

No. 1. pay the debts, otherwise an heir without his knowledge or consent may be subjected to his predecessor's debts, the active title being inseparable from the passive. This made a confirmation necessary to manifest Alexander's will to accept of the succession and to pay the debts. It was agreed, at the same time, that with respect to such moveables as can be possessed *via facti*, a horse for example, or an ox, a confirmation is unnecessary, because the laying hold of such a moveable shows the *animus* of the next in kin to take up the succession.

What misled the Ordinary and some others, was, that James died in minority without having contracted any debt; and they did not distinguish this case from a pure donation free of burden, which a man may acquire without his knowledge or consent. And they did not advert, that what is law in this case, must be law also where the succession is hazardous.

Another objection lies against the interlocutor of the Ordinary. That if the debt in question was extinguished merely by the survivance of Alexander the debtor, the creditors of James could have no access to confirm the subject for their payment, which no person pretended to maintain.

To obviate the first objection, a proof undertaken was successful, *viz.* That Alexander had intromitted with the moveables of his brother James, namely, his body-clothes, his watch, his horse, &c. which showed his willingness to subject himself to the debt of his brother; and upon that medium it was found that in this case *mortuus sasis virum*, without necessity of a confirmation, 7th March 1769.

Sel. Dec. No. 262. p. 335.

1806. March 7. CUTHBERTSON *against* BARR and Another.

No. 2.
General service, a sufficient title to the heir of a creditor, to discharge a real burden created in the person of the debtor

THOMAS CUTHBERTSON sold the lands of Borland to John Barr, writer in Kilmarnock, for the sum of £2500. Barr was allowed to retain £1900 of the price for a year, and accordingly this sum was declared, in the disposition granted by Cuthbertson, to be a real burden on the lands. At the same time, Barr, along with John Gemmill of Templehouse as his cautioner, granted a personal bond for the sum to Cuthbertson.

Before any part of this money was paid, Cuthbertson died, leaving a settlement, by which his eldest son Robert, a minor, succeeded to the whole of his heritable property. He made up his title by a general service, as heir to his father.

Robert Cuthbertson, and his tutors, raised an action against Barr and his cautioner, for payment of the sum contained in the bond, when the defenders objected,

1st, The title of the pursuer is defective. A general service conveys only personal rights; under which description, the right reserved in the disposition,

does not fall. By this reservation, the pursuer's father still remained infeft in the lands to the extent reserved; and the pursuer must therefore expedite a special service; *Halkerston against Drummond*, No. 22. p. 14436; *Robson against Lawrie and Corrie*, 22d January 1799, No. 94. p. 16139.

No. 2.

2d, This is an attempt upon the part of tutors to convert an heritable into a moveable debt, which they are not entitled to do, except in cases of necessity; *Erskine*, B. i. Tit. 7. § 17.

Answered: 1st, There are two classes of real rights, which pass by general service; those which do not require infeftment, and those which are secured by an infeftment not standing in the person of the ancestor as creditor, but in the person of another, as debtor in the obligation. This latter class comprehends all real liens, by which infeftments are incumbered, but which are not themselves feudalized in the person of the creditor; *Stair*, B. 2. Tit. 10. § 1.; *Ersk. B. 2. Tit. 3. § 49.* In practice, it has always been held by men of business, that a general service is sufficient to carry these.

2d, Tutors may be obliged at any time to receive payment of an heritable debt, because the debtor may insist for his discharge. There is a great difference, therefore, between uplifting an heritable debt, and selling an heritable property.

The Lord Ordinary found, 'That the title to the debt in question is quite sufficient for his enabling tutors to discharge the same;' and the Court adhered to his Lordship's interlocutor, upon advising a petition with answers.

Lord Ordinary, *Methven*.
Alt. *Copland*.

Act. *Cranstoun*.
Agent, *H. J. Wylie*

Agent, *W. Patrick*, W. S.
Clerk, *Home*.

J.

Fac. Coll. p. 243. No. 547.

1808. January 14.

ATKINSON, MURE, and BOGLE, *against* LEARMONTH and LINDSAY

ARCHIBALD HAMILTON, residing in St. Domingo, was indebted to Atkinson, Mure, and Bogle, to the amount of £4919 Sterling, and was likewise indebted to Learmonth and Lindsay to the amount of £1567 Sterling. Hamilton remitted money to John Miller in Glasgow, to the amount of £5717 Sterling, by whom it was placed in the branch of the Royal Bank of Scotland there. John Miller shortly afterward died; and George his brother acted as his executor.

In the year 1799, Hamilton died abroad, and left a will, wherein he appointed certain executors, of whom several resided abroad, and all ultimately declined to accept or act.

To secure this fund, the parties proceeded in the following manner:

Learmonth and Lindsay, on the 25th July and 12th December 1799, executed an arrestment to found jurisdiction; and having raised an action of

No. 3.

Arrestment used in the hands of the nearest in kin, before confirmation, is inept.

2d, In a competition between an arrestment in the hands of the nearest in kin, partially confirmed, and a confirmation as