

Case 85. Janet Maxwell of Cowhill, and Charles
 Maxwell her Husband, - - - *Appellants* ;
 George Sharp of Hoddam, Advocate, Son
 and Heir of John Sharp of Hoddam,
 deceased, - - - - - *Respondent*.
Et e contra.

10 May 1721.

Judicial Factor.—A person who had become surety for a judicial factor, and afterwards had a deputation from him, could by no right acquired during the factory invert the heir's possession: he could not retain possession till his debts were paid, but must pursue for them as accords.

He is also found liable in terms of the act of sederunt, 31 July 1690, in annual-rent for what he received or might have received within one year after the same grew due. He was entitled to no factor-fee, having disturbed the possession of the factor by virtue of other rights and titles in his own person.

Commissary Court.—This could not give decrees of preference among competing creditors.

Process; Decree.—In a decree, a former decree being founded upon as the ground thereof, and such former decree not pronounced, the second decree was null.

Annual-rent.—Aliments to children were to be imputed to the rents of the years in which they were paid, and not deducted out of the annual-rents due by a factor.

Costs and Expences.—In the above cause, the Court having refused expences, on a cross appeal taken, their judgment is reversed.

These costs ascertained by a committee of the House of Lords, at 640*l.*, and ordered by the House to be paid.

THE appellants in the original appeal, after their marriage in 1707, brought an action of count and reckoning and of removing, before the Court of Session, against the late John Sharp of Hoddam, setting forth, inter alia, as the grounds thereof: That Dugald Maxwell of Cowhill, the appellant Janet's father, died in 1688 seised of an estate of 200*l.* sterling per annum, or thereabout, leaving three daughters infants, of tender years, without having nominated tutors or curators to them; the appellant Janet being the eldest, to whom the estate was provided by her mother's contract of marriage: and on the petition of a relation, the Court of Session in July that year appointed one John Maxwell of Middleby, factor, to receive the rents till tutors and curators were appointed; and he granted security to be accountable for his intromissions:

That John Sharp of Hoddam, the respondent's father, who lived in the neighbourhood, devised methods to make a prey of the appellant Janet's estate: her grandfather having obliged himself and his heirs to warrant a part of his estate, which he had sold to one Roger Sofflaw, against a claim of multures, which the Earl of Southesk claimed to have thereon, as heritor of a mill which the respondent's father had purchased for the earl: and re-
 spondent's

respondent's father thereupon, by collusion with Soflaw, obtained decree against him on the 21st of November 1690, for a sum in name of abstracted multures; and thereupon Soflaw brought an action for his relief against the appellant Janet, and her sisters the infants, before the Commissary Court of Dumfries, of which the respondent's father was clerk: No defence was made on their part, and the claim being by the pursuer referred to the oath of the defenders, who were minors, on their not appearing to depone, Soflaw on the 16th of December 1690 obtained a decree against them for about 217*l.* sterling, and 8*l.* sterling *per annum* afterwards: and of this decree the respondent's father took an assignment the same day it was pronounced, and afterwards obtained a decree of adjudication thereon, in absence, before the Court of Session against the whole estate:

That in September 1690 John Maxwell of Barfield, a relation, was appointed tutor, but Mr. Sharp being clerk on this, the tutor never granted any security: that Mr. Sharp having also purchased various debts, or pretended debts, of the appellant's father; in 1691 through his means a petition signed by the tutor, (who was largely indebted to him) by himself and various creditors was presented to the Court of Session, stating, that Middleby's factory was only to last till tutors should be appointed, and praying that one John Macnaught should be appointed in his room:

That Mr. Sharp granted security for this Macnaught; and a deputation was first granted to one Lanerk, and afterwards to Mr. Sharp himself:

That after this factory granted, Mr. Sharp got possession of the estate on different titles acquired by him, among which Soflaw's decree for multures was one; and he continued to receive the whole rents till 1707.

The action concluded, that the respondent's father should be decerned to quit the possession, and that he should account for his intromissions with the rents, since the death of the appellant Janet's father. The respondent's father in his defences, contended that Macnaught the factor, and not he who was only security for him, should be first accountable for the rents; and that his possession was to be ascribed to the debts which he had acquired on the estate. The appellants in their answers, insisted upon a deposition made by Macnaught in an action of the respondent's father against him, in which he swore, that his name was filled up in the factory without his knowledge, and that he never did intermeddle in the matter. The Court, on the 23d of December 1707 " Found the defender's factory proved, and that
 " the factor could by no right, acquired during the factory, invert
 " the heir's possession; and ordained him to give up his possession
 " to the pursuers, reserving to him to pursue for his debts as ac-
 " cords; and found the debts acquired during the factory, re-
 " levant to be proved by writing or oath of the defender."

The respondent's father afterwards insisted upon two decrees of preference obtained against him by some of the creditors on the estate before the commissaries of Dumfries, and which he had
 after-

afterwards acquired right to : the appellants contended that the Commissary Court could not prefer one creditor to another. The Court on the 24th of January 1708 “ Found that the commissaries had committed iniquity by inverting the factor’s title or possession, and found those decrees null, and that the factor must account for the rents, and cede the possession pretended by virtue of the rights he acquired during the factory.” And on the 27th of February thereafter, the Court “ allowed the pursuers to prove the rental, and the defender to prove the payments made by him or others, for whom he is to count to creditors, who had legal diligence affecting the estate.” Nothing being proved on this head, the Court, on the 17th of June 1709, “ circumduced the term for proving.”

The respondent’s father having quitted possession, the action of count and reckoning proceeded, and by various interlocutors of 14th December 1710, 18th January 1711, and 19th June 1712, the defender was ordered to account, not only for the years of Macnaught’s factory, but also for the years 1690 and 1691, the years of Middleby’s factory, unless he should prove the receipt of the rents by Middleby.

In the mean time the defender had claimed allowance of the sum contained in the said decree obtained at the instance of Soflaw ; the pursuers objected collusion, and that Soflaw’s decree had been founded upon another alleged decree at the suit of the Earl of Southesk, which was itself void. The Court, on the 26th of July 1711, “ found the decree before the commissaries void, as being founded on Lord Southesk’s decree not produced in court :” and, on the 6th of November thereafter, “ found the decree so founded on null.”

The respondent’s father dying about this time, the appellants revived the action against the respondent his son, and insisted, that in terms of the act of sederunt, 31st July 1690, directing factors appointed by the Court of Session to be accountable for the annual rents of what they did or might have received within one year after the same grew due, therefore the respondent, as representing his father, should account in that manner : he contended, that this act of sederunt was in desuetude, and had never been reduced into practice ; and that though it had been revived on the 22d of November 1711, and directed that mode to be observed in all time coming, that, being long after the expiration of the factory in the present case, could be no rule of accounting. The Court, on the 12th and 25th of February 1718, “ found the defender’s father liable for annual rents in terms of the said act of sederunt, and directed the clerk to make up the calculation accordingly.”

The respondent next claimed that his father should be allowed deduction of a salary or factor’s fee ; but the Court, on the 4th of February 1719, “ found that the defender’s father, having disturbed and endeavoured to exclude Macnaught the factor, for whom he was cautioner, and Lanerk the sub-factor, by virtue of other rights and titles in his own person, he or his
“ heirs

“ heirs ought to have no allowance of any salary or factor’s fee.” And to this interlocutor the Court adhered on the 16th of July thereafter.

In making up the account between the parties, the appellants insisted that an aliment of 100*l.* Scots *per annum*, paid by the respondent’s father to the appellant Janet and each of her sisters, should be deducted out of the annual-rents of the rents, and not out of the rents themselves; but the Court, on the 14th of February 1719, “ found that the aliments were not to be imputed to “ the annual-rents of the rents of the estate of Cowhill, but were “ to be imputed and allowed out of the rents themselves of “ these years, wherein they were respectively paid and dis- “ charged.”

The appellants afterwards petitioned the Court, that the defender might be found liable in expences; but the Court, on the 21st of July 1720, “ found the defender ought not to be liable to “ the pursuers for any expence in the process.” And to this interlocutor they adhered on the 26th of same month.

The original appeal was brought from “ an interlocutor of the “ Lords of Session of the 14th of February 1719, and another in- “ terlocutor of the 21st of July 1720, and the affirmance thereof “ on the 26th of the same month.”

Entered,
15 Dec.
1720.

And the cross-appeal by George Sharp “ from certain inter- “ locutors of the Lords of Session, made on the behalf of the “ said Charles Maxwell and his wife.”

Entered,
8 Feb.
1720-1.

On the Original Appeal.—Heads of the Appellants’ Argument.

Costs and expences of suit ought of course to be allowed to the prevailing party in all cases; and much more in this case, where the appellant Janet hath by such practices been kept out of her estate for seventeen years. The appellants have been forced to contract great debts, not only for the maintenance of themselves and their family, but also for the carrying on this tedious and chargeable process; during the whole course of which they have prevailed in every interlocutor, except only in these against the allowing them their costs and expences; for which no other reason was given, but that the respondent’s father had no factor’s fee or salary, which had been so justly disallowed. And though a salary had been allowed him, it would not have amounted to 50*l.* sterling, a very inconsiderable sum, if compared with the costs and expences of the action.

By the articles of regulation made by the Court of Session in 1695, ratified by act of parliament, it is expressly provided that in all cases where the Court should find the defender to be litigious, they should take an account upon oath from the pursuer of the expences and damages he had been put to, and should decern the same to be paid to him; and in case of extravagance, to modify the said expences and damages *more largely in time coming*, for the better preventing litigious suits.

The aliments ought to have been paid out of the annual rents, and not out of the rents themselves; for by the law and universal rule

rule

rule in accounting, aliments ought to be allowed out of the annual rents, and not out of the principal sums, especially as there were annual rents in the factor's hands at the time of the different payments of the aliments. Were it otherwise the annual rents would be a dead stock for a great number of years.

Heads of the Respondent's Argument thereon.

It is extraordinary in any event to insist against the respondent for costs, incurred in his father's lifetime. If there was any negligence in the management of the affairs, or if any thing unjustifiable was insisted upon by the respondent's father, that can import nothing against the respondent, who was nowise accessory to it; and the respondent, in the whole of the proceedings since the action was revived against him, insisted upon nothing but what was extremely justifiable, even supposing the judges determined rightly against him. The only thing insisted upon by the respondent in which he did not prevail, was, that he coming in place of the factor should not be accountable in the strictest manner for the interest of money in the factor's hands annually; or if he were, that he might be allowed a factor's fee. To give costs against him on that account were introducing a hardship without a precedent.

But the respondent's father had all the reason in the world to defend himself in this suit. The appellants charged him with the rents of 1688 and 1689 and downward; and the Court at first found him liable for 1692, and no higher; and though he was afterwards decerned to account for 1690 and 1691, yet there were still two years overcharged. He was further charged with the payment of several sums, which the Court found he was not to be charged with: the appellants in particular stated him as indebted 1000*l.* sterling, as the value of wood cut by him, and after a long and expensive proof, they made out nothing against him. Not only was he loaded with these unjust charges, but great part of the articles of his discharge, which were allowed by the Court, were strenuously opposed and anxiously disputed by the appellants. Upon the whole the appellant's charge was for near 70,000*l.* Scots, whereas at most not one-third was due.

The aliment paid to the heirs portioners being an annual burden upon the rents must be deducted out of the rents, for the factor can only account for the free rent, *annuis debitis deductis*: and as the factor, was by the factory itself, specially obliged to pay these aliments, he could not warrantably employ the whole rents, without retaining sufficient to answer the aliments, and if he was bound to retain, he must of consequence be exempted from the interest of so much of the land rent as corresponds to that annuity.

On the Cross Appeal.—Heads of the Appellant Sharp's Argument.

(The appellant in the cross appeal enters into no argument on the interlocutors finding that his father as factor could not by any right acquired, during the factory, invert the possession and finding the

the decree of the commissaries in January 1708, null: he argues against accounting prior to the factory and against certain interlocutors, finding the possession of certain creditors not proved: these being founded on special circumstances are not here stated.)

To oblige a factor to account by a rental, whether he receives the rents or not, and for the value of those rents annually, is no doubt carrying things to great rigour. There is no foundation for this but the act of federunt 1690; but this act was in *desuetude*; nor can any instance be given, where a factor, upon the footing of that act, was obliged to account so rigorously. It is true the act, was revived in 1711, but that was long after the expiration of the factory in question: and this new act thought it so reasonable that every factor should know what he obliges himself to, that it is directed to be expressly mentioned in the security that the factor is to account for interest annually. But that is not to be extended to a case, where there is no such clause, and the condition of the bond in the present case is only to make just count and reckoning of the rents he shall receive, and pay the same as the Court shall direct. Besides, whatever might be said against the factor himself, this rigorous way of accounting can never be extended to the cautioner, against whom obligations are to be strictly interpreted.

For reversing the interlocutors obliging the factor to account for the interest of the rents annually.

All factors are allowed a salary or factor's fee, and as Mr. Sharp's father accounted as factor, and that in so rigorous a manner, he ought at least to have the same privileges as other factors. Indeed the reason assigned for making a difference between this case and others seems not very intelligible. The words are "that Mr. Sharp's father had endeavoured to exclude Macnaught the factor, for whom he was cautioner, and Lanark the subfactor, from the possession, by virtue of other rights and titles in his own person, and therefore ought to have no factor's fee." When Mr. Sharp is to account, the factor and he are but one person; but when a salary is demanded, Macnaught is deemed a different person. The interlocutor in fact comes to this: Mr. Sharp disturbed himself and endeavoured to exclude himself from the possession, *by possessing*; and therefore ought not to have a salary. But the instances of that pretended disturbance are trifling; for Mr. Sharp being a creditor, might no doubt, though security for the factor, complete his diligence, in order to establish his preference in competition with other creditors. But since he has accounted rigorously as a factor, he ought to be allowed a salary. No doubt the factor and subfactor expect a salary and will not account without being allowed one.

For reversing the interlocutors refusing a salary or factor's fee.

Heads of the Respondents' Argument thereon.

(The respondents follow the appellant in the cross appeal on those points mentioned to have been founded on special circumstances.)

It would have been very unreasonable to have given Mr. Sharp a salary for ruining the pursuers in their affairs, under

his management. The charging him with interest was in terms of the act of federunt made but a little before the date of the factory.

Judgment,
30 May
1721.

After hearing counsel, *It is ordered and adjudged that the cross appeal of the said George Sharp be dismissed, and that the several interlocutors therein complained of be affirmed: and that so much of the original appeal as complains of the said interlocutor of the 14th of February 1719, be dismissed, and that the said interlocutor be affirmed: and it is further ordered and adjudged that the said interlocutor of the 21st of July 1720, whereby the Lords of Session found Hoddam not to be liable to the appellants Maxwell and his wife, for any expence of the process, and the affirmance thereof on the 26th of the same July be reversed: and it is declared and adjudged, that the respondent Sharp is liable to the appellants Maxwell and his wife for the expences of the said suit: and it is hereby further ordered and adjudged that the said Lords of Session do cause the expences and damages of the said appellants in the said suit to be taxed and ascertained, according to the regulations in cases where defendants are litigious, and the same when so ascertained to be forthwith paid to the appellants by the said George Sharp.*

For Charles Maxwell and his Wife, *Rob. Raymond. Tho. Kennedy.*

For George Sharp, - - *Ro. Dundas. C. Talbot. Will. Hamilton.*

Journal,

On the 7th of December 1722, a petition was presented to the House of Lords, for Charles Maxwell of Cowhill, and Janet his Wife, complaining “that the Lords of Session in Scotland have
“not caused the petitioners’ expences and damages to be taxed
“in the suit between the petitioners and George Sharp of Hoddam, advocate, pursuant to the order and judgment of the
“House of 10th May 1721.” This petition was referred to a committee.

On the 23d of May 1723, the committee “report, that they
“have considered the said petition, to them referred, and in that
“consideration were attended by the parties on both sides as also
“their agents; and having considered, what was by them offered,
“and likewise considered the regulations in cases where defendants
“are litigious, according to which the expences and damages of
“the petitioners by the order and judgment of this House above-
“mentioned were directed to be taxed, the committee in the first
“place were of opinion, that the petitioners were not entitled to
“any allowance in respect of what was claimed for interest, for
“their costs sustained in the Court of Session, in the suits between
“the petitioners, and the said Mr. Sharp; nor likewise to any allow-
“ance of costs, in respect of their appeal to this House; nor any
“allowance for damages for loss of time.

“The committee in the next place think proper to acquaint
“your lordships that a copy of the petitioners’ bill of costs, which
“was exhibited to the Lords of Session, was laid before the com-
“mittee, who proceeded to consider the respective articles thereof
“with

‘ with due regard to the direction contained in the said order or judgment, on hearing the petitioners’ appeal ; and having gone through the whole account, and heard as well the parties themselves, as their agents, were further of opinion, in regard the petitioners in divers particulars in their said bill of costs had made extravagant demands, they ought not to be allowed any costs in respect of the taxation of their costs : and their lordships in going through the said account, did adjust and ascertain the costs they conceive right to have been allowed in respect of the several articles charged by the petitioners, some of which were disallowed by the Lords of Session, and others concerning which the said Lords had made no determination : and having done so, the committee did then cause the several articles approved of to be cast up, which amount in the whole to the sum of 64*q*l. which sum the committee conceive the petitioners are entitled to, and are of opinion the same ought to be forthwith paid to them by the said Mr. Sharp.”

On the 24th of May 1723, this report was taken into consideration by the House and agreed to, and an order made accordingly in terms thereof, “ that the said George Sharp do forthwith pay, or cause to be paid to the said Charles Maxwell and Janet his Wife the sum of 6*l*0*s*. pursuant to the said report.”

Alexander Munro the younger of Auchin-
bowie, - - - - -

Appellant;

Grizel Bruce of Riddoch, - - - - -

Respondent.

Case 86.

17th May 1721.

Vis et metus.—A disposition is granted by a woman to her heir at law, reserving her own life-rent, and the courtesy of a future husband, and declaring that it should not affect the heirs of her own body, and is followed by a more formal disposition a few days afterwards, on which infestment followed : she brings an action for reduction on the ground, that being under arrest at London at the suit of a creditor, her heir had refused to bail her, unless she executed the deed first mentioned, and the bailiff threatening to carry her to Newgate, she gave her consent, and executed the deed as soon as bail was granted, and before she left the spunging-house : The Court reduces the deed and all that followed thereon ; but the judgment is reversed.

THE respondent was proprietor of the estate of Riddoch and other lands in the county of Stirling, of considerable yearly value ; and she was also possessed of a considerable personal estate. Of these estates, she had executed a voluntary and revocable settlement in favour of a person in Scotland, who was a distant relation, and to whom she had also granted powers to receive her rents.

Being in London in 1714, she was betrayed into a marriage with a person of the name of Colquhoun, who had been a ser-