

whereby he might either have been preferred, or come in *pari passu* with the Lady Samford Nairn, who had adjudged, that he ought to be liable for the whole damage; albeit it was *argued* by some of the LORDS, That the Lady's adjudication being upon a special obligation to dispoise the whole lands irredeemable, she would have been preferred, albeit they had been equal in diligence; or if Wilson had adjudged only after or within year and day, he could not have craved the benefit of the act of Parliament to come in *pari passu*, which is only granted where the case is betwixt comprisers or adjudgers for personal debts.

No 71.

*Fol. Dic. v. i. p. 243. Gosford, MS. No 694. p. 414.*

1711. November 28. TROQUHEN against BALMAGHIE.

JOHN INGLIS, Commissary of Kirkcudbright, as principal, Roger Gordon of Troquhen, and Maghie of Balmaghie, as cautioners, become debtors to Mr John Birny for 1000 merks. The two cautioners being forced to pay the debt, they take the assignation in Balmaghie's name, and Troquhen gets a back-bond from him, acknowledging the trust, and obliging himself to do diligence against Inglis for recovery of the money. Troquhen pursues Balmaghie's heir on the passive titles, either to refund the half of the sum, or shew diligence against the common debtor. *Alleged*, Absolvitor from diligence, because it would have been wholly unprofitable; in so far as he offers to prove, that Inglis, at the time he gave the obligation, was altogether insolvent, and so holden and repute by the whole neighbourhood; there were so many diligences, both personal and real, by adjudications, infestments, and other preferable burdens, that it would have been lost money to have done any diligence against him, where none was to be expected in return: And the half of the sum being his own, it is not to be presumed but he would have looked after it, if he had seen any rational prospect. And this defence has been sustained to tutors, who are more strictly bound than common trustees; for Durie observes, that tutors were not made answerable for diligence, where their pupil's debtors were not *solvendo*, and that they were not bound to throw away money in prosecuting broken debtors, Watson, No 37. p. 3501.; and Hamilton *contra* Hamilton, No 39. p. 3502. And Stair's *Instit. Tit. Tutors. Answered*, There is a plain disparity betwixt the two cases; for, in tutors, the obligation is not *ex pacto*, but arises *ex quasi contractu*, and is interpreted *ex bono et æquo*, what a prudent rational man would do in such circumstances; but the burden of diligence arises here from an express positive stipulation, where he precisely binds himself to diligence; and *esto*, his real estate had been carried away by adjudications, yet he ought to have used caution, and it has been frequently seen, that the *squalor carceris* has caused them or their friends discover secret funds towards their liberation; and, in this case, Inglis lived many years after Balmaghie's obligation to relieve Troquhen and

No 72.

Two cautioners having paid a debt, and an assignation being taken in the name of one of them, who obliged himself to do diligence against the principal debtor for their common relief, it was found, that though, at the date of the obligation, the principal debtor was habite and repute insolvent, the one cautioner was liable for relief to the other, because he had neglected to do diligence.

No 72.

do diligence, and likewise transacted and purchased in sundry others of his debts. but wholly neglected this, which was *latissima culpa*, and next to dole. Some thought, if he could prove Inglis was then so denuded that his creditors were infest on their adjudications, or had charged the superiors, it should exoner him; but others said it was hard to leave this arbitrary to his choice, where his own writ *dedit legem contractui*; and therefore the plurality found he ought to have done diligence, at least by attempting incarceration, and having neglected it, they found him liable. There was a second point debated in this cause. Troquhen had paid Birny the annualrents from time to time, and craved repetition of the half from Balmaghie. *Alleged*, The discharges produced to instruct the payment, bear, 'received from Troquhen, for himself, and in name and behalf of Balmaghie,' which must be understood, that Balmaghie's money paid the half at least. *Answered*, The receipt of the money is acknowledged to be from Troquhen, and the addition of Balmaghie's name is only to shew the debt was *pro tanto* extinguished *quoad* Birny the creditor; but the discharges being in Troquhen's hand, presume the money was his, except Balmaghie prove he furnished the half of the money.—THE LORDS having read the discharges, found them of two different tenors. Some of them discharged singly Troquhen, when it came to the exonerating part. Others discharged both Troquhen and Balmaghie. In the first case, they found that the presumption lay, that the money was solely Troquhen's; but, in the last, that it was equally advanced by both. See PRESUMPTION.

*Fol. Dic. v. 1. p. 243. Fountainball, v. 2. p. 679.*

1714. June 26.

No 73.

A merchant, with whom bills of exchange, with blank indorsations, were deposited in trust, having acknowledged his receiving them, and that he was to negotiate them for the trust, upon getting allowance of necessary expenses, was found liable to do exact diligence.

WILLIAM STARK, Merchant in Glasgow, against WILLIAM M'KAY, Merchant in Inverness.

WILLIAM STARK happening to be at Inverness in September 1712, and having an accepted bill for L. 20 Sterling, payable to him by Alexander Ritchie, merchant in Orkney, the first of April preceding, and another accepted bill for L. 4 Sterling, payable to him by John Russel, merchant in Elgin, the first of February; he deposited those bills, with blank indorsations, in the hands of William M'Kay, merchant in Inverness, upon his granting a receipt and obligation, dated 19th September 1712, in the following terms; *Which writs I have received in trust for the said William Stark, and am to negotiate for him, he allowing me my necessary expenses and disbursements, &c.* About a year and a half thereafter William Stark pursued William M'Kay to make good these debts, or to shew exact diligence done by him for recovering payment, by protesting, registering, and charging, for Ritchie's bill, within the time allowed for summary diligence; and by pursuing, arresting, or otherwise, for Russel's bill.