1786. *January* 16. BARBARA BAIKIE *against* ARTHTR SINCLAIR.

No 101.
The annual-rents due on a decree of adjudication, go to the heir, and not to the executor, of the adjudger.

THE same competition here occurred as in the case of Ramsay *contra* Brownlie, No 99. p. 5538. where it was determined, 'That the whole sums contained in a decreet of adjudication, whether principal, annualrents, or penalties, belonged to the heir, and not to the executor of the adjudging creditor.'

On this occasion, the Court declined entering into a discussion of the question, as a departure from a general rule, so solemnly established, might be attended with bad consequences.

THE LORDS preferred the heir.

Lord Ordinary, *Gardenston.* Act. *David Smyth.* Alt. *Tait.* Clerk, *Menzies.*

N. B. The case of Willochs *contra* Auchterloney, decided in the House of Lords, 30th March 1772, No 100. p. 5539. was much insisted on in behalf of the executor, as a determination contrary to the principles formerly adopted. The Lords, however, considered that decision to have arisen from a destination made by the adjudging creditor, which had the effect of altering the course of the legal succession.

Fol. Dic. v. 3. *p.* 269. *Fac. Col. No* 245. *p.* 377.

1793. *January* 31.

Mrs ELIZABETH ROSS *against* The TRUSTEES of HUGH ROSS.

No 102.
When an adjudication is led on a moveable debt by a factor *loco tutoris*, the debt remains moveable as to succession.

HUGH ROSS died in London in the year 1775, leaving a widow and two sons, Hugh and Andrew-William. Hugh the eldest succeeded to the whole of his father's landed property. As a provision for Andrew-William, his father granted a bond for L. 10,000 to certain trustees, for his behoof, payable at his majority.

Mr Ross left his affairs in considerable disorder, and his eldest son having contracted large debts, the trustees of Andrew-William in 1776 thought it necessary to raise an inhibition against him.

Andrew-William attained the age of majority in 1777; but having soon after become insane, the Court of Session named a factor *loco tutoris*, to take charge of his interest.

In 1786, the Creditors of Hugh Ross the son brought an action of ranking and sale of his whole landed property. And in 1789, the factor *loco tutoris* of Andrew-William obtained an adjudication over it, in security of the sums contained in the above-mentioned bond of provision.

Andrew-William died in 1791, leaving no issue.

Hugh Ross served heir in general to his brother, and on that title executed a conveyance of the bond of provision and adjudication in favour of certain trustees, for behoof of himself and his creditors.

These trustees applied for an interim warrant of L. 10,000 on the purchasers of part of Hugh's landed property, to account of this debt.

No 102.

Elizabeth Ross, the mother of Andrew-William, opposed this warrant, on the ground, that notwithstanding the adjudication, the provision still continued moveable as to succession, and that as Andrew-William had his domicil in England, the division of his executry must be regulated by the law of that country, by which she was entitled to an equal share with his surviving brother, in terms of the statute 1st James II. c. 17. In support of her claim, it was

Pleaded, A creditor having the free administration of his own affairs, who leads an adjudication upon a personal debt, if he does not guard against it by proper deeds, must be presumed to have intended an alteration in the course of his succession. But when the adjudication is led by those acting for a person disabled by non-age or fatuity, from disposing of his property, there is no room for this presumption. Hence it is fixed, that no deed of a guardian can affect the succession of his ward; Bankt. v. 1. p. 169.; 12th July 1688, A. against B. *voce* TUTOR and PUPIL. It is true, indeed, that in this case from Fountainhall, the alteration in the state of the pupil's property arose from the tutor's voluntary act, whereas, in the present case, the adjudication was necessary, in order to secure the debt. But whether the deed be voluntary or necessary, seems unimportant, as the general principle applies equally to both.

2*dly*, Even if a proper tutor could, by leading an adjudication, alter the line of his pupil's succession, an adjudication led by a factor *loco tutoris* can have no such effect. It is clear, from the preamble of the act of sederunt 13th February 1730, under which such factors are appointed, that their whole duty consists in *preserving* the estate entrusted to their management. No step, therefore, taken with this view, should alter the course of its succession. Besides, when a tutor adjudges the estate of his pupil, the adjudication is led in the pupil's name; but here the adjudication went out in the name of the factor; so that the interest of Andrew-William Ross, at his death, had resolved into a personal claim against the factor, which must of course descend to his executors.

3*tio*, It is not in consequence of the adjudication, but of the inhibition in 1776, that any part of the debt is recovered. The interests produced for prior adjudgers exhaust the whole price of the estates in Scotland. But an inhibition neither alters the nature of the debt nor its course of succession.

Answered, 1*st*, It is not the presumed will of the proprietor, but the nature of the subject which regulates, whether as heritable it shall descend to the heir, or, as moveable, go to the nearest in kin; nay, it often devolves in direct opposition to his intention. In the case of Ross against Ross, in 1770, No 15. p. 5019. sums secured by adjudication went to the heir at law against the *enixa voluntas* of the deceased. See also Waddell against Colt, 13th February 1789, No 16. p. 5022. Upon this principle, testamentary deeds, bequeathing heritage, and dispositions on death-bed, are ineffectual against the heir. For the same reason it is not the citation in an action of adjudication, although it is then that the creditor shows his intention of altering the nature of the debt, but the de-

cree pronounced upon it, which renders a personal debt heritable; Erskine, b. 2. tit. 2. § 14. And, on the other hand, the mere *intention* of the proprietor to convert his heritable into moveable property, does not make it lose its heritable quality; Reids against Campbell, No 98. p. 5538.; President Falconer, 17th January 1683, Wishart against the Earl of Northesk, No 109. p. 5552. The right to a debt may even descend partly to the heir, and partly to the executor, although it is impossible to suppose, that the predecessor intended such a destination; Sir William Dunbar against the Executors of Brodie, Sect. 28. *b. t.* No 102.

Even the voluntary acts of a tutor affect the pupil's succession; Stair, b. 1. tit. 6. § 36.; Erskine, b. 1. tit. 7. § 18.; Bankton, b. 1. tit. 7. Par. 29. and 36.; Harcarse, p. 296. 19th July 1671, Sharp against Crichton, *voce* TUTOR and PUPIL. And that his necessary acts, such as the present, have that effect, has never before been disputed.

2*do*, A factor *loco tutoris* has nearly the same powers with a tutor; Kilkerran, 13th Jan. 1747, Robina Pollock, *voce* TUTOR and PUPIL; 17th June 1758, Brown against Scouler, IBIDEM. What is said of the adjudication vesting in the factor *loco tutoris*, and not in the pupil, is impossible; for then it would follow, that the debt could exist in the one, and the adjudication for the debt in the other. But even if the debt and the adjudication could be thus separated, it would not avail the objector; for a personal right attached to an heritable subject, is equally heritable with the subject itself. The factor held the subject in trust, and the claim against him was to denude.

3*tio*, It was solely in virtue of the adjudication that a security was created over the estate, by which the debt can be recovered. The inhibition had merely the negative effect of annulling posterior rights; Erskine, b. 2. tit. 11. § 13.

The Court were of opinion, that there was no difference between an adjudication led by a factor *loco tutoris* and a proper tutor. And a great majority thought, that although both might better the security of the pupil, by converting his moveable estate into heritable, yet no deed of either could alter the line of his succession. It was further observed, that the circumstance of a subject heritably secured going to the nearest in kin, was not at all adverse to the analogy of our law in other cases. It was upon the same principle, that requisition used by a creditor upon an infeftment of annualrent made the sum in the right moveable, although the infeftment remained.

One of the Judges wished to make a distinction between the voluntary and necessary acts of a tutor, and to consider the latter as having in all respects the same effect with those of the proprietor himself. But it was suggested, that this would leave the matter on too loose a footing, and involve parties in a proof of the necessity of altering the security in every particular question.

THE COURT found, 'That the debt in question was moveable in regard to succession.'

A reclaiming petition against this interlocutor was refused, without answers.

Lord Reporter, *Swinton*. For Mrs Ross, *Wight, M. Ross*. Alt. *Honyman et alii*. Clerk, *Sinclair*.

R. D. *Fol. Dic. v. 3. p. 269. Fac. Col. No 20. p. 40.*