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nation of the appellant's father was "of Scotstoun," and as he had died before the attainder, and left the estate to the appellant, his eldest son, the latter was properly designed, and commonly known by the addition of Walkinshaw of Scotstoun; for, by the custom of the country, proprietors take and have designations given to them from their lands, whether purchased or succeeded to, and without regard to infeftment being taken or not.

Judgment, June 9, 1737.

After hearing counsel, "it is ordered and adjudged, &c. that the appeal be dismissed, and "that the said interlocutors complained of be, and "the same are hereby affirmed."

For Appellant, *W. Noel, W. Murray.*

For Respondents, *Duncan Forbes, J. Strange.*

DR. GILBERT WAUCHOPE, and AGNES his Sister, } *Appellants;*

ANDREW WAUCHOPE of Niddrie, Esq. *Respondent.*

14*th June*, 1737.

SUCCESSION.—TUTOR and CURATOR.—MINOR.—Found that curators or administrators cannot directly alter the minor's or constituent's succession, by taking bonds secluding executors in lieu of bonds to heirs and executors, without the consent of the minor or constituent.

PROOF.—Circumstances under which parole evidence was allowed to prove the knowledge and consent of the minor.

[Elchies, *voce* Minor, No. 6.—*voce* Succession, No. 2.—*voce* Tutor and Curator, No. 7.]

No. 41. ANDREW WAUCHOPE of Niddrie, a minor, executed a deed with the consent of his curators, whereby

he appointed them, and two other persons, commissioners for the management of his whole affairs during his absence from Scotland.

Amongst other powers thereby conferred on these commissioners, they were authorised "to remove and put in factors and baillies, and to give warrants, orders, and directions to his stewards and others, in whose hands his money accruing, or which should thereafter accrue to him from his said estate, was or should be lodged, for lending out and employing the same; to remove and put in tenants, and grant leases; to receive vassals, and generally to subscribe all and sundry assignments, acquittances, discharges, and other writings that required his subscription during his absence, and to manage his whole other affairs; and to pursue and defend in all actions, compound, transact, and agree thereanent, and all other things requisite concerning the premises to do, use, and exerce as fully and freely as he with consent of his curators could have done if personally present."

Shortly after the commissioners had commenced acting under this trust, they entered the following resolution in their sederunt book. "*Item.* The said commissioners appoint such of the bonds as are moveably conceived to be got renewed, secluding executors, so as to put them on the same footing with the rest of the bonds, and this to be done betwixt and the next compting, and all the bonds to be taken hereafter in these terms, &c."

Various bonds were accordingly renewed in terms of this minute.

Mr. Wauchope never returned to Scotland, but

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died in Italy—a minor. He was succeeded by the respondent.

Dr. Wauchope, (appellant) having confirmed executor *qua* nearest of kin to his nephew, raised an action against the heir for payment of the sums contained in these bonds, as part of the executry, on the ground that the commissioners had no power to alter the succession of the deceased by any act or deed of theirs, having the effect of directing that money which by law descended to the executors, should go to the heir.

In defence, it was stated, that the money belonged to the heir and not to the executor, having been secured to the minor, his heirs and assignees, excluding executors, upon bonds taken by the commissioners, who had ample power to do so.

After some proceedings, the commissaries, (20th January 1735,) "repelled the defences in respect "of the answers, and ordained the defender to de-"pone and exhibit."

The cause was advocated by Niddrie, who maintained that the commissioners having a power to direct the lending out of the minor's money, must necessarily have had a power to regulate in what form the securities should be taken. But supposing that such a power had not been given by express words, yet their proceedings having been never challenged, but acquiesced in by their constituent, his consent and approbation must be presumed. In support of this, a letter was produced, addressed to one of the commissioners by the minor when at Eaton School, in which he expressed generally his approbation of his commissioners, and of their management of him and of his affairs.

Upon the report of Lord Newhall, Ordinary, the court,. (29th January 1736,) "allowed Andrew "Wauchope, now of Niddrie, to bring what further "proof he can by witnesses or otherwise, for in- "structing that the last Niddrie was informed of "the resolution of his commissioners for taking all "his bonds, secluding executors, and his approba- "tion thereof; and granted diligence."

Witnesses were examined, by whose testimony it appeared that the commissioners had given directions to Niddrie's uncle, (Mr. James Wauchope,) to inform him of this particular measure; and Mr. Waddell, his tutor, deponed that he saw a letter which Niddrie received from Mr. James Wauchope, acquainting him that his commissioners had come to a resolution to lend out his money upon bonds, secluding executors; and that Niddrie expressed his approbation of it, declaring his desire that his moveable property should go with the land estate for the sake of the family.

The Court (27th July,) "found that there is suf- "ficient evidence of the late Mr. Wauchope of "Niddrie's knowledge and approbation of the com- "missioners' resolution and appointment of the 6th "February 1721, that all their constituent's money "lent out upon moveable bonds, should be called "in, and given out or lent upon heritable security, "either upon infeftments, or upon bonds, seclud- "ing executors; and therefore found that the said "bonds thereafter renewed or taken by the com- "missioners secluding executors, descend to heirs, "and that they cannot be claimed by his execu- "tors."

This interlocutor was adhered to. (10th Dec.)

The appeal was brought from the several interlocu-

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tors of the 29th January, 27th July, and 10th December 1736.

Pleaded for the Appellants:—The commission in question relates only to such deeds of common administration as could not be executed by the constituent himself, on account of his absence. It does not extend even to selling or purchasing land, and far less to the extraordinary powers of making a will or settling succession. If the commissioners had powers, as is pretended, by the general words of their commission, to alter securities at pleasure, they might have changed the real securities into personal, in the same manner as they altered the personal into real, and so have prejudiced the heir at law in the same way as in this case they have injured the executor. But by the law of Scotland, no tutor, curator, factor, or commissioner, can settle or alter the succession of the pupil or constituent; this implies an extraordinary power which can be exercised only by the pupil or constituent himself.

It manifestly appears that these bonds were not taken for the benefit of the minor. And as it has been found that the commissioners had no power to make that alteration in their nature, (the Court having founded their judgment expressly upon the minor's knowledge and approbation only,) it is clear that there is no sufficient evidence of his consent or approbation. There is no writing under his hand to that effect, and by the law of Scotland, parole evidence is never allowed in any matter concerning which a proof may be had in writing.

The evidence of Niddry's intentions of settling all his property one way, must go for nothing. Neither is such an intention probable by witnesses,

nor yet the *emissio verborum*, from which it is inferred. Then the letter cannot be founded on merely through Mr. Waddell's testimony. If it is intended to make it evidence, it must be produced, or else its tenor regularly proved. But as it is, the existence and nature of it rest solely on the evidence of one witness, which is not sufficient to prove any fact, and surely not to support so important a document as the settlement of an estate. Would such evidence have been sufficient against Niddrie himself, supposing that he were alive, and challenging some other act of his commissioners? It is clear that neither the evidence of Mr. Waddell, nor of any other man, would have tied down this letter on him; and if this would have been law in his case, the same must hold in a question with his heir or executor.

Pleaded for the Respondent:—The commissioners had a general and full power to direct the lending out the minor's money, and were at liberty to take securities for the same in what form they thought fit.

The evidence does not rest on the single testimony of Mr. Waddell, but upon a chain of facts and circumstances, *quæ fidem faciunt judici.* It is in vain to say that the fact of Niddrie's receiving the letter, is not probable by witnesses. His knowledge is made out by proving that instructions were given to inform him of the resolution of his commissioners, and that a letter to that effect was accordingly written and received by him; which is evidently stronger proof of his knowledge than the mere production of the letter could afford. When the resolution was made known to him, he expressed his approbation of it.

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Other circumstances corroborating this were proved, such as his general desire to aggrandise his family estate, evidenced by a will in which he left almost the whole of his personal estate to the heir of entail, and by his intention to do so, frequently expressed to those about him who were in his confidence.

Judgment, June 14, 1737.

After hearing counsel, "it is ordered and adjudged, &c. That the appeal be dismissed, and "that the interlocutors therein complained of be, "and the same are hereby affirmed."

For Appellants, *J. Strange* and *James Erskine.*

For Respondent, *Dun. Forbes* and *W. Murray.*

The import of this decision upon the first head under which it is reported, is not free from uncertainty. It was not found *expressly* either by the Court of Session or the House of Lords, that the act complained of was *ultra vires* of the commissioners; but this certainly appears to have been virtually decided, when they allowed a proof of the minor's acquiescence. In the reclaiming petition for Dr. Wauchope, (signed by Mr. R. Dundas) this is stated to have been the nature of the judgment; but in the answers signed by Mr. Areskine, (afterwards Lord Tinwald,) it is said that the question of law was entirely waved. In Lord Elchies' notes upon this case, it is said, "The Lords generally thought that administrators cannot settle their "constituent's succession, though their necessary or reasonable deeds "of administration may have the effect of altering the succession, "as taking securities upon land, leading adjudications, lending money "upon annual rent, (before the act 1641 as to heirs, and since that "time *quoad jus mariti et relictæ,*) but they cannot make destinations "of succession by secluding executors without the knowledge and "consent of their constituents; though some seemed to differ as to "that; but most of us thought that Niddry's knowledge of his com-"missioners' resolution in their sederunt book would be a good de-"fence."

With regard to the competency of allowing a parole proof, his Lordship observes; "I and others thought his (the minor's) knowledge "presumed from his letter in March 1722, and therefore gave a di-"ligence for proving such knowledge even by witnesses; wherein we "had the less difficulty, that it was only to support the express ap-"probation of all their resolutions in that letter; but Newhall "differed."