

Ex parte

Alexander Abercromby, Esq; of Glasshaugh,
for himself and the other Creditors of
Alexander Wilson of Littlefield, deceased, *Appellant* ;

Case 103.

John Innes of Knockorth, and Lewis Do-
naldson, Writer in Edinburgh, Son, Heir,
and Executor of John Donaldson, de-
ceased, - - - - *Respondents.*

31st Jan. 1723-4.

Trust.—Trustees chosen by creditors, who had a salary for their trouble, having thrown the debtor into prison on a caption, but afterwards liberated him without applying to the creditors for their consent ; the debt being afterwards lost, it was relevant to make the trustees liable for the debt that they consented to the debtor's liberation.

ALEXANDER WILSON of Littlefield, being greatly in debt to several persons at the time of his death, his creditors agreed to appoint trustees for the purpose of taking joint measures for recovery of their claims. The respondent John Innes, and John Donaldson, father of the respondent Lewis; were appointed such trustees, and they were to be allowed not only their expences, but an allowance for their trouble. In January 1707 these trustees were accordingly confirmed executors creditors to the deceased, and possessed themselves of considerable part of his estate.

One Robert Saunders, late provost of Banff, being indebted to the deceased in the sum of 2000 merks, the trustees raised and carried on an action against him for the same, whereupon he was thrown into prison. Afterwards the trustees, without consulting the other creditors, released him from prison, without taking any security from him for the money due. Saunders some years after became insolvent, and the debt was totally lost.

The other creditors thereupon brought an action against the trustees, to compel them to render their accounts, and pay what was due by them. In this action the creditors insisted, that the trustees should be charged with the said debt of 2000 merks due by the said Saunders, in regard they had by a regular process thrown him into prison, and had afterwards liberated him without the consent of the creditors, whereby the debt was lost. After sundry proceedings upon this point, the Lord Ordinary, upon the 29th of January 1715, " Found the trustees' consent to Provost Saunders' liberation relevant to make them liable for the debt."

The trustees thereupon offered to prove, that Provost Saunders had paid one-half of the debt to Wilson, the deceased, in his lifetime ; and the Lord Ordinary, on the 1st of February 1715, sustained this defence of payment as relevant to be proved, and gave

the trustees till the 20th of that month to make proof thereof: No proof, however, was made upon this point, but the trustees presented a reclaiming petition to the Court, praying to be relieved of the whole demand upon assigning to the creditors an adjudication they had obtained against Provost Saunders. The appellant states, that the interest of the creditors not being properly attended to, no answers were made to this petition, and the Court, on the 18th of February 1715, “sustained the said article of discharge, “the said trustees disposing the adjudication against Saunders in “favour of the creditors.”

The trustees afterwards made proposals to end all the matters in dispute amicably by a submission; but this not taking effect, the appellant, on behalf of himself and the other creditors of Wilson of Littlefield (*a*), presented a petition to the Court, praying to have the cause re-heard, and the last mentioned interlocutor altered; but after answers, the Court, on the 29th of November 1719, refused the “desire of the petition;” and to this interlocutor the Court adhered on the 1st of December thereafter.

The appeal was brought from “several interlocutory sentences “or decrees of the Lords of Session of the 18th of February “1715, the 29th of November, and 1st of December 1719.”

Entered,
23 Oct.
1722.

Heads of the Appellant's Argument.

The trustees were appointed for the behoof of all the creditors, and were to have a considerable allowance for their encouragement, and consequently were to use exact diligence in recovering the debts due to Wilson, and to account for the same to the creditors.

The trustees regularly took out process against Provost Saunders on his bond for 2000 merks, and laid him in prison by a caption. He was afterwards set at liberty by the trustees, without any directions from the creditors. Saunders at that time was in very good circumstances, being possessed of a pretty good real estate, and of a personal estate of considerable value; and had he been detained in prison some time longer, and other proper methods then taken, the trustees might no doubt have recovered payment of the debt. The creditors, therefore, having lost this debt, which was the great fund of their payment, by the negligence of the trustees, the loss ought not to affect the creditors, but the respondents ought to stand charged with it.

The adjudication obtained by the trustees is an additional proof of their mismanagement; for that adjudication was not obtained till four years after he was dismissed out of prison, during all which time Saunders lived in good credit; but in February 1711, his affairs falling into disorder, the trustees adjudged his estate, after several other creditors had done the same, whereas if they had done it about the time he was set at liberty, the debt might probably have been paid.

(*a*) It does not appear how the appellant's right from the other creditors was constituted.

Counsel appearing for the appellant, but no counsel for the respondents, and the appellant's counsel being heard, *It is ordered and adjudged, that the interlocutory sentences or Decrees of the 18th of February 1715, the 29th of November and 1st of December 1719, complained of in the said appeal, be reversed; and that the interlocutor of the 29th of January 1715, be affirmed: and it is further ordered and adjudged, that the Lords of Session do proceed in the cause, in such manner as if the said interlocutors complained of had never been made.*

Judgment,
31 Jan.
1723-4.

For Appellant, - *Will. Hamilton.*

John Earl of Breadalbane, Sir James
Sinclair of Dunbeath, and John Sinclair
of Ulbster, Esq; - - - *Appellants;*
Alexander Earl of Caithness, - - - *Respondent.*

Case 104.

20th March 1723-4.

Reduction Improbation.—In an action, where various objections were made to the pursuer's title, the Court having ordered production to be made, and afterwards granted certification; the judgment is reversed, and it is ordered that the defenders be not obliged to take a term for production, until the pursuer make out his title, upon which he founds his suit.

Ujury.

IN 1719, the respondent brought an action of reduction improbation against the appellants before the Court of Session, in which he insisted, for production of the rights and titles by which the appellants held or claimed the lands of Ormly, Slebster, milnlands and multures thereof, the towns and lands of Shanwell and Acharraskell, with the teinds and pertinents of the same; which had been part of the estate of Sir James Sinclair of Murkle, deceased. The circumstances of the case which gave rise to the action, as stated by the respondent, were:

That the respondent was the lineal descendant and heir of Sir James Sinclair of Murkle, who was heir of George late Earl of Caithness, who died without issue; so that all the estate of Caithness would, by the course of law, have come to the respondent, as well as the honours; but this Earl George was prevailed upon, without any valuable consideration, to make over his whole estate in Caithness to John late Earl of Breadalbane, deceased, the father of the appellant Earl John, subject indeed to a right of reversion not expressed in the deeds of conveyance, but in a separate deed, which was secreted, and which but lately came to the knowledge of the respondent:

That after the death of the said George Earl of Caithness, the said late Earl of Breadalbane possessed himself, not only of the whole estate of Caithness, which belonged to the said Earl George,
but