

1712. July 1. The DUTCHESS of BUCCLEUGH *against* SIR DAVID NAIRN.

IN 1786, Sir David being received into the Dutchess's service, in the quality of secretary and receiver of her money, as succeeding to one Mr John Sinclair, he continued till 1701, till the Dutchess came to Scotland, and during these 15 or 16 years had great management and intromission, for which the Dutchess pursues him for count, reckoning, and payment, the charge amounting to no less than L. 86,000 Sterling; and his discharge being given in, the Dutchess declared that she passed them where she had any conviction of the verity of his articles, though destitute of legal formal instructions; yet as to many of them she very justly doubted the truth, and saw him taking advantages; therefore *quoad* these she *objected*, *imo*, That the article of 412 Guineas contained in a bond granted by the Lord Cornwallis her husband, to Valentine Duncomb, a London goldsmith in 1687, could not be allowed him; because, though he produced the bond, with a receipt on the back of it, yet it was cancelled, and *non constat* that ever it was signed by Cornwallis. *2do*, It is not discharged by Duncomb, the creditor, but by one Ashton, without any assignation, transfer, administration or conveyance, either in the Scots or English form, in Ashton's person; and this were a most dangerous practice, if a servant or factor producing a cancelled bond, (which they might easily come by) would entitle them to claim allowance for it; and though Sir David has in supplement deponed thereon, yet this can never make up a lame instruction; for, by the English law, no servant can, by his own oath, prove his disbursements above 40 shillings Sterling. *Answered* for Sir David, That the article was sufficiently instructed by the bond itself; and though the receipt be not the creditor's, yet by the English custom the producer of a bond (though he cannot validly pursue) yet he can discharge it. The having presumed his mandate to receive it; and in fortification of it he has deponed that he truly paid it; but beside this special answer, he has a general defence extending to this and other articles, viz. that in 1691 he gave in his accounts to the Dutchess and her Lord, who examined them, with the assistance of her friends and commissioners; and this was not objected against him, when the article was fresh in my Lord Cornwallis's memory; and afterwards being reviewed in 1694 by one Mr Knight, trusted by Dutchess, though they were not fitted, yet the silence and acquiescence now for 17 or 18 years since, sufficiently speaks their satisfaction with them; and if it had been controverted then, he would have got my Lord Cornwallis's oath, which now he has lost; and it is plain, that he having received her Grace's money, not as a banker to keep it, or as a debtor on bond to repay it, but *nudo ministerio* to issue it out, as their servant, when ordered by verbal warrants, it were absurd *post tanti temporis intervallum* to call for his warrants; for persons of quality would take it very ill, if servants demurred to pay, till they got written warrants; and if they were required to give a discharge every time

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A factor being ordered to cause make a cistern of the value of L. 500, and in his accounts charging L. 573, which was *ultra fines mandati*, the Lords allowed this article, because it is scarcely possible for a craftsman to frame a piece of work exactly to the weight bespoke.

No 7. their money was debursed by their order; and if a servant's bread and wages depended on these strict precise rules of written instructions, it would be a snare instead of a livelyhood; and so have the Lords found, Howison *contra* Cockburn, *voce* PRESUMPTION, where a servant taking off ware from a merchant for his master was not put to instruct his warrant, but it was presumed. *See* also Cockburn against Oxenford, *voce* MINOR. And this is but a transcript from the common law, l. 20. *D. de. instit. act.* where Lucius Titius a banker, intrusted Octavius Terminalis, his servant, to manage his exchange, who gives obligatory notes; and being pursued thereon, Scævola answers, that there is no obligation on him, or equity to reach him, *cum id ex officio institoris scripsisset*; and therefore a servant intrusted with his master's money, to give it out on his daily exigences, and having given in his accounts, and they being examined and audited, though not discharged, yet he, still intrusted with the receipt of farther sums, and continued long after in the service, and dismissed without questioning his fidelity, is not obliged, *post tanti temporis lapsum* to a legal nice proof of every article of these accounts. And this is precisely Sir David's case with the Dutchess.

*Replied*, These examinations of his accompts in 1691 and 1694 were so far from being an approbation, that it was expressly refused him; and after the 1692 he was no more her secretary, though he remained in her service, and was carrying on a secret trade and correspondence with Mr David Scrimgeour, negotiating the Dutchess's money to her prejudice. Yet the LORDS, in respect of his oath, conjoined with the other adminicles, did, by plurality, sustain this article of 412 guineas. *2do*, It was *objected*, That the Dutchess having employed him to cause a goldsmith make a cistern to L. 500 Sterling value, to be gifted to a person of great quality, Sir David gives up L. 573 Sterling paid for it; and so *in quantum excessit fines mandati* he can have no action. *Alleged*, That it is scarce possible for a tradesman exactly to frame a piece of workmanship to the weight bespöke, and he has produced the artificer's discharge, and deponed he paid the L. 73 Sterling of excresce as well as the L. 500. THE LORDS also allowed this article. *3tio*, *Objected*, That he sought L. 100 Sterling for his expenses of a journey to Scotland; for the truth was, he was going down on his own affairs, and the Dutchess gave him only some few instructions by the by. *Answered*, He oppones the mandate given him, and he has deponed it truly cost him more than the sum he has charged. THE LORDS sustained the article. *4to*, *Objected* against L. 108 Sterling, as the price of coals he alleged were bought to her Grace's family, and yet some of the receipts do not mention they were for her use; and he being married, and having a separate family they have been to himself. THE LORDS refused to allow those receipts that did not mention the Dutchess. *5to*, *Objected* against the L. 796 Sterling craved for coal, candle, chamber-rent, pocket-money, and postage of letters for 16 years as most exorbitant. THE LORDS declared they would modify it. *6to*, He craved

E. 1384 Sterling for his board-wages. *Objected*, The Dutchess had a 2d and 3d table for her servants, where he either got, or might have got his diet, and therefore it is most disingenuous to seek it twice. THE LORDS ordained trial to be taken of the establishment of her family, and what tables she kept during that time. *7mo*, He craved L. 50 Sterling a-year, as his secretary-fee. *Objected*, None due unless he instruct paction; as the Lords found, Ross *contra* the Master of Salton, *voce* PRESCRIPTION. THE LORDS ordained them to condescend what salaries the secretaries before him, or they who succeeded him, had; that they might regulate the same accordingly. And as to the time of his serving in that office, found it relevant that Mr Knight was admitted to it in 1692; and that the Dutchess designing him in writs, secretary, proves nothing, because they were drawn by Sir David himself, and only related to the post he formerly enjoyed. Many thought Sir David had stated many of his articles scandalously high. Some said, great persons looked on that as a part of their grandeur, *potentes potenter agant*.

*Fol. Dic. v. 1. p. 288. Fountainball, v. 2. p. 746.*

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1714. July 22.

ROBERT EDGAR, FACTOR appointed by the Lords of Session upon the Estate of PROVOST GRAHAM in Duffries *against* ANDREW and JAMES WHITEHEADS, Tenants in Inglistoun.

ROBERT EDGAR, by virtue of a factory from the Lords of Session, set to James and Andrew Whiteheads a tack, for the space of one year, of the half of the lands of Inglistoun, in which they had been ancient tenants and possessors without tack, in which he inserted an obligation by each of them to remove at the ish of the tack summarily without warning; however, that they might not be surprized he caused warn them 40 days preceding the term, and took a decret of removing against them before the Baron Court, upon which they were charged to remove, and the factor set the lands to other tenants for the accustomed rent. James and Andrew Whiteheads suspended the charge upon this reason, that they had not only punctually paid their rent, but had also offered more rent than was to be paid by the new tenants; and it could not be said but they were abundantly solvent. For the charger hath no power from his factory to dispossess a solvent tenant whom he finds in possession, in order to make way for his friend, or to satisfy his own humour and caprice; and he could as little take them obliged to leave their possession, as to turn them out without the said obligation. Nor did ever the Lords design to vest their factors with any such arbitrary power, which could never contribute to advance the interest of the creditors for whose behoof the factor is there placed.

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The Lords refused to allow a factor put upon an estate by themselves, to remove tenants who had taken tacks from him for an year, and obliged themselves to remove without warning, they having paid their rent, and offered more rent than was to have been paid by the persons he would have put in their room.