

deemed from him, and that the sums debursed should accree to the reversion. This action was sustained; and after commission given by the Lords to two of their number to consider the estate of the harbour, who made report again of the ruin of the same, the summons was found relevant; and after probation by witnesses, decret was given, and the action sustained, conform to the desire of the summons. But no party compeared here for the defender.

No 7.

Clerk, Scot.

Fol. Dic. v. 2. p. 317. Durie, p. 223.

1669. February 20. BRUCE against LAIRD and LADY STANHOPE.

ANDREW BRUCE, merchant in Edinburgh, pursues the Laird of Stanhope for payment of a continued tract of merchant accounts, inserted at several times in the account book, as being taken off by Margaret Sinclair, in the name, and for the behoof, of the Laird of Stanhope, upon these grounds; *1^{mo}*, That the ware was worn and made use of by the Laird of Stanhope and his Lady, and so was converted to their use; *2^{da}*, That Margaret Sinclair was entrusted by the Laird of Stanhope and his Lady, to take off ware for them from time to time, as appears by several missive letters of theirs to the said Margaret; so Margaret having taken off the ware, and being entrusted so to do, they must pay the same; *3^{to}*, Not only was Margaret Sinclair trusted to take off merchant ware in general, but particularly to take off the same from Andrew Bruce, upon these grounds; *1^{mo}*, Because there is produced an account in the pursuer's books, before the accounts in question, which is not controverted; so that Andrew Bruce was Stanhope's merchant, when Margaret Sinclair began to be employed; *2^{do}*, By one of the Lady Stanhope's letters, it appears, that a satin pettycoat and lace were taken off from Andrew Bruce by Margaret upon trust of Stanhope, and the Lady desires that Margaret may endeavour to get the lace taken back, and their names put out of the account book; *3^{to}*, The Laird and Lady's oaths being taken, *ex officio*, the Lady acknowledges, that she was several times in Andrew Bruce's shop with Margaret Sinclair, and that she was present with Margaret Sinclair, when the last part of the account of L. 114 was taken off; all which are sufficient evidences of a warrant or commission to Margaret to take off the ware in question from the pursuer. The defender *answered*, that none of these grounds were relevant to oblige him; for albeit he acknowledged the goods to be converted to his use, there is nothing to make it appear, that he had any meddling with the pursuer, but by the letters written by him and his Lady to Margaret Sinclair, made use of by the pursuer, it is evident, that he only employed Margaret Sinclair to furnish him upon her credit, and did prohibit to put him in any merchant's account, saying, that he would be only her debtor, and no others; so that it were of most

No 8.

One was found liable for goods purchased in his name, altho' without his order, in so far as converted to his use, and in so far as he could not instruct that he had paid the money to the person who had purchased them.

No 8. dangerous consequence, if the making use of goods should infer an obligation to pay the merchant, whose they were at first, though payment were made to the person intrusted, as in this case the letters to Margaret Sinclair bear that she was paid of what was taken off formerly by her, and there are severals also subscribed by her hand for a part of the particulars contained in these accounts; neither can any trust put upon Margaret Sinclair, to take off ware in general, oblige the defender, unless it had borne to take off the same upon his faith and credit, and not to take off the same upon Margaret Sinclair's own credit; neither doth the circumstances adduced infer a special commission to take off from Andrew Bruce or prove, that he was ordinary merchant, or so much as that Stanhope knew that the particulars in the account were taken off upon his credit, and were put in his name in the book, except that which concerns the pettycoat and the last articles of the L. 114; especially seeing his letters prohibit her to put his name in a merchant's account; and seeing Andrew Bruce, for several years, never so much as intimated the account to Stanhope, till Margaret Sinclair was dead. The pursuer *answered*, That *in rem versum* is an unquestionable obligation in law, albeit nothing of a commission were instructed, unless the defender can allege that he made payment to Margaret Sinclair, and proved by her hand writ, and not by his own letters; *2do*, There is nothing more ordinary, than to take off ware from merchants by taylors and servants, who cannot be thought to have the ware of their own, but that they must take them off from some merchant; and therefore payment should not be made to such persons, till they produce the merchant's account, and his discharge; or if it be, and if these persons interposed pay not the merchant, as in this case, the loss must not be to the merchant, but to those who paid to the interposed persons upon their hazard; and if this were not, all merchants would be ruined, for no persons of quality do immediately take off from the merchants themselves.

THE LORDS found, That these articles in the account, in relation to the pettycoat, and the L. 114, which were known by the defender or his Lady, to be taken off in their name, and put in Andrew Bruce's book, were due by them, and that though the same had been paid to Margaret Sinclair, it was upon the defender's peril, if she paid not the merchant. They did also find, that the goods being acknowledged to be converted to the defenders' use, they were liable to the pursuer, in so far as they proved not they paid Margaret Sinclair, and found the same probable by Margaret's writ, or by witnesses; but found not that ground relevant, that Margaret Sinclair was intrusted generally to take off ware; or that the grounds alleged did instruct a particular warrant to take off from the pursuer; and therefore did not find the payment made to Margaret Sinclair, which she failed to pay the merchant, to be upon the defenders' peril, except as to the two parcels of account foresaid, which the defenders knew to be in their name in the pursuer's book.

* * * Gosford reports this case :

No 8.

1669. February 19.—IN an action pursued by Bruce against Stanhope, for paying of certain merchant-ware taken off by one Margaret Sinclair, which were delivered to Stanhope, and made use of by him, his mother, Lady, and children; which action was founded upon these two grounds, That the goods were *in rem versum*, and that the said Margaret was ordinarily entrusted by the defenders for such business, and was several times in the pursuer's shop, present with the Lady, when she took off merchant-ware; likeas, there were many missive letters produced, shewing a constant tract of trust given to the said Margaret in such business: THE LORDS, *ex officio*, having examined Stanhope and his Lady, and seriously considered the dangerous consequence if gentlemen in the country, who have written no order to a merchant to trust any person, should be liable notwithstanding they did declare they sent in money for payment thereof; therefore they did only find the defender liable in so far as he should not instruct, that he has receipts and discharges from Margaret, and no farther.

Gosford, MS. p. 44.

1679. January 11. BOWIE *against* CORBET and Others.

HAMILTON of Milton having wadset his lands for 10,000 merks, he did thereafter grant bond to Isobel Corbet his wife, bearing, That in lieu of the lands of her contract of marriage, he disposed to her an annualrent of 400 merks out of the wadset lands, and for her security assigned her to the reversion of the wadset. Upon this bond she was infeft; but thereafter, by a contract of wadset with Peter Johnston, who had right to the first wadset, and advanced 2000 merks more, whereupon the wadset was renewed to him, the wife was consenter, and the reversion is provided to Hamilton and his wife, the longest liver of them two, and their heirs. Bowie apprised from the heir of Hamilton the right of reversion, and now pursues declarator, that the reversion so conceived could import no more to the wife but a faculty to redeem upon payment of the sum, that she might enjoy the profits of the land during her life, which she not having done, the faculty was extinct, and the sole reversion belongs to the pursuer, as come in place of the husband, who was fiar in the reversion. It was *alleged* for Corbet of Hadgrey, who had right from the liferenter, That this declarator could only be sustained with the burden of Isobel Corbet his author's right, and that he, as her assignee, might redeem the wadset *ad hunc effectum*, that the wadset being the only middle impediment, hindering the effect of the liferenter's infeftment of annualrent, he might point the ground for all the years she was widow, by which he might apprise, or adjudge the ground right and property, the right of reversion, and all other rights competent to Hamilton, granter of the wadset; which adjudication being upon

No 9.
Liferenter's
right of re-
compense for
damage by
want of her
liferent. See
Trail against
Moodie,
infra.