

No 59. against Balfour, that he may operate his relief against the common debtor ; but found Lindsay not liable, and that the pursuer is not to assign against him.

For Garden and Donaldson, *Arch. Murray.* For Lindsay, *Alex. Garden.*
And for Pilmore, *Jo. Ogilvie.*

Fol. Dic. v. 3. p. 181. Edgar, p. II.

1724. July 30.

MR JAMES GILLON Advocate, against WILLIAM DRUMMOND of Grange,
Writer to the Signet.

No 60.

A bill was put into the hands of a writer to the signet to recover payment. Twenty years afterwards, an action was brought against him for payment. The Lords assoilzied him, on his making oath that the bill had been lost, and that he had not received payment of it.

WILLIAM GLADSTONES, an officer in one of the Scots Dutch regiments, in the year 1700, drew a bill for 500 Florins from Paris, payable to Alexander Stevenson factor there, for value, upon John Lillie, agent for the regiment at the Hague ; Lillie having refused to accept the bill, it was returned to Stevenson by Vanderhyden and Drummond merchants in Amsterdam, to whom it had been indorsed. Gladstones having died shortly after without paying the bill, Stevenson sent it to Arthur Brown merchant in Edinburgh, his correspondent, in order to affect any remains of estate or effects he could find in Scotland belonging to Gladstones. Stevenson's affairs having also failed anno 1702, arrestments of his effects were used by several of his creditors in the hands of Brown at Edinburgh ; and amongst others, by Vanderhyden and Drummond, and by Mr Gideon Murray. Upon a settlement of Stevenson's Creditors with Mr Brown, the above bill was lodged in the defender's hands, as factor for the three arresters above named, anno 1703, upon his granting a receipt thereof, obliging himself to be accountable to Gideon Murray for the half of the money to be recovered upon it ; to this obligation the pursuer having right by assignation, insisted for production of the bill, or payment of the half of the money.

The defender *pleaded*, That he had kept the bill carefully for many years after the date of the receipt libelled on, and until, after a diligent enquiry, he found that Mr Gladstones had left no estate or effects, out of which payment of the bill could be recovered, and that no demand for the bill having been made on him for near 20 years, he had lost or mislaid it ; so that after the exactest search it could not be found, and that upon this he was willing to make oath, and that he had never received payment of the whole or any part of it ; that therefore he ought to be assoilzied, unless the pursuer could condescend on some estate or effects of Mr Gladstones, out of which payment might have been recovered.

Answered for the pursuer, That the defender being an agent practised in business, and having undertaken a trust, was liable *qua mandatarius in culpa levissima*, and therefore ought to be decerned against, though the pursuer should

not be able to be particular as to effects of Mr Gladstones, the time being now over for enquiring about them, and the defender having been entrusted to make the enquiry while it was possible to do it; *2do*, If it was fact, that there were no effects of Mr Gladstones, it was the defender's duty to have acquainted Mr Gideon Murray of it in time, and to have delivered up the bill, especially since he had granted an obligation to that effect, to which Mr Murray had reason to trust; *3tio*, There was ground to think, that Mr Gladstones left sufficient fund for payment of this bill, if it had been carefully looked after, *imo*, From a letter of Stevenson's anno 1702, to Mr Drummond at Amsterdam, acquainting him, that one Ramsay, an officer in the army, executor and brother-in-law to Gladstones, had assured him, that Mr Lillie had effects of Gladstones sufficient to pay the bill, and that he would order the payment of it as soon as he saw Mr Lillie; *2do*, From an interlocutor of the Lords, 26th July 1705, ordaining Crawford of Munquhanny to assign to Mr Lillie (as creditor to Mr Gladstones by adjudication, led 16th July 1702) an adjudication at Munquhanny's instance, against Mr Gladstone's father's estate, upon payment of half of the sum for which it had been led; which fund, the pursuer contended, might have been affected by the defender as well as by Mr Lillie.

Replied for the defender, That he had not been guilty of any fault or the smallest neglect; on the contrary, he would have been to blame, had he laid out charges for his employers, when there was no probability of success; and as to the tendering of the bill, it could have been of no service to Mr Murray, unless there had been effects which he could have reached. As to the particulars condescended on by the pursuer, it was observed, that the one part of the pursuer's allegiance destroys the argument brought from the other; for the interlocutor 1705 shews, that Lillie was so far from having effects in his hands for payment of Gladstones' bill to Stevenson, that it appeared he had been otherwise creditor to Gladstones, on which he was obliged to lead an adjudication. And as to affecting the fund which Lillie had adjudged, the date of the defender's obligement, 8th March 1703, shews it to have been impossible to have got a second adjudication within year and day of Lillie's, dated 16th July 1702, considering that Gladstones was but an apparent heir, which required a course of diligence previous to the adjudication, impossible to have been completed in time.

THE LORDS found, That the circumstances, that Gladstones' bill in the year 1700, being in the hand of Stevenson and of Brown his correspondent, for some years after Gladstones' death, and before the bill came into the defender's hands, and his granting the obligation libelled in the 1703, and no demand made upon it for so long time, and that the pursuer did not condescend upon any effects in Britain belonging to the defunct, relevant to excuse the defender for not doing diligence; and that he was not now liable to produce the said bill,

No 60. he deponing before the Ordinary, that after search he could not find the same ; as also, that he never received any payment of the said bill.

Reporter, *Lord Grange* Act. *Ipsc.* Alt. *Graham, sen.* Clerk, *Gibson.*
Fol. Dic. v. 3. p. 181. Edgar, p. 115.

No 61. 1740. February 8. M'CAUL against VAREILS.

A FACTOR must either do diligence, or acquaint his constituent with his not doing diligence, and with his reasons : And where he did give such notice, and his constituent gave no orders for diligence, but left it to the discretion of the factor, it was found the factor could not be reached as negligent, merely because the debtors proved in the event insolvent.

Fol. Dic. v. 3. p. 182. Kilkerran, (FACTOR.) No 4. p. 183.

No 62. 1744. November 9. SINCLAIR of Barack, against SINCLAIR of Duren and MURRAY of Pennyland.

A cautioner, who had a bond of relief for himself, and other co-cautioners, having neglected to do diligence thereon against the debtor, when he did it for other debts of his own, was found not entitled to relief against his co-cautioners, on payment of the debt in which they were jointly bound.

JAMES SINCLAIR, clerk to the bills, was creditor by decret to Murray of Clarden, in a considerable sum ; and insisting for his money, Clarden himself, and several of his friends, viz. Sinclair of Barack elder, Sinclair of Duren, Murray of Pennyland, Mr — Oswald minister at Dunnet, William Innes writer to the signet, and Richard Murray merchant, became bound conjunctly and severally to pay it in certain proportions, and at terms mentioned in the bond ; but John Sinclair younger of Barack not having opportunity to sign alongst with the rest, gave a separate obligation to William Innes, (who had previously bound himself to James Sinclair to procure to him this security,) subjecting himself to the prestations contained in the bond, and obliging him to sign it when it should come to hand.

Clarden gave his friends separate bonds of relief, which were not intimate to Mr Sinclair the creditor ; and he, on this recital, ' that William Innes and ' Richard Murray, (two of the obligants) had made payment to him of the sum ' contained in the foresaid decret against Murray of Clarden, at least he had ' received security for the same, assigned and transferred to the said William ' Innes and Richard Murray, the said sum, as contained in the said decret, ' grounds and warrants thereof, and diligence thereon ; and delivered up the ' writs relative to the debt.'

These transactions were all much about the same time ; and thus things remained, till Innes and Murray granted a back-bond, acknowledging that the right stood in them, for the behoof of all the co-obligants ; and therefore ob-