

No 67.

*Objected* to Torsonce's apprising, That part of the sum on which it proceeded, was a bond due to the Earl of Roxburgh, and assigned by his factor, and though factors might uplift, they could not assign.

*Answered*, This bond was payable to the Earl, his factors and chamberlains, and as factors could discharge, so it was thought they might assign, on receiving the full value, and the presumption was, this factor had accounted fairly with his constituent; besides, it was *jus tertii* to the Creditors to start this objection, which was only competent to the family of Roxburgh.

It was *objected*, That this apprising was satisfied within the legal, and it was endeavoured to be inferred from presumptive arguments, that possession had been obtained thereon, at, or shortly after it was led, and had continued so long as to operate an extinction by payment; but as the argument run into a great length, and was scarcely capable of being made intelligible in an abridgement; and besides there was no point of law to be determined, which it might be useful to observe as a decision, it was thought proper to omit it.

THE LORDS, 18th December 1744, repelled the objections *hinc inde*.

Upon mutual reclaiming bills and answers, the LORDS adhered.

Reporter, *Lord Strichen*.

For the Creditors of Clapperton, *Lockhart & Hay*.

For Elizabeth Ramsay, *H. Home*.

Clerk, *Forbes*.

*D. Falconer, v. i. p. 62.*

No 68.

Whether the passive title can be inferred from the intromissions of a factor *loco tutoris*.

1747. November 25. CATHCART against HENDERSON.

WILLIAM HENDERSON being appointed factor *loco tutoris* to the infant children of Quintin Dick, and having intromitted with the defunct's effects, which were all moveable, Elias Cathcart, a creditor of the defunct's, brought a process against the pupils and their tutor, on the passive titles, before the Sheriff of Ayr, and recovered decree.

At discussing the suspension of the decree, "the letters were suspended, because no passive title was proved."

The view the LORDS took it in was, that infants could not incur a passive title by intromission, nor could the intromission of a factor appointed by the LORDS involve them in a passive title; and that therefore the proper method for the creditor was to confirm executor-creditor.

But in this the Court was not unanimous; for several of the LORDS were of opinion, That where a factor, appointed to infants *loco tutoris* intromits, action is competent on the passive titles against the infants and against the factor *tutorio nomine*, in the same way as such action would be competent in case of tutors intromitting.

*Fol. Dic. v. 4. p. 41. Kilkerran, (PASSIVE TITLE.) No 8. p. 371.*

\* \* \* D. Falconer reports this case.

1747. November 24.—WILLIAM HENDERSON in Gueltryhill was appointed factor, *loco tutoris*, to the children of Quintin Dick, over the effects of their father and grandfather John, who had survived his son.

Elias Cathcart, merchant in Ayr, and Mary Machutcheon, his spouse, being creditors to John Dick, pursued the children and their factor, as vicious intrmitters with his effects.

*Pleaded in defence*, That the action on the passive titles was incompetent against the Lord's factor, and the children were incapable of intromission.

The LORD ORDINARY, 2d July 1746, "In respect the pursuer's procurator did not offer to prove the passive titles against the children, assoilzied all the defenders from that instance."

*Pleaded in a reclaiming bill*, A factor, *loco tutoris*, must be liable in the same manner as a tutor; if he has intromitted regularly, he and his pupils are liable *in valorem*, if irregularly, he is liable as vicious intromitter, and they to the value of his intromission; the creditor here has no other method of getting payment of his debt; for he cannot confirm, as executor-creditor, these subjects, which, by the LORDS authority, the factor is in possession of; and if he did, he would not get them into his possession,

*Answered*, A factor is by the act of sederunt directed only to confirm, if necessary; and therefore, if he intromit without confirmation, he cannot be subject to a passive title; he is liable as tutor, but a tutor is not bound to pay till a debt is constituted against his pupils; so the pursuers may constitute their debt by a decret of cognition, and then apply for a warrant upon the factor.

*Observed on the Bench*, That the factor's intromission did not subject him to a passive title: That the defunct's effects could not be affected by the creditor without a title, and therefore he ought to confirm, in which method other creditors would have an opportunity of applying to be conjoined, and then pursue the factor.

THE LORDS did not sustain action.

Act. A. Macdual.

Alt. H. Home.

D. Falconer, v. 1. No 210. p. 290.

\* \* \* Lord Kames's report of this case is No 20. p. 2142, *voce* CREDITORS of a DEFUNCT.

1752. February 26. LADY JANE SCOTT *against* DUKE of BUCCLEUGH.

ANNE Dutchess of Buccleugh had, in Scotland, besides the family-estate which was entailed, a considerable estate of her own purchasing. In the year

No 69.

Where a person grants a bond binding himself and his heirs in