

1739. *November 30.* ANNA CRAWFURD and Her HUSBAND *against* NEWAL.

## No 20.

A factor taking bond in his own name for his constituent's money, the *jus exigendi* remains with the factor's heir.

WHERE a factor takes a bond in his own name for his constituent's money, the *jus exigendi* continues with his heir; for, should it accresce *ipso jure*, the factor would be excluded from claiming deduction on account of expense, which yet is certainly competent to him.

Wherefore, a factor having taken bond in his own name, for his constituent's money, in a process at the instance of the heir of the factor against the heir of the debtor, though the COURT was of opinion, that the constituent appearing might be preferred, allowing the factor's expense, yet they 'Repelled the objection proponed by the debtor to the pursuer's title, and found that the pursuer had the *jus exigendi*, reserving all defences competent against the constituent.'

*Fol. Dic. v. 3. p. 202. Kilkerran, (FACTOR.) No 3. p. 182.*

## No 21.

1742. *July 7.* DUNCANS EXECUTORS of Duncan *against* BLAIR.

It was here found, that commission was due to a factor, not only on bills, whereof payment had been recovered, but also on bills on which diligence had been used by the factor; but not if he had done no more than to protest the bills; and that such was the merchant custom.

*Fol. Dic. v. 3. p. 202. Kilkerran, (FACTOR.) No 5. p. 183.*

## No 22.

A factor receiving a subject from his constituent, tho' it be certified to belong to another person free from any claim of retention, is bound to account to the constituent, and not to the owner.

1786. *January 27.* WILSON, GREGORY, and COMPANY *against* JOHN OLD.

A MERCANTILE house in Scotland transmitted to Old, their factor in the West Indies, a quantity of goods for sale on commission. The goods were ascertained to him as belonging to Wilson, Gregory, and Company, and as being exempted from any claim in behalf of his constituents for commission-premium, or for freight. In consequence of a demand afterwards made by the owners, he promised to remit to them the proceeds of the sale; which, however, he having failed to do, they, on his return to this country, instituted in an action against him. In defence, he alleged that he had accounted for those proceeds to his constituents; and

*Pleaded*; It is to his constituent alone that a factor is bound to render an account. Other persons, indeed, may have an interest in the subject of the factory; but to that he is not bound to pay any regard beyond the limits of his instructions.

*Answered*; If it is certified to a factor, that the subject of his factory belongs to a person against whom, as in the present case, neither he himself nor

his constituent has any claim, his detaining such property, contrary to the will of the owner, is equally wrongful, as if, without the interposition of the former, he had received it immediately from the hand of the latter.

No 22.

THE LORD ORDINARY found, That the factor was bound to render an account to his constituents alone; and

THE COURT adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Stonefield*.  
Clerk, *Home*.

Act. *Morthland, W. Stewart*.

Alt. *A. Campbell*.

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*Fol. Dic. v. 3. p. 201. Fac. Col. No 251. p. 385.*

1790. May 15.

LORD ELPHINSTONE, against ALEXANDER KEITH, Senior and Junior.

No 23.

MESSRS KEITH had long been the confidential agents of the late Earl Marischal. At different times they had rendered an account of their management, without making any demand for their personal services. On the other hand, although considerable sums had been allowed to remain in their possession, they were not required to pay interest.

In an action at the instance of the executor of a defunct against his factors, it was found that the factors having received no recompence for their services, were not liable to pay interest for the money in their hands before their constituent's death; but interest was found due for the money in their hands from the period of his death.

Earl Marischal died on 28th May 1778, after having made a settlement in favour of Lord Elphinstone. Some difficulties however occurred with regard to the effect of it; and it was not till the year 1780, that they were entirely removed. In 1788, an action having been brought by Lord Elphinstone against Messrs Keith, for the payment of certain sums lodged in their hands by Earl Marischal; the defenders claimed a deduction on account of their services; and they also contended, that no interest could be demanded from them.

THE COURT considered the mutual obligations between the defenders and Earl Marischal to be sufficiently ascertained, by the manner in which the accounts had been settled between them; the advantage derived by the defenders from the temporary use of the money deposited with them, having been viewed as a proper recompence for their personal trouble.

The only difficulty arose with regard to the interest of the money left in the defenders possession at the time of Lord Marischal's death. In general it was held, that a factor was not obliged, immediately after the death of his constituent, to pay interest for the money in his hands. As soon, however, as it could be known in what manner it was to be disposed of, if he did not put it into one of the banking-houses, it was thought just that he should be liable in the same rate of interest which might have been obtained for money so employed.

THE LORD ORDINARY found, 'That the defenders were not liable for interest on the above-mentioned balance.' But the COURT altered that interlocutor, and