

No 12.

A relict being infest in a jointure of victual, the heir, or his tenants, were found obliged to deliver the victual.

1680. July 29.

The COUNTESS DOWAGER of Errol *against* The EARL of Errol.

THE Earl offering to pay her annualrent and victual at his own girnells, and on the ground of the lands, and he could in law be decerned in no more; *alleged*, That the tenants are bound to carry it for the Earl to Aberdeen, where either he sells or transports it, and he ought to do the same for her, and the Lords may enlarge and explain their sentences in those things which are but consequences thereof and necessary to their execution. THE LORDS declared, the Earl and his tenants liable to transport her victual to any ports or places, as they do to the Earl himself, by tacks or custom, and ordained those to be proved or produced; and this same was decided formerly in ——— between Halton and the Countess of Dundee.

Fol. Dic. v. 1. p. 440. Fountainhall, MS.

No 13.

An indorser of a bill wrote to the indorsee, desiring him to give the acceptor the delay he requested, adding, "you'll lose nothing by it." Found that he was obliged to relieve the indorsee of what damage he might sustain by the delay.

1738. January 4.

JOHN MACKENZIE *against* JOHN SOMERVELL.

JOHN SOMERVELL being creditor to Campbell of Carrick, by bill, indorsed the same to James Lohead, on this condition, That the indorsee should take his hazard thereof without recourse. Lohead, after this, protested the bill, whereupon Carrick applied to Somervell the indorser to use his interest with Lohead for a delay, upon which Somervell wrote a letter to him of the following tenor: "Sir, Carrick came here this day, who says it is not in his power to pay his bill I indorsed you these two months, having a sum to pay at Whitsunday; and, as he has all the inclination you should have the money, if he could raise it, I therefore beg you'll give him a delay for the time he demands, which will oblige him and me, and ye'll lose nothing by it.— I am," &c. After this, Lohead assigned this debt to Mackenzie, who insisted against Somervell, libelling on the above letter, as importing a cautionary obligation for Carrick.

For the defender, it was *urged*, That the import of the missive was no more than giving an opinion Lohead would eventually lose nothing by the the favour asked; but could not mean, that he intended to come under an obligation to make up such loss, if it should happen; which appears from the expression, 'and ye'll lose nothing by it;' for the contraction ye'll is made use of instead of you will, but is never used as a contraction of you shall; betwixt which two expressions there is a great difference, as the one imports the writer's opinion about what would happen; but the other, viz. you shall, implies an engagement in the writer to make good the verity of his assertion.

For the pursuer, it was *answered*, That, from the letter, it was plain, the defender did not interpose as a friend or adviser anent what he thought most

expedient for the interest of the creditor, seeing it is at Carrick's desire he asked the delay, which was a direct stating himself a cautioner; and, in consequence thereof, Lohead, who was going on in diligence when he received the missive, forbore for upwards of two months. It is true, that a mandate, granted only for the sake of the mandant, infers no obligation; but a mandate, on account of a third party, which is the present case, does oblige the mandant to repair any loss the mandatary shall incur by following thereof. Besides, it would have been ridiculous to ask of Lohead to suffer the effects of his debtor, viz. the sum that Carrick was to pay away at Whitsunday, to be withdrawn, and to relinquish the method pointed out to him by law for attaching thereof, unless some other security was to be substituted in the place of what he passed from. And, as to the observation on the letter, it is believed the word ye'll has the very same meaning in Scots, that you shall hath in English.

THE LORDS found, That the letter implied an obligation on the defender to relieve Lohead of all damages he might sustain in delaying diligence against Carrick, but found, That he has the benefit of Carrick's being first discussed.

C. Home, No 78. p. 130.

1738. February 15.

JAMES PATERSON, Writer in Stirling, *against* LADY HOUSTON.

LADY HOUSTON having an interest in the parish of St Ninians, wrote a letter to Sir Hugh Paterson, empowering him to vote in her name, and sign a call in favours of Mr Mackie to be minister of the said parish; and then adds, "Upon doing whereof, and what else is necessary for me in that affair, I hereby oblige me to hold as sufficient as if I had done so myself." The settlement having met with opposition; such of the heritors, who had signed the call, assessed themselves, in order to raise a fund for defraying the expenses; for payment of a proportion whereof, a process was raised against Lady Houston, founded upon the above letter.

The *defence* was, That it imported no more than the giving a proxy to vote in the call, which could not subject the defender to the expenses. And, as to the latter part of the missive, it was plainly relative and executive; for the words, "and what else," &c. could only be understood of what was naturally consequent upon the call's being approved of by the presbytery, namely, the declaring her submission to Mr Mackie as minister of the parish, in case of a settlement; and, as the assessments were laid on without any authority from the defender, they could not affect her.

Answered for the the pursuer, That, though Lady Houston had not added to her proxy the general power of doing all things necessary for obtaining the

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A party who had empowered a proxy to act for her, was found not to be bound to consequences of the obligation incurred, not mentioned in the procuratory given.