

merks, seeing he should not have given out the act in these terms : And found by Gogar's back-bond, he was a trustee thus far, that he having not paid the full price for the lands, as to any sums of Bordy's he transacted, he could not charge Bordy with any more than what he actually paid, and that the eases behooved to accresce to him ; and therefore, before answer, whether they would loose the act in that point or not, they ordained Keirie to give his oath of calumny, whether he did not compone Dow's debt for 13,000 merks, less or more. See WRIT.

No 12.

1694. June 20.—THE LORDS found Kiery not accountable any farther for the emoluments of the commissariot but conform to the accounts of the factor put in by the Lords, and that the said factor shall only account for actual intromission since 1680, when he was debarred by Bordy, on pretence that Gogar was paid of the sums for which he had a right to the commissariot dues, in corroboration. The question arose, if the instrument taken *contra* Bordy sitting in judgment was probative, his oath of calumny being taken at the bar, and he not positive. The witnesses insert were ordained to be examined. The *second* question was, Whether the Sheriff's fiars were to be the rule, or the prices set by the regality of Dumfermline, within which the lands lay. But the LORDS chused the Sheriff's fiars, in regard the other are more properly made *in modum penæ* between master and tenant, in case of not delivering the victual.

Fol. Dic. v. 1. p. 288. Fountainball, v. 1. p. 532, 620.

1711. June 22.

PATRICK HERIOT, Merchant in Fisher-row, *against* ARCHIBALD KER, Writer in Edinburgh.

IN the count and reckoning at the instance of Patrick Heriot, and the other Creditors of Monkton, against Archibald Ker, late factor to the estate, the LORDS refused to allow any factor-fee to the said Archibald Ker, in respect he had been negligent, and had given up, in his accounts, two articles of rests that had been really paid to him. Albeit it was *alleged* for Mr Ker, That this could be no reason for denying him a salary, because his negligence prejudiced nobody but himself ; he being liable to the creditors for what is lost thereby without any allowance of expenses, which his doing of diligence would have cost them, and perhaps, at the long-run, would not have operated their payment ; so that it is more advantageous to the creditors, that Mr Ker hold count to them for the rents, than that he could instruct ineffectual diligence done by him for recovery thereof ; and, there is no more reason to refuse him a salary, than there is to detain a servant's fee, upon the account of some things lost by him to his master, albeit the servant had made up his master's loss. For the LORDS thought, that Mr Ker, who had been negligent, and put his constituents

No 13.

A factor on a bankrupt estate was allowed no factor-fee, in respect he had been negligent, and had given up, in his accounts, some articles as due, that had been really paid to him.

No 13. to great charges in rectifying the mistakes in his accounts, had no title to any salary; or if he had, their damage and interest did compensate the same. Besides, that the allowing him a salary, would encourage factors to endeavour to wrong their constituents.

Fol. Dic. v. 1. p. 288. Forbes, p. 510.

No 14. 1712. July 1. DUTCHESS of BUCCLEUGH *against* NAIRNE.

A FACTOR who had no written factory was found entitled to a salary, though none was pactioned.

Fol. Dic. v. 1. p. 288. Fountainball.

* * * See This case, No 7. p. 4051.

1715.

No 15.
Found as
above.

The CHILDREN of Baillie SMITH *against* The Earl of WINTON.

IN this action, as mentioned 1st and 3d December 1714, No 67. p. 526. the LORDS having by their interlocutor of the 18th January 1715.

‘ Found, That the short prescription could take no place, with respect to the salary of the two years not accounted for; did now also repel the prescription, as to what salaries were due preceding the late Earl’s decease. And found that these salaries may be allowed by way of discharge in the accounts to be made preceding the said decease.’

There being also three periods of time condescended on, wherein Baillie Smith did manage, viz. *imo*, From the decease of the late Earl of Winton, in *anno* 1704, till the death of his second son Mr Christopher, (under whom the Baillie did manage) in *anno* 1705, being about ten months. *2do*, From the decease of Mr Christopher, till Baillie Smith obtained a factory from the Lords of Session in *anno* 1706. *3tio*, From the time of the present Earl’s arrival in November 1707, till the Baillie’s death in July 1710.

As to the *first* of these periods, having been proven, that the Baillie assisted Mr Christopher in the management of the estate for the space aforesaid, the LORDS allowed him for his said assistance and service, and for his pains and expenses 200 merks per annum. But, as to the *second* and *third* periods, they found no salary due to the Baillie, and therefore assoilzied the Earl from that part of the libel. See PRESCRIPTION.

Act. Falconer.

Alt. Horn.

Clerk, Gibson.

Fol. Dic. v. 1. p. 288. Bruce, No 60. p. 74.