. payable out of Scotland after the Union, as should be applied towards the payment of the debts of England contracted before the Union; and that the said equivalent (whereof there was advanced in ready money the sum of L. 398,085. 10s) should be applied; *1mo*, Towards payment of the loss of private persons by rectifying the coin; *2do*, To re-payment of the proprietors of the Scots African, and Indian Company, their respective shares therein; *3tio*, Towards payment of the public debts of Scotland, and towards the encouragement of manufactures, &c.

Two acts past in the last parliament of Scotland, regulating the manner of stating and paying the said debts of Scotland, viz. the 15th and 16th articles of Union.

One act was also past in the first Parliament of Great Britain, *anno* 1708, for the better stating of what should be payable to Scotland by way of equivalent, and for stating the public debts of Scotland, in so far as the same remained undone, in pursuance of the said 16th act of the last Parliament of Scotland; whereby the Commissioners of equivalent were empowered to issue to each Creditor debentures for the sums due to them respectively, which were to carry five per cent. of interest till payment, which the Commissioners accordingly did to the extent of L. 230,308 : 9s : 10d.

In the year 1710, while the extent of the equivalent remained somewhat uncertain, and it was thought doubtful, if there would be a sufficiency of it for payment of the Scots debts, a considerable number of the Creditors on the equivalent granted a commission to the pursuer to solicit and agent for them, by proper applications to her Majesty Queen Anne, to the Treasury and Parliament, the procuring such farther acts of Parliament, as should be necessary for bringing the extent of the equivalent to a clear state, and for the due and regular application of it towards the payment of the Scots debts, and agreed by a clause in the commission to allow him for his pains and charges five per cent.