

July 7. 1778.

A N S W E R S

F O R

JOHN HENDERSON, in Cleugh-brae;

T O T H E

PETITION of CHARLES BROWN Writer to the Signet, ROBERT HENDERSON of Cleugh-head, and JOHN MURRAY of Murraythwaite.

ARCHIBALD DOUGLAS of Dornock deceased, was debtor to Thomas Bell in Ecclefechan, also deceased, in the sum of 74 l. Sterling, with interest and penalty constituted by bond, bearing date 20th March 1758.

This bond Mr Bell assigned and made over to Robert Dalrymple writer to the signet, in trust, for the purpose of leading an adjudication against the estate of Dornock. Dec. 16. 1758.

Mr Dalrymple accordingly led an adjudication, after which he reconveyed the bond, with the adjudication following thereon, to the said Thomas Bell; and Mr Bell soon afterwards conveyed the same in favours of the respondent John Henderson. July 26. 1763.

The estate of Dornock having been sequestrated, a ranking and sale was brought by some of the creditors; and, as the deed of retrocession, above mentioned, was not produced in the ranking, Mr Dalrymple was, of course, ranked for the accumulate sum in the adjudication, which had stood in his person as trustee for Mr Bell. Aug. 24. 1763.

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Mr Dalrymple died in the year 1765, having previously executed a settlement, conveying his whole estate, heritable and moveable, in favours of the petitioners, alongit with Alexander Orr writer to the signet, and certain other persons, for the uses and purposes therein specified; any three of the trustees being declared to be a quorum.

These gentlemen having accordingly accepted of the trust-right, executed a factory in favours of Mr Alexander Orr, one of their number. This factory proceeds upon the recital of the trust-deed, "and that it was necessary a factor should be appointed, for ingathering the means and estate of the said Robert Dalrymple; and that Alexander Orr, one of the trustees, had agreed to accept of the said office of factor: Therefore, they nominate, constitute, and appoint the said Alexander Orr to be their factor, with power to him to uplift, ingather, call for, pursue, discharge, or convey all debts and sums of money, heritable or moveable, due or owing to the said deceased Robert Dalrymple, by bonds, bills, decreets, accompts, or any other manner of way generally or specially assigned by the said settlement, with the annualrents, &c.; declaring, that he shall not be liable for omissions or negligence of any kind, but only for his real and actual intromissions."

The estate of Dornock was sold in the year 1768, at which time the debt, to which the respondent had got right in manner above mentioned, amounted to 134*l.* 14*s.* 6*d.* Sterling, bearing interest from that period. And, of this date, an application was made to your Lordships, in name of Mr Dalrymple's trustees, in consequence of which they obtained an interim act and warrant upon Mr William Alexander, one of the purchasers, decerning and ordaining him to make payment to the trustees of the said Robert Dalrymple, of a variety of sums contained in different adjudications, led at Mr Dalrymple's instance, for his own behoof, and as trustee for others; and, amongst these, the debt above mentioned, belonging to the respondent.

This act and warrant, in favours of the trustees, they extracted, and Mr Orr, their factor, received payment of the whole debts therein contained, upon which occasion Mr Orr executed a discharge and assignation, "in favours of Mr Alexander, of the whole debts and sums of money for which the above act and warrant was obtained; and, at the same time, delivered up, *inter alia*, the respondent's grounds of debt and diligence." This discharge proceeds upon the recital of Mr Orr's factory above mentioned, from the trustees; and after narrating the fundry grounds of debt, and, amongst

May 8.
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mongst the rest, that of the pursuer's. It subsumes, "and now, seeing that the said William Alexander has made payment to me, the said Alexander Orr, as factor for the trustees of the said Robert Dalrymple, of the sum of 3465 l. 17 s. 1 d. in full of the debts contained in the said warrant, and interest thereof from and since the term of Whitfunday 1768 to the date hereof, making together the sum of 4027 l. 1 s. 3½ d. Sterling, whereof I hereby grant the receipt; therefore, wit ye me, as factor foresaid, and as having power by my said factory, not only to discharge, but to assign the several debts before recited; to have exonerated and discharged, &c." and, by this discharge, Mr Orr binds the trustees in warrandice, and gave them credit for the whole sum received.

These operations were perfectly unknown to the respondent, who resides at a distance from Edinburgh, and had no agent there to advert to his interest. But, having heard that the debts upon the estate of Dornock were paying off, he began to make enquiry about his, and learned, accidentally, that it had been uplifted by Mr Orr in the manner above mentioned, as factor for Mr Dalrymple's trustees. Upon receiving this information, the respondent came to Edinburgh, in the full expectation of receiving his money; but Mr Orr put him off, for this time, upon some frivolous pretence. The respondent again applied, and met with another delay; and, in this manner, he went on, traveling from Dumfriesshire to Edinburgh once or twice each Session, and receiving one evasive answer after another, from the year 1771 till Mr Orr's death in 1774.

The respondent then applied to the trustees, who told him, that they would have nothing to do, either with him or his money; and that he might seek it from Mr Orr's representatives in whatever manner he thought proper.

The respondent, seeing no chance of recovering his money in any other shape, was obliged to raise the present action against Mr Dalrymple's trustees; and the Lord Elliock, Ordinary, having pronounced repeated interlocutors, finding these gentlemen liable to repeat, and pay back to the respondent his money, which had been so improperly intromitted with by their factor, they have presented a reclaiming petition, which your Lordships have appointed to be answered.

The claim made by the respondent rests upon a very simple footing, and does not seem to be attended with any sort of difficulty. It is not disputed, that the respondent had right to the above-mentioned debt, for which Mr Dalrymple stood ranked upon the estate of Dornock, but the trustees of Mr Dalrymple, applied to the Court,
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in their own name, and obtained a warrant upon Mr Alexander, the purchaser, to pay this money *to them*, alongst with a number of other debts, which stood in the person of Mr Dalrymple; after obtaining which warrant, and by virtue of a factory, granted by them, Mr Orr uplifts the money, under the express character of factor for Mr Dalrymple's trustees; having, at the same time, discharged the debt, and delivered up the vouchers and diligence; and the whole sum so received, he entered in his accompts, to the credit of the trust estate. The trustees, therefore, have intromitted with money belonging to the respondent, by the hands of Mr Orr the factor; and, it must appear but reasonable, that they should be obliged to account to him for the same. The defences stated in this petition against this claim, admit of an easy answer.

It is said, that Mr Orr, when he uplifted this money, was acting in the character of agent for the respondent, and not as factor for the petitioners; and that the business was transacted in the way above described, merely in order to save expence.

But the respondent does peremptorily deny, that he ever employed Mr Orr to act as his agent, or authorised him to uplift the money; and there is already in process undoubted evidence of the contrary. The application for a warrant upon the purchaser, was expressly made in name of the trustees; and a warrant was granted, ordaining the several debts to be paid to them. When Mr Orr uplifted the money, he granted a discharge and assignation to Mr Alexander, wherein it is expressly set forth, that he was acting in the character of factor for Mr Dalrymple's trustees; and from Mr Orr's books, it appears, that the money when paid, was immediately put to the credit of the trust estate; whereas, if Mr Orr had been transacting this matter as agent for the respondent, the debt, when paid, would have unquestionably been placed to the respondent's credit, and Mr Orr would have further stated an allowance for his trouble and expence in recovering the money; so that the allegation made in the petition is not only unsupported by evidence, but is clearly disproved by every one circumstance attending the transaction.

The respondent, who is totally unacquainted with business himself, may have been too inattentive in not employing an agent at Edinburgh to look after his interest; but this certainly could be no reason for the trustees and their factor uplifting a debt to which, it is admitted, the respondent had a just right, and still less for their now refusing to account to him for the money.

The petitioners further plead, That, by the terms of Mr Dalrymple's trust-right, they are authorized to appoint factors for whom they are not to be answerable; nor are they to be liable for omissions, but each of them only for his actual and personal intromissions.

But the respondent humbly maintains, That whatever effect this clause might have in a question with Mr Dalrymple or his heirs, it can be of no avail against the legal claims of third parties, who had no concern in the trust-right. The respondent's author, Mr Bell, had conveyed his debt in trust to Mr Dalrymple, who, of consequence, was answerable for diligence in discharging this trust, according to the ordinary rules of law; and if Mr Dalrymple chose to appoint trustees of his own, who, by their acceptance, came in his place, and undertook the execution of that trust, he certainly could not, by any act or deed, to which the respondent was not a party, discharge either himself or them from the ordinary obligations incumbent upon a trustee.

But still less can the petitioners be allowed to shelter themselves under any particular expressions of the trust-right, when it is considered that Mr Dalrymple, having previously reconveyed to Mr Bell the debt in question, with the adjudication following thereon, could not make over this debt to his trustees, or authorize them to interfere at all in the matter. When the trustees, therefore, applied to your Lordships, in their own name, for an order upon Mr Alexander to pay this debt to them, along with a number of others, and when, in consequence of such warrant, the money was uplifted by the trustees, or by Mr Orr their factor, which can make no difference, it is impossible to maintain, that the terms of Mr Dalrymple's trust-right can exempt them from accounting to the respondent in the same way as the law obliges all persons to do, who have, at their own hand, intromitted with money belonging to another.

What may be the real state of accounts betwixt the petitioners and Mr Orr their factor, which are now under submission to Mr Farquharson, the respondent does not know with certainty, nor is he bound to enquire; only, he has been informed, that by Mr Orr's accounts, there is a balance of 2000 *l.* in his favour, exclusive of his charge for trouble, in collecting and managing the trust-estate; and that objections having been made to these accounts, answers were lodged thereto for Mr Orr's representatives, more than a twelve-month ago, to which the trustees have not yet found leisure to reply.

But, as Mr Orr, in uplifting the respondent's money, acted in name of the petitioners, the respondent holds them to be answerable for the money, after which they may settle their accompts with their factor Mr Orr, within such a time, and in such manner as they best can.

In respect whereof, &c.

ROBERT BLAIR.