

was paid on their account; they have no claim, but to have their real damage made up: And as they could not have refused to repay him their proportions, if he had adjudged on their account; so neither can they now, if he is to be held as if he had adjudged. *Fictio in casu ficto tantum valet, quantum veritas in casu vero.*

No 62.

THE LORDS repelled the defence founded on the septennial prescription introduced by act of Parliament in favours of cautioners; and found, that this case did not fall under that act: But found, that the assignation by William Innes and Richard Murray, to Sinclair of Barack, being expressly made, to the end that he might operate his and their relief, and the relief of the other co-obligants; and he having omitted to do diligence for the operating their relief, when he did diligence for the separate debts owing to himself; that he could not now seek relief off the other co-obligants, in so far as they might have been relieved by the diligence, in case he had done diligence for relief at the time he did it for his own payment.

Reporter, Lord Arniston. Act. Lockhart. Alf. W. Grant. Clerk, Forbes.  
Fol. Dic. v. 3. p. 183. D. Falconer, v. I. p. I.

1748. July 8.

CLARK contra Sir JOHN HALL.

No 63.

THE question stated, but not determined, How far a creditor, taking decree of mails and duties, and even possessing in consequence of it, is obliged to account by a rental, except where he debars another creditor?

One thing is plain, that he debars the debtor; and although, where the debtor has had a promiscuous possession, another creditor cannot oblige him to account by a rental, yet, if the debtor has had no promiscuous possession, it is thought another creditor may oblige him to account in that manner.

*Kilkerran, (DILIGENCE.) No 1. p. 166.*

1757. January 4.

JOHN GOLDIE, Trustee of HENDERSON'S CREDITORS, against KATHARINE MACDONALD, Relict of George Keir.

No 64.

ANDREW GARDEN died in Dumfriesshire in 1742. His nearest of kin were George, William and Janet Keirs, the children of his sister.

William Keir set up a claim to the whole executry, founding upon a letter wrote by the defunct; which induced George, who lived at Alloa, and acted as a writer, to come to Dumfriesshire; and, on the 19th August 1742, he granted a power or factory to John Henderson of Broadholm, who had been educated as a writer, and was then living in Dumfriesshire as a country gentleman, and acting as factor to the Marquis of Annandale.

A person accepted a factory, empowering him to procure the constituent confirmed executor to a distant relation. He neglected to obtain the confirmation, and in the mean