

No. 2. persons ever to obtain payment of his account. He must raise an action against every individual for payment of his proportion, however small; and after obtaining his decree, and ascertaining the precise sum due by each, he must submit to the loss which the insolvency of any number of his employers may occasion. Accordingly, in several instances, the employers of an agent have been found liable to him, each *in solidum*, as in the case of Mr. Walter Scott against Dewar of Vogrie, and in that of Mr. Laurence Hill's heirs against the Peers of Scotland, 25th November 1801, (not reported.) It makes no difference upon the nature of the claim in this case, that the distillers resolved to defray the expence incurred, by an assessment according to the extent of their respective stills. This was altogether an arrangement among themselves for the convenience of the trade, in which the pursuer had no concern.

Answered: Although it may be true in general, that those who take a concern in the proceedings of a meeting are liable *in solidum* for the expence incurred in the prosecution of any measure for the general benefit, the pursuer is in this case barred by his own conduct from thus following out his claim. He originally undertook the business, relying upon the proposed assessments of the distillers by whom he was employed, and continued afterwards regularly to demand from each individual the particular proportion of the assessment imposed upon him. Having acted in this way hitherto, he must be understood as having homologated these proceedings of the distillers, and he cannot now change his ground, by insisting against any individual *in solidum*.

The majority of the Court were of opinion, That all who attended these meetings, or acceded in any way to the measures therein adopted, were liable conjunctly and severally, as Mr. Walker's employers, to satisfy his just demands.

The Lords 'found the defenders liable to the pursuer jointly and severally, 'for defraying the expenses of the business in which he was employed by 'them.' And a petition against this interlocutor was refused, (21st December 1803.) There was at the same time a remit to the Lord Ordinary, to adjust certain points.

Lord Ordinary, *Meadowbank.* Act. *H. Erskine, Dickson.* Agent, *Party.*
Alt. *Boyle.* Agent, *J. Macritchie.* Clerk, *Pringle.*

J.

Fac. Coll. No. 127. p. 271.

1808. *February 2.*

WILLIAM FORBES, Esq. of Callender, *against* The TRUSTEES of the EARL of GALLOWAY.

No. 3.

Circumstances in which the non-ac-

ON the 3d July 1804, the Earl of Galloway executed a trust-deed, wherein he 'Gives, grants, and disposes to, and in favour of the said Ann, Countess

‘ of Galloway, my beloved wife, the Right Honourable Sir Archibald Macdonald, Lord Chief Baron of his Majesty’s Court of Exchequer in England; the Honourable Sir William Honyman, one of the Senators of the College of Justice, and others, or to such of them as shall accept of the present trust, or the survivors or survivor of them, and such other person or persons as they or the survivors or survivor of them shall assume.’

No. 2.
 ceptance of a
sine qua non
 did not render
 ineffectual the
 nomination of
 executors.

By a subsequent clause the trustees are authorised to sell certain parts of the trust-estates for the discharge of debts, to borrow money, grant securities, and let leases. After prescribing the order in which the lands shall be sold, the deed grants power to the trustees ‘ to nominate and appoint, by a writing under their hands, any person or persons whom they shall judge fit to be trustee or trustees, for the purposes herein mentioned, along with them, or after their decease.’

It then proceeds, ‘ I do also hereby declare, that the majority of my said trustees, whether named in this deed afterward to be executed by me, or to be assumed into the management of this trust, in virtue of the powers above granted, and who shall accept as trustees, shall be a quorum; providing always, that the said Anne, Countess of Galloway, my beloved wife, shall be one of the said quorum, and *sine qua non*: And also declaring, that in case none of my said trustees other than the said Anne, Countess of Galloway, my beloved wife, shall accept of this trust, or, if after her death, there shall be only one accepting trustee, or the number of my said trustees shall be reduced to one, she the said Anne, Countess of Galloway, during her life, and such single trustee after her death, shall have full power to act as a quorum; and that every act and deed done by such quorum shall be equally valid and effectual as if done by my said whole trustees. And further, I do hereby nominate and appoint the said Anne, Countess of Galloway, and the other trustees before named, and the acceptors or acceptor, and the survivors or survivor of them, and such other person or persons as may, in virtue of the powers hereby conferred upon them, be assumed by them into this trust, or who may hereafter be appointed by me in manner foresaid, and their quorum, to be my sole executors and intromitters with my whole moveable and personal estate and effects,’ &c.

In the clause in the deed containing the obligation upon the Earl and his heirs to infest the trustees, the procuratory of resignation, and precept of saine, the grantees are described as ‘ the said Countess of Galloway, Sir Archibald Macdonald, Sir William Honyman,’ &c.;—‘ And the acceptor or acceptors, survivors or survivor of them and to such other person or persons as they may assume into this trust, or as I may afterward appoint by a writing under my hand.’

The Earl of Galloway having died, four of the trustees nominated in this deed accepted, but the Countess of Galloway did not accept.

No. 2. On the 5th April 1807, certain parts of the trust-estate were brought to public sale; and Mr. Forbes of Callender was a purchaser to a considerable amount.

A disposition was made out in name of the four accepting trustees, containing the concurrence and consent of the present Earl of Galloway, and of the Countess Dowager, and payment of the price was demanded.

Mr. Forbes, in a bill of suspension, maintained, that the profered disposition was not a regular, sufficient, and unchallengeable title, and that he was not bound to accept of it. That by the conception of the trust deed, the Countess Dowager was an indispensable member of the quorum, was a *sine qua non*, without whose concurrence as a trustee, the other members of the trust could not validly act. That her non-acceptance sopped the nomination, and some other mode must be adopted of investing the suspender with a sufficient title.

The Lord Ordinary reported the case to the Court; and, by their direction, 12th December 1807, refused the bill.

The Court were of opinion, that if the Countess Dowager had accepted, her consent, as *sine qua non*, would have been necessary to validate all the proceedings under the trust-deed; but by the terms and conception of the deed, it did not appear to have been the intention of the granter that her non-acceptance should dissolve the trust; and even if it had, the title would then have been in the present Earl, who concurs in the sale.

On advising a petition and answers, (2d February 1808), the Lords adhered.

Lord Ordinary, <i>Hermann.</i>	Act. <i>Thomas Thomson.</i>	Alt. <i>Advocate.</i>
<i>Jo. Smith, jun.</i> W. S. and <i>R. Aytoun,</i> W. S. Agents.		<i>P. Clerk.</i>

J. W.

Fac. Coll. No. 27. p. 90.