COALSTON. The Act 25th Geo. II. has not sufficiently provided for the interests of superiors. By it subject superiors have forfeited the right of non-entry; the duplicando and the composition to be paid by singular successors. I must give full effect to it, though I could not extend it beyond the words. I am now satisfied that the Crown takes from necessity.

PRESIDENT. No circumstance of equity, or idea of benignity, will make me alter the principles of the feudal law, which is the constitution of Scotland. I will not inquire into the reason of any principle of the feudal law; but *here* Lord Pitfour has explained the principles. I do not consider the Acts 20th and 25th Geo. II. as hard laws. In great measures of government there must be little hardships to individuals.

On the 7th March 1772, the Lords adhered to their interlocutor, 21st December 1771.

Act. H. Dundas. *Alt.* A. Lockhart.

Reporter, Kaimes.

Diss. Monboddo, Gardenston.

1772. *June* 23. MESSRS GIBSON and BALFOUR *against* HUTTON and COMPANY.

NEGOTIORUM GESTOR.

Arrestment used by him *proprio nomine*, upon a blank admiral precept, not available to the person in whose name it was afterwards libelled, in a competition with an intermediate arrester.

[*Fac. Coll. VI.* 44; *Dictionary*, 9283.]

HAILES. The forms in the court of Admiralty as to blank precepts, &c. are certainly erroneous, but custom has sanctified them. We can go no further than custom has gone. If we argue from the analogy of erroneous forms, *where* can we *stop?* The next thing would be to sustain a precept without any name of pursuer, for the behoof of all concerned; and it will be said that when the summons comes to be filled up, it will be time enough to insert parties; and it will be pleaded that this also is very convenient, and not more erroneous than other forms already practised. Much is said of the security of foreign merchants, but every thing in forms must not bend to that security. The counter-objection seems over critical. It is said that the word copy of an arrestment should have been used. Yet this, in strictness of speech, is incongruous. By the same rule, an account of the Battle of Minden, in the Gazette, ought to be termed the copy of a battle.

GARDENSTON. Strangers would have been in a bad situation as the law stood, till lately, if the Ordinary's judgment were to be held as the rule. The

contrary maxim seems just, *ratihabitio mandato equiparatur.* The consequences apprehended from this doctrine will not follow. Gibson and Balfour could not have communicated the benefit to any one else.

KAIMES. My difficulty arises from the want of a mandate. Gibson and Balfour arrested in their own name, not in the name of their constituents. Equity cannot come in here, for there is a competition of creditors.

MONBODDO. I should have been clearly of Lord Gardenston's opinion, if arrestment had been laid on in the name of the foreign merchant. In that case ratihabition would have made it good. Gibson and Balfour, *tanquam negotiorum gestores,* might have arrested in the name of the foreign merchants, but there was a blunder in using their own names.

PITFOUR. Foreign merchants are not to be deprived of the benefit of diligence in this country. The factor may do diligence in his constituent's name without any mandate. An infant *indefensus* will be protected by diligence, such as inhibition, executed by any near friend. Why may not a factor or correspondent do the like with like effect? That Gibson and Balfour did diligence in their own name, was owing to their delicacy, as they had no express powers. But this ought to make no difference.

[This, with great submission, seems strange reasoning. An infant *indefensus,* who cannot appear for himself, is compared to a stranger who can; and the blunder of raising diligence in one's name who has no interest, is termed a piece of delicacy, and justified as such.]

KENNET. I think the ratihabition would have been sufficient without a mandate; but my difficulty was, that the precept run in the name of Gibson and Balfour, and that the summons could not be filled up in favour of another person;—if it could, the consequences would be terrible.

ALVA. The maxim of ratihabition does well in a question between the original debtor and a creditor, but not in the case of co-creditors competing.

On the 23d June 1772, "the Lords sustained the reasons of reduction of the Admiral's decreet, in so far as concerns the debt due by Robert Cheyne to Michael Barston, &c. *viz.*:—That the defenders, Gibson and Balfour, took out the admiral precept in November 1766, and, in virtue thereof, in January 1767, summoned the said Robert Cheyne, and used an arrestment of Cheyne's ship, all in their own names, and without mentioning that they were factors or trustees for the said Messrs Barstow, &c., and that it is admitted, when they took out said precept, executed the same, and arrested in virtue thereof, they had no authority from Messrs Barstow for so doing, and that the summons in which Gibson and Balfour mentioned that they were trustees for these gentlemen, was not called in the admiral-court till January 1768, which was posterior to the arrestments used by Hutton and Company; and therefore reduced the decreet in so far as it gives a preference for the debt due by Cheyne to Messrs Barstow, &c. to the debts due by Cheyne to Hutton and Company, for security of which they had arrested his ship, and repelled the counter-objections;" adhering to Lord Kennet's interlocutor.

Act. R. Blair. *Alt.* Ilay Campbell.

Diss. As to general point,—Pitfour, Gardenston.