No 68.

*** 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 vitious intromitters 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 regulary, 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 decreet 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. Macdoual.* 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.

No 69.
Where a person grants a bond binding himself and his heirs in

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.
a certain subject, if he make up no titles to that subject, nor possess it for three years, and his heir serve as to that subject to a remote predecessor, but represent the granter in other subjects, the obligation will still be valid against the heir to affect that subject.

1731, she came to a resolution to provide the children of the Duke of Buccleugh, her grandson, in number three, Francis, afterwards Earl of Dalkeith, Lord Charles, and Lady Jane. She settled the separate estate upon the Earl of Dalkeith, and the heirs of his body, &c. She granted a bond of L. 20,000 Sterling to Lord Charles, and the heirs of his body; whom failing, to the Earl of Dalkeith, and the heirs of his body; whom failing, to Lady Jane, and the heirs of her body. For security of the sum in this bond, Lord Charles was infeft in the separate estate, and, at the same time, the Earl of Dalkeith was infeft in the separate estate as proprietor.

Lord Charles died in July 1747, whereby the succession of the same bond opened in favours of his elder brother, the Earl of Dalkeith; and, at the same period, there was a family transaction betwixt the Duke and the Earl, by which, provision was made for payment of the family-debts, and the entailed estate was made over to the Earl, upon condition of granting a bond of provision to his sister Lady Jane. And as it was not safe to contract debt upon the family estate, which was entailed, the bond was executed in the following terms: The Earl "bound himself, and the heirs succeeding to him in the heritable bond granted by Anne Dutchess of Buccleugh to Lord Charles, to pay to his sister Lady Jane the sum of L. 15,000 Sterling, to the end that she might, upon the said obligation, charge him to enter heir in special to his brother Lord Charles, and thereupon obtain an adjudication of the heritable bond, redeemable upon payment of the said L. 15,000, with interest. And it is specially provided and declared, that no diligence should be competent upon this obligation against the person or estate, real or personal, of the granter, except the foresaid heritable bond granted to Lord Charles."

In pursuance of this obligation, the Earl was charged to enter heir in special to his brother Lord Charles; an adjudication was brought, and nothing remained to complete the pursuer Lady Jane's right, but decerning in the adjudication, when, to the great misfortune of the family, the Earl was carried off by a sudden illness in April 1750, leaving an infant son his heir; and as the tutors did not think themselves impowered to grant any deed, a process was brought at Lady Jane's instance, concluding against the infant, that he ought to be liable upon the passive titles for payment of her provision of L. 15,000.

Though her claim was equitable, and was entitled to the utmost favour, the difficulty was great to find a medium upon which the infant could be made liable. He was not liable as representing the Earl his father in the family-estate, or in the moveables; because, by the tenor of the Earl's obligation, it was confined to the single purpose and effect of attaching Lord Charles's personal bond; and all other subjects belonging to the Earl are freed from this claim. Neither could he be liable as heir in the said heritable bond, because his title must be made up as heir to his uncle Lord Charles, who died last vest and seized in the same. Nor could the act 1695 aid the pursuer, because the

Earl did not survive his brother three year; and consequently, it could not be qualified that he was three years in possession of the said bond. No 69.

It occurred to me as the only *medium concludendi* against the defender, that as it was the Earl's intention declared in a formal writing, to give his sister a right to the heritable bond, to the limited extent of L. 15,000 Sterling, the Earl's heir who has succeeded to the heritable bond, though not in right of his father, ought to be deemed in equity to pay Lady Jane's provision, as far as he is *lucratus* by his father's succession; that is, to the extent of the personal estate, and all that is derived to him from his father, except what is entailed. And this I observed was the same medium that subjects a man who is *lucratus* by his marriage to pay his wife's debts after her death.

Elchies took a shorter road; he implied an obligation upon the Earl of Dalkeith to make up titles to the heritable bond, and to convey to Lady Jane for security of the L. 15,000; and he thought the defender, his heir, was liable to implement this obligation. And accordingly, upon this medium, the LORDS pronounced the following interlocutor:

"In respect that the succession to the heritable bond has, by the death of the Earl of Dalkeith, devolved to the defender; and that the defender is heir served and retoured to the Earl his father, and has succeeded to him in all his other estates; therefore find the defender liable to perform and make good the obligation for L. 15,000 Sterling, granted by the Earl of Dalkeith to the pursuer, so as effectually to give her security in the heritable bond."

I am not satisfied with the *ratio decidendi*. In the deed granted by the Earl to his sister, I can find no obligation upon him, expressed or implied, to make up titles; but the contrary, for the express agreement is, That the titles should be made up in Lady Jane's person, by a charge to enter heir and adjudication.

*Fol. Dic. v.* 4. *p.* 40. *Sel. Dec. No* 4. *p.* 5

*** This case is reported in the Faculty Collection.

ANNE Dutchess of Buccleugh was possessed of the family-estate under a strict entail; but having purchased the lands of East-Park, and several other lands, she, on the 13th April 1731, executed a settlement thereof in favours of her great-grandson Francis, afterwards Earl of Dalkeith, eldest son of Francis Duke of Buccleugh, and the heirs of his body; whom failing, to Lord Charles Scott, second son to the Duke, and the heirs of his body; whom failing, to the Duke of Buccleugh, and the other heirs therein mentioned, subject to the conditions, and clauses irritant and resolutive, usual in strict entails. Upon this settlement the Earl was infeft.

Of the same date with the settlement, the Dutchess granted a bond for L. 20,000 Sterling, payable by her Grace, her heirs and successors whatsomever,

No 69. to the said Lord Charles, and the heirs of his body; whom failing, to the said Francis Earl of Dalkeith, and the heirs of his body; whom failing, to Lady Jane Scott, eldest daughter to the Duke of Buccleugh, and the heirs of her body; whom failing, to return to her Grace, and her heirs. The bond contains an obligation to give infeftments in the lands of East-Park, and others, purchased by the Dutchess, for security of the payment of the said provision; and, in consequence thereof, Lord Charles was infeft.

Lord Charles Scott died in the month of July 1747, and thereby the succession of the foresaid bond opened to the Earl of Dalkeith; and, on the 15th of of August 1748, the Earl granted a bond of provision to his sister Lady Jane Scott, narrating the foresaid L. 20,000 bond, and that the succession thereof had fallen to him, and that the said Lady Jane was unprovided by her father, and therefore "obliging himself, his heirs and successors, in the foresaid heritable bond of provision, to content and pay to the said Lady Jane, her heirs, &c. the sum of L. 15,000" at the terms mentioned in the bond, with annualrent, &c. "to the end she might, upon the said obligation, charge him to enter heir in special to his brother Lord Charles, and might thereupon obtain an adjudication of the foresaid bond, redeemable upon payment of L. 15,000 and the interest thereof." And the bond contains a proviso, "That no diligence should be competent thereupon against the person, or other estate of the Earl, except the foresaid provision granted to the said Lord Charles Scott, and the foresaid heritable bond granted to him, and infeftment following thereupon."

This provision being made for Lady Jane, Francis Duke of Buccleugh, on the 4th of March 1749, disponed the fee of the whole family-estate in Scotland to the Earl of Dalkeith (except in so far as it had been formerly disponed to the said Earl in his contract of marriage;) and, of the same date, conveyed to the Earl his household-furniture in Scotland, and also settled upon him the whole personal estate in Scotland that should belong to the Duke at his death.

Lady Jane Scott was proceeding to affect the foresaid L. 20,000 bond, by legal diligence upon the bond or obligation granted to her by the Earl of Dalkeith. But the Earl dying in April 1750, before the decreet of adjudication was pronounced, her diligence proved ineffectual.

The Earl was succeeded by his infant son, who was served heir of provision to him in the whole family-estate, and who also attained possession of the household furniture, which had been disponed to the Earl as above-mentioned.

After all these transactions, Francis Duke of Buccleugh also died.

Lady Jane Scott brought a process against the said infant (now Duke of Buccleugh) and his tutors, upon the bond granted to her by the Earl, in order to obtain a decreet of constitution, that she might thereupon adjudge the foresaid heritable bond of L. 20,000.

*Pleaded* for the Duke and his tutors, That although the tutors are very sensible of the melancholy situation of the pursuer, in case it shall be found, that

the bond of provision, pursued on, hath become ineffectual by the accident of the Earl of Dalkeith's death; yet they not only have no power to relieve her, but are obliged to state the following defences, competent to their pupil, against this action of constitution, viz. No 69.

*1st*, By the bond pursued on, the Earl bound only his heirs succeeding to him in his brother Lord Charles's bond of provision; and, by the Earl's death before he made up titles to this bond, he never can have heirs therein; for if the the defender makes up a title to this bond, he can only do it by a service as heir to the said Lord Charles Scott, and will not thereby be liable to fulfil the foresaid bond or obligation granted by his father to the pursuer.

*2dly*, The pursuer's bond of provision contains an express condition, that it should not affect the Earl's person, or other estate, except Lord Charles's bond of provision alone; and therefore, though the defender has succeeded to his father in the family-estate and moveables, yet this cannot be available to the pursuer, because of the said limitation or condition in the bond.

*Answered* for the pursuer, That the Earl's obliging his heirs succeeding to the L. 20,000 bond, might have given relief to the Earl's other heirs, had they been different; yet still, as he obliges himself, he thereby bound his whole representatives, of whatever denomination; and as the defender is heir served to the Earl, he is, upon that passive title, bound to implement the Earl's bond. As to the restrictive clause in the bond pursued on, the pursuer only insists for a decreet of constitution *ad hunc effectum*, that she may, on such decreet, charge the defender to enter heir in special to Lord Charles Scott, in the foresaid bond of provision, to the end she may thereupon adjudge the foresaid bond from the defender.

*Observed* on the Bench, That when one binds his heirs in a certain subject, he binds those who might be heirs to him in that subject, though they make up their titles to the subject, as heirs to a remoter predecessor, and passing him by, if they be also his heirs general.

It was also *observed*, That the binding of heirs in the obligation to the pursuer, was intended for the event of the adjudications not being led in the Earl's lifetime; for, had it then been led, there would have been no occasion for binding his heirs; but the binding these implied, that the Earl ought to make up titles to the bond, that he might have heirs therein, and his heirs are bound to supply what he did not do.

"THE LORDS found, That in respect the succession to the heritable bond of L. 20,000, granted by Anne Dutchess of Buccleugh to Lord Charles Scott, and the heirs of his body; whom failing, to the deceased Francis Earl of Dalkeith, and the heirs of his body; had now, by the death of the said Earl, devolved to the defender his eldest son and heir; and that the defender was heir served and retoured to the said Earl, the granter of the bond now sued for, and had succeeded to him in all his other estates; therefore he was liable to perform and make good the said bond for L. 15,000 Sterling, and interest thereof, grant-

No 69. ed by the said Earl to the pursuer, so as effectually to give her security, in the said heritable bond of L. 20,000 Sterling, and infeftment following upon, for security and payment to her of the said L. 15,000 Sterling, and interest thereof, and penalty, if incurred; but not to affect the defender's person, nor his other estate.

Reporter, *Lord Minto.* Act. *A. Lockhart & R. Dundas.* Alt. *Ja. Ferguson & Jo. Grant* Clerk, *Forbes.*

*Fac. Col. No 7. p. 10.*

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1757. *December* 1. GORDON *against* MAITLAND.

No 70.

FOUND, That a service as heir male upon a deed of entail, but without reciting the prohibitory clauses, does not infer an universal passive title.

*Fac. Col.*

*** See this case, *voce* TAILZIE.

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1760. *November* 19. HALL *against* BUCHANAN.

No 71.

A creditor pursuing a decree of constitution in common form against the son of his debtor, who, in obedience to the order of the Court, had made up titles to his father's estate, and disponed the same to assignees, under a commission of bankruptcy; it was *urged*, That he could not renounce to be heir, and ought to be subjected *passive* to the debt pursued for. THE LORDS found no passive title was incurred. See APPENDIX.

*Fol. Dic. v. 4. p. 42.*

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1782. *November* 19. SAMUEL BROWN *against* PETER BLACKBURN.

No 72.
How far a residuary legatee, accepting a sum of money for a conveyance of his right, is liable to that extent for the testator's moveable debts.

BY the death of Dr Brown of Jamaica, his personal estate in that island, after payment of his debts and certain legacies, devolved to Mr Blackburn, in the character of residuary legatee, his real estate there, to Patrick Brown, as his heir at law; and a debt due to him, which was secured by infeftment in Scotland, to Samuel Brown, as his heir of conquest.

A transaction took place between Mr Blackburn, the residuary legatee, and Patrick Brown, the heir in Jamaica; by which, for the sum of L. 1000 Sterling, the former sold to the latter his interest in the personal estate.

It however soon appeared, that the subjects falling under this transaction were inadequate to the payment of the Doctor's debts; and a personal creditor