No 67.

'THE LORDS having advised the petition for Mrs Jacintha Dalrymple, reclaiming against the above judgment, with answers for the trustees, and having heard parties procurators thereon, and upon the whole cause, found no sufficient ground, from the terms of the trust-right, or from the manner in which the trust has been executed, to subject the trustees personally to the payment of the sums pursued for.'

The COURT adhered to this interlocutor, on advising a reclaiming petition and answers.

Lord Ordinary, *Braxfield.* Act. *Maclaurin, H. Erskine.* Alt. *Lord Advocate, G. Ferguson.* Clerk, *Home.*

Fol. Dic. v. 3. *p.* 183. *Fac. Col. No* 174. *p.* 272.

1787. *February* 4. WILLIAM MASON *against* WILLIAM THOM.

No 68.
An agent, who had neglected to adjudge, which, if he had, it would have had the effect to secure part of his client's money, was found liable for the sum which an adjudication would have rendered effectual.

WILLIAM THOM, Advocate in Aberdeen, was intrusted with a bill of exchange which had been accepted in favour of William Mason, 'for the purpose of 'doing such diligence as to put the drawer on an equal footing with the other 'creditors.'

The debtor in the bill had a landed estate, which was covered with heritable securities for debts amounting to L. 8000 Sterling. It was farther affected with two existing liferents, amounting to L. 150, and an eventual one of L. 50. It was sold by a trustee appointed by the debtor, but not before it had been adjudged by a considerable number of the personal creditors; among whom L. 3000, the residue of the price, after discharging incumbrances, being nearly a fourth part of what was due to them, was immediately divided. This was chiefly owing to the liferents having unexpectedly terminated between the execution of the trust-deed and the payment of the price of the lands.

William Thom used inhibition on the ground of debt that had been intrusted to him; but, as he neglected to adjudge, no part of the money could be recovered. An action of *damages* having been afterwards brought against him by William Mason, he

Pleaded in defence; If a person, in the situation of the defender, has had the line of his conduct marked out to him by his employer, he cannot, it is true, deviate from it, without subjecting himself to the loss thence arising. But otherwise, as a discretionary power is in general understood to be given, nothing but inexcusable *negligence* on his part ought to have that effect. And as the defender's proceedings, in the present case, were dictated by the laudable purpose of avoiding an expense which he thought would be fruitless, and which his employer's circumstances could very ill afford, such a determination here would be extremely unjust, as well as inexpedient.

No 68.

Answered; The line of conduct to be pursued by the defender was prescribed with sufficient accuracy. He was directed to use those measures which were necessary for putting his constituent on an equal footing with the other creditors. But even although his instructions had been less precise, still, as he must have known, that, after the greater part of the creditors had proceeded to adjudge, those who did not would be altogether excluded, nothing but the most explicit orders from his employer could justify his doing what was equivalent to a renunciation of every hope of payment. Kilkerran, 8th February 1740, Macaul *contra* Vareils, No 61. p. 3524.

The Lord Ordinary sustained the defences. But the question having been brought under the review of the Court, the Lords altered that judgment. The circumstance which seemed chiefly to weigh with the Court was this, that the defender had not given his employer an opportunity of judging for himself as to the expediency of leading an adjudication.

'The Lords found the defender liable in payment of a sum equal to that which the pursuer would have received, if an adjudication had been led.'

Lord Ordinary, *Alva*. Act. *Dean of Faculty*. Alt. *Solicitor-General, Blair*. Clerk, *Sinclair*.
C. *Fol. Dic. v.* 3. *p.* 182. *Fac. Col. No* 307. *p.* 474.

SECT. VIII.

Diligence of Trustees properly so called.

No 69.
A trustee was found not liable to do diligence, though he did possess, but only for his actual intromission, he being bound to denude whenever the truster pleased.

1666. *December* 18. Charles Cass *against* Mr John Watt.

Dr Cass having taken infeftment of an annualrent out of the lands of Robertland, in name of Cockpen and Adam Watt, Charles Cass, as heir to the Doctor, pursues Mr John Watt, as heir to his father, for count and reckoning of the mails and duties; and charges him with the hail rental, being intromitted, or which ought to have been intromitted with by him and his father, by virtue of the trust in their person; and also Adam Watt took a gift of tutory to the pursuer, and so is liable as his tutor. The defender *answered*, That his father's name being borrowed on trust, could lay no obligation on him to do any diligence but what he thought fit, seeing, by his back-bond, he was obliged to denude himself whenever the Doctor pleased; and the pursuer has reason to thank him for what he did, and not burden him with what he omitted, seeing he had no allowance therefor; and as for the tutory, there was a multiplepoinding all