

1710. July 5.

The CREDITORS of DUMFERMLING *against* Mr DAVID COWPER, late Factor appointed by the Lords upon that Estate.

No 7.

A factor appointed on an estate by the Lords, found liable to account to the creditors, either according to the fiars, or the prices he sold at, reserving to him to be heard as to what ease he might claim, on account of his not receiving payment from the merchants of the whole agreed prices.

IN the compt and reckoning at the instance of the Creditors of Dumfermling, against Mr David Cowper their factor, the Creditors charged him with the prices at which he sold the victual.

Answered for Mr Cowper; He can be obliged to compt only at the fiar-prices, as the most equal for both parties; for, a factor being supposed to sell for ready money, is presumed to get no more than the fiars, and if he sell to a day, in prospect of a higher price, he thereby runs a risk, if the merchants happen to break *medio tempore, et quem sequitur incommodum, &c.* Nay, it is visibly to the advantage of creditors that the fiars be the rule, with this quality, that the factor get no allowance for the charges of selling and disposing of, or receiving the victual, or doing diligence for the price, or upon the account of the buyer's turning insolvent; and no such allowance is claimed by Mr Cowper. Besides, by establishing of the fiars as the standard, the creditors have this further benefit, that the charge against the factor is liquidated by an extract of these, without the trouble and expense of a probation, which any other rule would require; and, should a factor be obliged to answer for the prices sold at, he hath reason to ask allowance in his discharge of all charges and accidental losses by the sale, which may sometimes reduce the price far below the fiars. *2do*, Mr Cowper is content to hold compt at the prices he received for the victual, if the creditors will take it complexly, and accept of these prices every year, though sometimes below the fiars, which cannot be thought unreasonable; seeing they who reap the advantage, should also suffer the loss.

Answered for the Creditors; Factors, as trustees for the creditors, getting both allowance for their necessary charges, and a salary for their pains, are bound to do exact diligence, and compt for the prices sold at, or instruct that they sold *bona fide* to persons responsible at the time, upon usual security, and at the term of payment did diligence, and could not recover the prices: For law presumes, that a trustee liable to diligence, received what he ought and should have received; therefore, if he sold to some above, and to some below the fiars, he must compt for the fiars when he sold below them, and at the price he sold for, when above them; seeing to allow a factor, who sold perhaps for a third above the fiars, to be liable in all events only for the fiars, were to free him from diligence, which is the consequence of his trust and office. And why should not a factor named by the Lords compt for prices received, as well as the factors of private men.

Replied for Mr Cowper; The disparity betwixt the Lords' factors, and those of private men is, that the latter do commonly follow their master's particular instructions, whereas the former must act upon their peril; and a master may, from his own private knowledge of circumstances, dispense with the doing of

diligence, or the like ; but nothing can be allowed in a factor's exoneration before the Lords, without the nicest probation of circumstances.

No 7.

THE LORDS found, That the creditors' charge must be constituted against Mr Cowper, either according to the fiars, or the prices he sold at ; reserving to him to be heard upon what diligence he was liable for, and what ease he may claim upon the account of his not recovering payment of the whole agreed prices from the merchants.

Fol. Dic. v. I. p. 311. Forbes, p. 416.

1711. *January 23.* CREDITORS OF HAY of Park *against* FALCONER.

No 8.

A FACTOR upon a bankrupt estate was found liable to accmpt for victual rent according to the fiars, or according to the prices received by him deducting all losses, in the option of the creditors.

Fol. Dic. v. I. p. 311. Forbes.

* * * See This case, No 27. p. 2097.

S E C T. III.

Wronguous intromitter accounting.—Whether competent to question the mode of striking the fiars.

1685. *December.* MUDIE *against* CRAIGIE of Gairsie.

No 9.

IN the action at the instance of William Mudie of Milsetter against William Craigie of Gairsie, for his intromission with some victual rent in Orkney ; and there being no fiars there, but only the fiars made by the stewart, which were far above the true prices, being penal, made only to force the King's tenants to pay their rents ; the LORDS ordained the current prices at which the victual in Orkney was in use to be sold yearly to be that rule, and appointed the same to be proven by such witnesses as were heritors and merchants who were in use to trade with victual in that country. *Item*, THE LORDS having advised the report of the commission, found the same null, and had no regard to the testimonies of the witnesses, because they did not bear these words adjected to every deposition, ' As I shall answer to God,' albeit the deposition did bear that the witnesses were deeply sworn.

Fol. Dic. v. I. p. 311. Sir P. Home, MS. v. 2. No 742.

* * * This case is reported by Fountainhall, *voce* WITNESS.