

after the remit upon the advocation, is proved by the letter wrote in his name to the commissary; and the commissary's answer proves, that the delay was to be imputed to George's doer alone. Though George might have recalled the factory upon the suspicion of negligence, he was not bound to recall it; Henderson, who undertook the office, not gratuitously, was bound to execute it; and his negligence, in this case, was similar to that of a factor neglecting to insure a ship, or a messenger to execute a caption. The want of money, or of a new bond of cautionry, cannot be an excuse for the delay, unless Henderson had acquainted George that these were wanted.

' Upon the 1st July 1755, the Lords repelled the reasons of reduction of the decret quarrelled, and assoilzied.'

Upon a reclaiming petition, a diligence having been allowed to the Creditors for recovering writings, the cause came again to be advised.

' THE LORDS adhered.'

Act. *Johnstone, Th. Hay, Ferguson,* Alt. *Bruce, And. Pringle.* Clerk, *Kirkpatrick.*
W. 7. Fol. *Dic. v. 3. p. 182.* Fac. *Col. No 2. p. 3.*

1757. *March 4.*

ELISABETH MAULE, Widow of Thomas Ker, *against* JAMES GRAHAM of Methie.

THOMAS KER farmer at Ovenstoun, died, leaving Helen Fotheringham his widow, and Thomas Ker his son, a minor, in possession of his farm and stocking.—The widow, and James Graham of Methie, were chosen two of the son's curators, and acted accordingly during his minority.

In the 1746, while Thomas Ker was yet under age, he, with consent of his curators, intermarried with Elisabeth Maule; and, by contract, became bound to provide her in a jointure of 400 merks Scots.

In December 1747, Thomas Ker having come of age, discharged his curators of their intromissions; but, as he was of so weak a mind as to be totally incapable of all business, and particularly of judging as to the import and propriety of deeds which he signed, when desired by his friends; so his mother continued to manage the farm after his majority till her death, in the 1749; and Mr Graham of Methie took the charge of his other affairs.

Upon the death of the mother, the farm was given up, and the stocking roused. The proceeds were received by Mr Graham; who accounted for the same, and obtained a discharge from Thomas Ker, at the sight of his uncle John Ker, who had also been one of his curators. About the same time, Thomas executed a bond of interdiction of himself to the said James Graham and John Ker; but, as he had no heritable estate, it was not used nor recorded. Mr Graham, without any express factory or commission, continued in the management of Thomas Ker's affairs.

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A person who had been curator to a man who was weak in his judgment, continued to manage his affairs after the curatory expired, and lent out his whole funds on personal security to a shop-keeper, who dealt in smuggling. The shop-keeper having become bankrupt, the Lords found the *negotiorum gestor* liable for the sums lent, tho' his interference was gratuitous, and the uncle of the fatuous person had subscribed as witness to the bond.

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The only funds belonging to Thomas Ker, besides the produce of the stocking, were, a bond-debt of 1000 merks due by Sir Patrick Murray, which Mr Graham compounded along with Sir Patrick's creditors; and another bond-debt of 8500 merks due by Mr Fotheringham of Pourie, who at the same time was due to Mr Graham himself, by bond, a sum of 22,000 merks. In 1751, Pourie having intimated his resolution to pay up both his bonds, unless the interest was restricted to four and a half per cent., Mr Graham received payment of both debts at Martinmas 1751, and delivered to Pourie, Thomas Ker's discharge for his bond, witnessed by John Ker his uncle.

Mr Graham having thus in his hands the funds of Thomas Ker, did, on the 29th November 1751, lend out the same, to the amount of 10,700 merks, to Thomas Kinnear, on his personal bond, payable at Martinmas 1752; and, upon Kinnear's owning his subscription to John Ker, some months after the date of the bond, John Ker subscribed the same as an instrumentary witness; but was not present at the transaction itself.

Thomas Kinnear had been bred a weaver, and resided in the cottar-town of Finlarg; where, after the 1738, he kept a shop for retail of sugars, soap, tea, &c.—He also purchased a small feu, and built a house upon it. But his credit was chiefly from the British Linen Company, and other dealers in linen; for whom he was employed to purchase yarn, and to weave part of it, to a considerable extent.—It did not appear, indeed, that any other person had ever lent him above 1000 merks on a lasting security; and he was discovered to have been deeply engaged as a partner with his son John Kinnear, who carried on a smuggling or contraband trade.

Thomas Ker died in February 1752, leaving Elisabeth Maule, his widow, and two infant daughters. In July thereafter, John Ker, acting as tutor of law to these two infants, received payment from Kinnear of part of the interest then due on his bond; and, about the same time, Elisabeth Maule and the said John Ker granted a factory to Isaac Jolly for receiving the interest of all sums due to the widow or children; and, under that factory, Jolly received from Kinnear payment of the interest of his debt due in the years 1752 and 1753, and paid over the same for the uses of the widow and children.

In the beginning of the 1754, Thomas Kinnear became insolvent.

Elisabeth Maule being decerned executrix to her deceased husband, as creditor in the provisions of her marriage-contract, brought an action against the said James Graham of Methie, and John Ker, jointly, for payment of the sum contained in Kinnear's bond. She afterwards passed from her conclusion against John Ker, and insisted against Mr Graham singly, on this ground, That Thomas Ker having been under a natural incapacity, Mr Graham took upon him the management and direction of all his affairs as a *negotiorum gestor*; and having uplifted all the funds belonging to him, when settled on good security, and lent out the whole to Thomas Kinnear on his personal bond, payable at a distant term, when Kinnear was in such a situation as no prudent person would have

entrusted him, for any length of time, with such a large sum, Mr Graham was liable, in law and equity, to relieve Thomas Ker's family of the consequences of Kinnear's insolvency, by paying the bond, on obtaining an assignment to it.

Pleaded for the defender; *imo*, Thomas Ker, though a weak man, was under no legal incapacity. The lending the money to Kinnear was consequently his own act; and the defender, from motives of humanity, considering, that his situation required the interposition of friends, only acted the part of a friend, and had no profit thereby, nor any ill design or fraudulent intention in advising that loan. *2do*, None of the characters of *negotiorum gestor*, of mandatary, or tutor, are applicable to the defender; and therefore he must be proved guilty of a fraud or gross negligence, before he can be made liable; which cannot be here done, as Kinnear's circumstances seemed then good, and his credit fair. *3tio*, John Ker, the uncle of Thomas, under the character of tutor for his children, and the pursuer herself, having rested on Kinnear's security for two years after Thomas Ker's death, and having joined in naming a factor, who, by their authority, uplifted from him those two years interest, the defender was thereby discharged of any consequences of Kinnear's failure, even supposing him to have been originally answerable, all demand or challenge being barred by that homologation.

Answered for the pursuer; *1st*, Though Thomas Ker was not under a legal, yet he was confessedly under a natural incapacity of managing his affairs, and cannot be said to have received advice from the defender, or to have authorised the defender to act for him. A person who voluntarily, and without any authority, takes the management of another's affairs, makes himself responsible for all the consequences. He excludes all others from acting; and is therefore bound to bestow the greatest care and attention, insomuch that if even mere negligence appears, without ill design, he who acts so officiously is bound to repair every loss. *2do*, The defender was liable in the strictest diligence, as a *negotiorum gestor*, which is defined, *Is qui absentis, vel ignorantis, negotia gerit sine mandato*. Thomas Ker, though corporally present, was in mind and understanding absent, and ignorant as to this loan; which therefore was not the act and deed of him, but of the defender; who is liable for the consequences, *ex quasi contractu*, since it appears any other person more diligent would have managed the matter to greater advantage. Here the circumstances even indicate fraud and collusion, as the defender lent none of his own money to Kinnear, but of himself put the whole fortune of a helpless family into his hands, and secured him in possession of it for an uncommon time, by taking the bond payable at the distance of a year from its date; and his procuring John Ker's subscription, at a distance of time, as a third instrumentary witness, was in order to give some sanction to his proceedings. But, at any rate, the defender was grossly negligent and culpable, in sinking the whole stock of this family, (which was till then well secured), in the hands of a labouring manufacturer, embarked in the pernicious practice of smuggling, and with whom he had been long

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acquainted. The credit which Kinnear had, was only from merchants and dealers in linen, residing at a distance, who trade for profit, and are obliged to venture that they may gain. They did not (like the defender) trust him for any considerable time; but caused him make his returns always in a few days or weeks. And *3tio*, It does not appear that John Ker was a party to this transaction, or approved of it; but supposing he did, that cannot prejudice the pursuer.

The pursuer, kept ignorant of this transaction, and of all the other business of her family, was obliged to accept of the interest of this money for their immediate subsistence.—She gave a general power for receiving monies due to her husband, without knowing who was bound in Kinnear's bond; which having been necessary, cannot be construed into an approbation of the defender's conduct; and neither this, nor any other act of the pursuer, can disappoint the just claim of her infant children, for whom, as well as for herself, she is now prosecuting.

THE LORDS found James Graham of Methie liable to the pursuer in the sum of 10,700 merks lent to Thomas Kinnear, and annualrents thereof resting since Martinmas 1753, upon her making a valid conveyance to him of the bond for the above sum granted by Thomas Kinnear to Thomas Ker; without prejudice to the said James Graham's insisting against John Ker, or any other parties, as accords.'

Act. *Rae, Wedderburn, Lockhart.*Alt. *Advocatus, Geo. Brown.**D. Rae.**Fol. Dic. v. 3. p. 182. Fac. Col. No 20. p. 33.*

* * * This cause was appealed :

9th March 1758.—The House of Lords ' ORDERED and ADJUDGED, That the appeal be dismissed; and that the several interlocutors complained of be affirmed.'

1760. November 27.

CHILDREN of DAVID LIZARS, *against* The REPRESENTATIVES of JOHN DICKIE,
Writer to the Signet.

No 66.

A factor *loco tutoris* having neglected to do diligence on a bond of the pupils, till three persons who were debtors in the bond, failed in their circumstances; the Lords found him liable to account for the sum.

JOHN DICKIE, writer to the signet, was, in 1744, appointed factor *loco tutoris* by the Court of Session, for managing the estate and effects of the children of David Lizars, who had died some time before, without naming tutors to them.

Among the debts due to Mr Lizars, was a bond granted to him, in January 1743, by Archibald Punton, Thomas Hay, and George Begbie, jointly and severally, for the sum of 2000 merks.

Mr Dickie continued to have the management of the childrens affairs till the 1754, when he died; and the children soon after brought a process against his Representatives, to account for his intromissions with their estate. The defen-