

No 132. Steuart, No 138. p. 9008.; February 14. 1677, Duke and Dutchess of Buccleuch against The Earl of Tweeddale, No 8. p. 2369.

Fol. Dic. v. 1. p. 582. Forbes, p. 52.

* * Fountainhall reports this case :

JAMES MURRAY, taylor in the Canongate, against the Children of Patrick Chalmers, beltmaker in Edinburgh, and his relict. Patrick being debtor to the said James in L. 100 Sterling by bond, he pursues his relict and children on the passive titles, for payment ; there is compearance made for them by an advocate, who propones, *1mo*, Payment of a part of the sum ; *2do*, Compensation by an account which James owed Patrick, which is referred to Murray's oath, who compears and depones *negative* ; and when he is taking out his decret for the remanent sum, there is a bill given in, craving to be reponed against the passive titles, which they now deny, and were not proven. *Answered*, You proponed peremptors, and produced a discharge of a part of the debt, which shews your intromission with your father's papers, which is a clear passive title, and likewise referred an allegiance to my oath, whereon I have deponed, so you cannot recur now to deny the passive titles. *Replied* for the Bairns, They were minors ; and, as they would be reponed against a clear bond, so *multo magis* against a judicial act to their lesion, that being only their advocate's deed, and his error and mistake cannot bind them ; as was found 1st December 1638, Stewart, No 138. p. 9008. ; and 14th February 1677, D. of Buccleuch, No 8. p. 2369. ; and as to the relict, the compearance was promiscuous, and more for the bairns than her ; and there is no act as yet extracted in the cause, so there is still room for her denying the passive titles. *Duplied*, Her second husband was present at Murray's examination, and put interrogatories to him, and so was not ignorant.—THE LORDS reponed the children being minors, but not the widow, nor her second husband.

Fountainhall, v. 2. p. 299.

No 133.

A party had been cautioner for a teller in a bank, who, after the cautioner's death, run in arrear. The cautioner's children were found liable, altho' they pleaded

1739. December 22. ERSKINE against The Daughters of ERSKINE.

COLONEL John and Mr Thomas Erskines had been cautioners for Mr George Andrew, as one of the tellers in the Royal Bank ; and the Colonel being charged on his bond of cautionry for the sum of _____, in which Andrew was deficient in his accounts, repeated a process for his relief of the one-half from the representatives of the other cautioner.

Their defence was, that the deficiency had happened since their father's death, while they were pupils ; that it was the duty of their tutors to have withdrawn their father's bond of cautionry, which every cautioner for a person

in office, or his heir, may do when he thinks fit; and that against this omission they fell to be reponed on the head of minority and lesion.

But as this was no direct lesion, but a lesion arising from the accidental bankruptcy of the principal, and that occasioned by his latent and scarce to be suspected malversation, the LORDS 'found it not to be a lesion of that nature, against which the minor could be reponed; and therefore repelled the defence.

It is a different question, how far tutors are liable to make up the loss arising from their omissions; for though, in this case, even the tutor would not be liable, as it was such an omission as a prudent man might have fallen into, yet, in many cases, minors will not be reponed against their tutors' omission, to the prejudice of a right acquired by third parties, when yet the tutor may be liable to make up the minor's loss.

Fol. Dic. v. 1. p. 582. Kilkerran, (MINOR.) No 4. p. 347-

1743. February.

JACK against HALYBURTON.

ROBERT WEIR, March 1669, executed a disposition of his heritable and moveable effects, in favour of his second wife, Bethia Glen, under this express provision, 'That the same shall nowise prejudice his sons of the first marriage, ' Thomas and Alexander, of the sum of seven thousand merks provided to ' them in their mother's contract of marriage, nor prejudice the granter's just ' and lawful creditors; but that they shall have right to satisfy themselves out ' of the subjects disposed, saving always to the said Bethia her preference for ' payment of the annualrent of six thousand merks provided to her in her con- ' tract of marriage.' This right came by progress into the person of John Scot, an infant, to whom Patrick Scot, writer in Edinburgh, was tutor nominate. There was an easy manner laid down by law for the management of this fund, as well as of the other funds which descended to the pupil from his father. The disposition by Robert Weir to his wife was not with the burden of debts, nor did the acceptance make the disponee personally liable. The tutor therefore, after making up proper titles in his pupil's person, had a safe course to pursue, which was to convert the effects into money, for paying the creditors in the first place; and if there was any surplus, which could not now appear, the pupil had it free to himself, without being subjected personally to any obligation. But instead of this course, the tutor entered into a very extraordinary transaction with Thomas and Alexander Weirs, which was, ' That they should ' make up titles to their father's heritable and moveable estate, and convey the ' same to John Scot the pupil, in order to fortify the right he already had by ' the said disposition; that the tutor, in name of his pupil, should grant them ' a bond to relieve them of all their father Robert Weir's debts, and another ' bond corroborating the 7000 merks due to them by their mother's contract of

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minority and lesion; alleging, that their tutors ought to have withdrawn the caution.

No 134.

An adjudication had been raised on a transaction which had been entered into very improperly by the tutor of a minor. The adjudication was alleged to be null, on account of minority and lesion. Found that objections could not be stated, after 40 years, on this ground, by way of exception.