

No 3.

the procurator compearing had no mandate. *Answered*, His producing writs relative to the cause presumes a mandate. *Replied*, These writs were in his hands upon another account. THE LORDS found it sufficiently instructed that he was his ordinary procurator, and had a mandate in this cause.

Fol. Dic. v. 2. p. 194. Fountainhall, v. 1. p. 590.

1709. January 4.

JAMES HARDIE, Merchant in Kelso, *against* HELEN ALLAN and WALTER CHISHOLM, her present Husband, for his Interest.

No 4.

A person's procurator in an inferior court cannot refer the verity of a point to the other party's oath without a special mandate for that effect.

JAMES HARDIE having charged Helen Allan and her Husband, for payment of L. 30 Scots, contained in a decret obtained at his instance against her before the Sheriff of Berwick; they suspended upon this reason, That though the said decret bears that Helen Allan was personally apprehended, and a procurator marked compearing for her, and producing the copy of the summons given as her mandate; yet the said procurator did so far overact his part, as that the pursuer having offered to prove a promise of payment by the defender's oath, he officiously deferred the same to the pursuer's oath, who thereupon deponed and got decret for what he pleased; which is a palpable nullity in the decret charged on. For it is the constant custom in inferior courts, for a defender's procurator to get first a general mandate to defend, and where any thing is to be deferred to the pursuer's oath, he must have a special procuratory for that effect; it being of dangerous consequence to sustain the copy of a summons as a sufficient mandate to authorise any who are pleased to call themselves procurators before an inferior court, to conclude a person arbitrarily; seeing copies of summonses may be lost, or may fall in the hands of the pursuers or their doers, being left at the dwelling-house with servants, &c.; and perhaps might be procured from the officer who executed the same, if they were to have such an effect.

THE LORDS turned the decret into a libel, because the suspender's procurator had deferred the promise of payment to the charger's oath, without a special mandate for that effect.

Fol. Dic. v. 2. p. 211. Forbes, p. 296.

. Fountainhall reports this case:

JAMES HARDIE, merchant in Kelso, pursues Helen Allan, relict of Johnston of Herlington, and Chisholm, now her spouse, for L. 50 as the price of merchant-ware furnished to her in her first husband's time, and obtains a decret against her before the Sheriff of Berwick; which was suspended on these reasons, That it was truly in absence, and if any goods were furnished to her first

husband, she noways represented him by any passive title; likeas, *2do*, She was then married, and noways obliged to depone in prejudice of her husband. *Answered*, To the *first*, Noways a decret in absence, for she had a procurator compearing for her, and produced a mandate, in so far as he produced the messenger's copy citing her to compear, which Perezius ad Cod. tells, does as sufficiently authorise him as if he had the party's writs in his hand; and he refers the verity of the debt to the pursuer's oath, who having deponed affirmative, the Sheriff decerns accordingly; and the sentences of inferior courts are not to be made like Penelope's web, or spiders nets, to be swept down at every touch, else these judicatories will be absolutely discouraged. And as to the *second*, of her being married, the same was clandestine without proclamation, and so never came to the charger's knowledge, and must not prejudice him of her oath. *Replied*, *Nulla modo relevat* to produce the copy for proving that the procurator had a mandate; for copies may be lost, or left in the lock-hole, or got for a little money from a messenger, and so the pursuer may employ a mock procurator for his antagonist, and bind a false compearance on him; but *esto* it had been a full mandate, yet that never empowers a procurator to refer the debt to the pursuer's oath without a special particular mandate to that individual effect, seeing a procurator is not so *dominus litis* that he can dispose of his client's property, as if it were his own; so that he clearly malversed, *et excessit fines mandati*; and as to her marriage, they prove it by the minister's testificate, that it was publicly celebrated in the church. THE LORDS found that no procurator could defer the libel to the pursuer's oath without a special warrant to that effect, and therefore reponed the defenders against the Sheriff's decret.

No 4.

Fountainball, v. 2. p. 477.

1712. January 18.

INGLIS against FULLER.

THE LORDS, upon report of the Lord Cullen, found that one's procurator before an inferior court, could not defer the verity of a point to the other party's oath, *etiam in re minima*.

No 5.

Fol. Dic. v. 2. p. 211. Forbes, p. 577.

1775. November.

GRAHAMS against FERGUSSON.

No procurator in an inferior court can defer a libel to the defender's oath without a special mandate to that effect. See APPENDIX.

No 6.

Fol. Dic. v. 4. p. 153.

See PROCURATOR-FISCAL.—See DELINQUENCY.—See APPENDIX.