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. *Ipse.* 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.

1744. *November* 9.
SINCLAIR of Barack, *against* SINCLAIR of Duren and MURRAY of Pennyland.

No 62.
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 decreet 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 decreet 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 decreet, '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-

liging themselves, if the debt was paid by Clarden, to discharge it, and if by any of the cautioners, to communicate it to them for their relief. No 62.

John Sinclair of Barack was distressed by Sinclair of Southdun, executor to James Sinclair; upon which Innes and Murray made over to him their rights, with this proviso, 'That the same was granted for the relief of the co-obligants; 'and to the end he might operate the relief competent to them against the said 'James Murray of Clarden, saving and reserving to them all their mutual re-'lief off one another, as accorded of the law.' And he having paid, took from Southdun a discharge and assignation to the bond, and thereon pursued Sinclair of Duren and Murray of Pennyland, as representing their predecessors, two of the obligants, for relief; who made this defence, 1*mo*, That their predecessors being cautioners for Clarden, and having bonds of relief, which were sufficiently notour to James Sinclair the creditor, and no diligence having been done against them for seven years, they were free; 2*do*, That Barack ought to be repelled *exceptione doli*, as having fraudfully neglected to prosecute the relief competent to him, for the behoof of all the co-obligants, while at the same time he did diligence on other debts due to himself.

Pleaded for the defenders on the *first* point, That the statute, like many others, is so conceived as to need, and has accordingly received interpretation by the decisions of the Lords. It gives relief to co-cautioners, providing they have either a clause of relief in the bond, or a bond of relief apart, intimated personally to the creditor at the receiving of the bond; and the question is, concerning the meaning of these provisions. It is owned, that private knowledge is not sufficient, but there must be authentic evidence of notice. THE LORDS have extended this beyond the letter of the act, and applied the benefit of the statute to a man bound expressly as cautioner, though he had no bond of relief intimate at the time, nor a clause of relief in the bond, 11th December 1729, Ross of Craig against ——*. And, in another case, a cautioner had a bond of relief wrote by the creditor, and to which he signed witness, but which was not formally intimate. 'THE LORDS sustained the creditor's knowledge so qualified,' 24th February 1714, Macranken against Shaw†. In the present case, James Sinclair, the creditor, was distressing Clarden; and, to prevent this, William Innes gave his obligation to procure for his security the bond signed by the co-obligants. Now, when a man obliges himself to become bound with another, to that person's prior creditor, and afterwards binds accordingly; can it be said, that there is not more than private knowledge of his being only a cautioner? 2*do*, The creditor, on his receiving this cautionary security, made over to Messrs Innes and Murray his debt and decreet. The nature of the thing speaks this to have been for the behoof of the other co-obligants, in order to operate their relief; and it is stronger than any intimation made to him; for there the creditor is passive, but here he is furnishing them with the means of making their relief effectual; he is treating them as cautioners by a writing un-

* *See* APPENDIX.

† Forbes, MS. *voce* PRESCRIPTION.

No 62. der his hand, which is surely as good as his being writer, or signing witness to a bond of relief.

Pleaded for the pursuer; The statute, which introduces a *novum jus*, is not to be extended: But it is no extension to apply it to the case where a person is bound as cautioner; for there the deed itself is sufficient notification. If he is not so bound, there must either be a clause of relief in the bond, or a bond of relief duly intimate. Many authorities might be given, that no private knowledge is sufficient; one case, for instance, so decided, 14th February 1727, Bell against Herdman*: But indeed this is *triti juris*; so that the whole argument of the defenders fails, which is only that James Sinclair must have known they were cautioners; and even this is not clear, since they might have clubbed to pay so much money for Clarden, or he might have imprest money into their hands for their payment: And nothing can be inferred from the assignation to Murray and Innes, from what past amongst the co-obligants themselves, or Southdun's conveyance to Barack, since these were all posterior to the date of the obligation; and to some of these transactions James Sinclair was no party.

Pleaded further for the defenders; Barack having taken an assignation to the original debt from Murray and Innes, who were trustees for the whole, and that expressly, "to the end he might operate the relief competent to him and us, (viz. the assigners") and the other co-obligants in the foresaid bond, became thereby trustee for the rest, and obliged to do diligence; which he having neglected, cannot insist in this claim. It is no defence to him, that he was himself concerned; for, *in communi negotio*, a man is not at liberty to neglect the common interest because he neglects his own: But indeed he took care to secure separate claims of his own; for Clarden's estate was wholly exhausted by diligences led and acquired by himself, before he brought this process, which he is therefore *in pessima fide* to insist in.

Pleaded for Barack; Trusts are not constitute by inferences; and the fact is only this, That he being distressed, acquired in the right that stood in Innes and Murray, so far indeed in trust for the whole; that is, it was for their behoof, and the holders were obliged to denude thereof when required, but not bound to diligence; and, in the same manner, it was afterwards in Barack: The words in the assignation only express what was implied in the nature of the thing. The defence might have had some appearance, if he had been required to do diligence, or denude: But he never was; and each of them had it in their own power to do for themselves, in virtue of their bonds of relief. In these circumstances, there was nothing to hinder Barack to take care of his separate claims: And, in fact, it is not true that the whole estate is exhausted by diligence.

If the Lords shall be of opinion, that he was obliged to diligence, the effect of it will only be, that he must be liable to them as if diligence were done, that is, he must account to them as if he had adjudged for them with his own debts; so that in a sale of Clarden's estate, they might draw *pro rata*: And this can afford no defence against paying, in the mean time, their proportions of what

* *See* Appendix.

was paid on their account; they have no claim, but to have their real damage made up: And as they could not have refused to repay him their proportions, if he had adjudged on their account; so neither can they now, if he is to be held as if he had adjudged. *Fictio in casu ficto tantum valet, quantum veritas in casu vero.* No 62.

THE LORDS repelled the defence founded on the septennial prescription introduced by act of Parliament in favours of cautioners; and found, that this case did not fall under that act: But found, that the assignation by William Innes and Richard Murray, to Sinclair of Barack, being expressly made, to the end that he might operate his and their relief, and the relief of the other co-obligants; and he having omitted to do diligence for the operating their relief, when he did diligence for the separate debts owing to himself; that he could not now seek relief off the other co-obligants, in so far as they might have been relieved by the diligence, in case he had done diligence for relief at the time he did it for his own payment.

Reporter, *Lord Arniston.* Act. *Lockhart.* Alt. *W. Grant.* Clerk, *Forbes.*
Fol. Dic. v. 3. *p.* 183. *D. Falconer, v.* 1. *p.* 1.

1748. *July* 8. CLARK *contra* Sir JOHN HALL. No 63.

THE question stated, but not determined, How far a creditor, taking decree of mails and duties, and even possessing in consequence of it, is obliged to account by a rental, except where he debars another creditor?

One thing is plain, that he debars the debtor; and although, where the debtor has had a promiscuous possession, another creditor cannot oblige him to account by a rental, yet, if the debtor has had no promiscuous possession, it is thought another creditor may oblige him to account in that manner.

Kilkerran, (DILIGENCE.) *No* 1. *p.* 166.

1757. *January* 4.

JOHN GOLDIE, Trustee of HENDERSON'S CREDITORS, *against* KATHARINE MACDONALD, Relict of George Keir. No 64.

A person accepted a factory, empowering him to procure the constituent confirmed executor to a distant relation. He neglected to obtain the confirmation, and in the mean

ANDREW GARDEN died in Dumfriesshire in 1742. His nearest of kin were George, William and Janet Keirs, the children of his sister.

William Keir set up a claim to the whole executry, founding upon a letter wrote by the defunct; which induced George, who lived at Alloa, and acted as a writer, to come to Dumfriesshire; and, on the 19th August 1742, he granted a power or factory to John Henderson of Broadholm, who had been educated as a writer, and was then living in Dumfriesshire as a country gentleman, and acting as factor to the Marquis of Annandale.