justice, but it was said they might proceed, though there were neither a legal crime, nor a legal proof, if there were a sufficient cause of offence; that Mr Foulis's fault, contrary to the express foundation, joined with his absence after removal of the rebels, and not giving notice to the vestry, which had an appearance of waiting for the issue, before he declared himself, was a sufficient ground of removal. No 2.

They found, 10th November, 'the vestry, in removing the pursuer, had not acted arbitrarily, but agreeably to the discretionary powers given them by the founder.'

Pleaded in a reclaiming bill, That a vestry had no power of censuring or removing their minister, and that no such power was committed to this vestry by their founder, as neither had he reserved any such to himself during his life; that the vestry had settled their former minister during pleasure, because they then had Mr Foulis in their view, who could not immediately accept of the charge, but there was no such clause in the nomination of him, which was therefore plainly intended for life; that his failure of praying for the King one day, occasioned by fear, could not be considered in this cause, as it was none of the reasons whereon the vestry proceeded, but as it appeared by their minutes they had no evidence before them of the fact, and pronounced their sentence abstracting from it; that the reason given by them, of his concealing himself so that he could not be found, was not true, for the beadle found him, and delivered the message, discharging him from the exercise of his office, which he was ready to have entered upon, having recovered his health, as soon as his colleague, who had gone to England.

Observed; That Mr Foulis, by his own pleading, was on the place, and neither offered to exercise his office, nor gave any intimation of his want of health to any of the congregation, from the time the rebels left Edinburgh, to the beginning of January.

THE LORDS refused and adhered.

Act. *Lockhart, H. Home, & A. Pringle.* Alt. *W. Grant.* Clerk, *Gibson.*
Fol. Dic. v. 3. *p.* 307. *D. Falconer, v.* 1. *No* 208. *p.* 287.

1748. *July* 6. GORDON of Buckie *against* ANDERSONS.

No 3.
Payment made to an adjudger in trust on his bills, cannot be imputed to his trusters.

HELEN, ELIZABETH, and CLEMENTINA ANDERSONS being creditors of their brother Alexander Anderson of Arradoul, assigned their debts to Sir William Gordon of Park 'in trust, for their own proper use and behoof, to the end that 'he might lead such legal diligence, by adjudication or otherwise, as should be 'thought necessary for affecting the lands, &c. surrogating him in trust, for 'the use and behoof above-written, with power to prosecute and pursue all 'liable in payment of the sums of money assigned, decreets of constitution and

No 3. ‘ adjudication, and all others necessary thereupon to recover, and the same to ‘ due and lawful execution cause to be put, and generally every other thing, ‘ for the use and behoof aforesaid, to do that they might have done themselves.’ And because the said assignation was made ‘ in trust, to the end that he (who ‘ was also a creditor) might lead an adjudication for his own and their respec- ‘ tive interests ;’ it is declared, that he should not be liable for the validity of his diligence, but to use such as he did for himself, whereof he was to denude, with warrandice from fact and deed.

Sir William led an adjudication, which, as well as the constitution whereon it proceeded, bore to be in trust, in so far as concerned the sums assigned.

The creditors were ranked, and the estate purchased at a judicial sale by George Gordon of Buckie, who, before approbation of the scheme of division, advanced sums of money to several creditors on their bills, and amongst the rest to Sir William Gordon.

Sir William being attainted on account of the rebellion, Buckie raised a declarator against the Andersons, that his advances to him ought to be imputed proportionally to their debt.

Pleaded for the defenders ; By the conception of the assignation he had no power to receive payment, but only to do diligence, whereof he was to denude ; and this being ingrost in his right, and the diligence led by him, behoved to be noticed by the pursuer.

Pleaded for the pursuer ; Sir William had power to do whatever was competent to his constituents ; besides, a power to adjudge implied a power to take payment, which might have been offered at the Bar.

Replied ; If payment had been offered, he might have produced his cedents to receive it and discharge.

Observed on the Bench ; That the trustee had power to carry his adjudication into execution, which properly was to be done by a decreet of mails and duties, and levying the rents ; so that he had power to take payment.

On the other hand, That when two parties were endeavouring to avoid loss, the burden ought to fall on him who had the choice of taking the security ; that whatever might have been the case, if Buckie had taken a discharge, he could not obtrude upon the defenders a bill, which was no payment, but only afforded him a ground of compensation against their trustee.

The Lords, 7th June, ‘ found, that George Gordon of Buckie, the pursuer, could not have allowance from the defenders of any part of the money paid by him to Sir William Gordon upon the bills in question.’

On bill and answers the Lords adhered.

Reporter, *Tinwald.* Act. *R. Craigie & H. Home.* Alt. *Ferguson.* Clerk, *Kirkpatrick.*

Fol. Dic. v. 3. *p.* 306. *D. Falconer, v.* 1. *No* 271. *p.* 364.