

May-light duties, set by Scotstarvet to Alexander Chalmers, the defender's father, in November 1759, to commence at Whitsunday 1760; and remit to the Ordinary to proceed accordingly." No. 296.

Lord Ordinary, *Auchenleck*.

For Parkhill, *Sol. H. Dundas, Lockhart*.

Clerk, *Campbell*.

For Chalmers, *Rae, Ilay Campbell*.

Fac. Coll. No. 116. p. 142.

* * This case was appealed. The House of Lords ORDERED, That the appeal be dismissed, and the interlocutors complained of be affirmed.

1772. August 11.

JOHN MOWAT, a Minor, and DANIEL MOWAT, his Father and Factor, *against* JOHN FORDYCE of Ardo.

Fordyce, as purchaser of the estate of Ardo, being, by the articles of roup, obliged to retain in his hands 12,000 merks of the price, to answer an annuity of 600 merks *per annum* to the widow of Gordon, the former proprietor, he granted an heritable bond for that sum to Mrs. Gordon, in life-rent, and her son, William Gordon, in fee, on the precept of sasine in which they were infest in the estate of Ardo, for their respective rights of life-rent and fee. And this bond was afterwards conveyed by William Gordon, the fiar, by disposition and assignation, to George Turner; and by him, in like manner, to Agnes Murdoch; who having occasion for 3000 merks, took up that sum from Fordyce, the debtor, in part.

Thereafter, in pursuance of a destination by John Mowat of Jamaica, ordering £.500 Sterling to be laid out by his executors, on heritable security in Scotland, and of a transaction between these executors and the said Agnes Murdoch, she conveyed the remaining principal sum of 9000 merks, with said heritable bond itself, in favours of (the testator's father) John Mowat, senior, in life-rent, and, after his decease, to John Mowat, junior, and the other children of Daniel Mowat, (the testator's brother), in their order, precisely in the terms of John Mowat of Jamaica's will.

Fordyce having been threatened to be charged with horning, at the instance of John Mowat, junior, the institute, and the said Daniel Mowat, his father and administrator-in-law, he presented a bill of suspension, setting forth, that this institute was a minor, residing in Jamaica, and that, as the conveyance of this bond in his favour contained a strict substitution to other heirs, failing him, and those of his body, it was a matter of doubt, whether he, a minor, could alter or defeat such substitution; and, *2dly*, That, at any rate, there was no feudal title in this minor. For though Mrs. Gordon and her son, the original creditors, were infest on this

No. 297.
Not competent to a debtor, in a sum secured by heritable bond devised to a minor, to object that the factory granted by the minor to his father is not a good title to sue for and uplift the money, as being a deed authorising *in rem suam*.

No. 297. heritable bond for their respective rights of life-rent and fee, neither Turner, Mr. Gordon's disponee, nor Agnes Murdoch, his disponee, nor the Mowats, her disponees, ever were infeft; so that, until infeftment was taken in the person of John Mowat, the minor, he was not in capacity to disburden the suspender's lands, either by discharging or renouncing the heritable bond. And this bill was passed by the Court, March 7, 1772.

Upon the 14th March, 1772, John Mowat was infeft in the aforesaid heritable bond on the precept of sasine contained in the disposition by William Gordon, the original creditor, in favour of George Turner. And the suspension coming then to be discussed, there was produced a factory by John Mowat, the son, with consent of his father, Daniel Mowat, of date 15th November, 1770, empowering his said father (in respect he himself was gone abroad) to uplift all debts and sums of money owing to him, particularly this debt upon Ardo's estate; and to be accountable for his intromissions only; signed by both father and son. Which factory, it was contended, did entitle the father to uplift the money in question.

Objected by the suspender: That it did not, seeing there was no consent of curators of the minor to said factory, but only that of the father himself, his administrator, who, of course, became *auctor in rem suam*.

The Lord Ordinary "found the letters orderly proceeded."

Pleaded in a reclaiming petition: In the former proceedings, it was admitted, that Daniel, the father, was in very narrow circumstances; and it cannot be doubted that it is for his own purposes he wants to receive this money; and such being the case, he seems to fall directly within the principle of *auctor in rem suam*; which is reprobated by all the authors in our law.—Erskine, B. 1. Tit. 7. § 11.; Bankton, B. 1. T. 7. § 57. See also July 25, 1667, case of Sir George M'Kenzie, No. 72. p. 8960.

In these circumstances, it behoves the suspender to attend to his own interest, and that of his family. He can foresee that it might happen that Samuel Mowat, the father, might receive and discharge this money, and John Mowat, the institute, or some of the other sons of Daniel, who are substitutes in this bond, might afterwards challenge the discharge to the suspender, and put him, and his heirs-male, to much trouble. The sum charged for is not inconsiderable; and it is of importance to the suspender that his estate should be properly disburdened thereof, so as to prevent future challenge.

"The Lords refused this petition, without answers."

Pct. J. Douglas.

Fac. Coll. No. 25. p. 67.