

1743. December 9.

WALKINSHAW of that Ilk, and Others, Tutors nominated by Johnston to his Children *against* GRAY.

No 5.

NOTWITHSTANDING a factory be of its nature revocable by the granter or his heirs, though granted for a certain endurance, yet, where a defunct has appointed tutors for his heir, and granted a factory during his pupillarity, in that case, the factory is considered as a quality of the nomination of the tutors, even though they be in different deeds; upon which ground, the tutors in this case were not allowed during the pupillarity of the heir, to recal a factory granted by the defunct to William Gray during the pupillarity and minority of his heir, unless they could allege malversation; but there appeared no occasion to determine with respect to the minority.

Fol. Dic. v. 3. p. 200. Kilkerran, (FACTOR.) No 6. p. 183.

SECT. II.

Factors' powers.

1628. June 13.

PURVES *against* SMITH.

IN an action to make arrested goods furthcoming Purves against Smith, one compearing and *alleging*, that the goods arrested desired to be made furthcoming, could not be decerned to be delivered to the pursuer, because the wife of the husband, for which husband's debt the saids goods were arrested, disponed the saids goods to the excipient, long before any arrestment executed thereon by the pursuer, and that for satisfaction of a debt owing to the excipient by her said husband, which wife disponer had a factory and power given to her by her said husband, to pursue for all debts owing to him, and to intromit with the same, and bearing a general clause, 'to do all and whatsoever he might do himself if he were present;' in respect of the which factory and power, and clause foresaid, 'to do as if he himself were present;' the defender *alleged*, that as the husband might have given the saids goods, either *gratis*, or sold the same to whom he pleased at that time, when his wife disponed and assigned the same to this excipient, seeing the husband at that time neither was put to the horn

No 6.

A wife who had a general factory, with a clause empowering her to do every thing the husband himself might do, &c. disponed some goods to another person and acknowledged him to be creditor to her husband. The Lords found the disposition null.

No 6.
unless the dis-
ponee could
qualify how
the husband
was his debt-
or; for tho'
the factory
might be in-
terpreted in
the most ex-
tensive shape
as to acts of
administra-
tion, it could
not carry a
power gra-
tuitously to
alienate.

by this pursuer, neither were the goods then arrested, but long after the said disposition by the space of three months; and therefore he *contended*, that he had no necessity to qualify or show now, that the husband was his debtor, seeing the narrative in the disposition purported the same, and he had no necessity to keep the bonds any longer after the said disposition, which was given to him for payment, and which might lawfully have been received by him; albeit there had been no preceding debt, the husband not then being bankrupt. This allegiance was repelled, except that the excipient qualified a debt owing by the husband to him, answerable in sum and quantity, to the avail of the goods disposed by the wife; which being so proven, the LORDS sustained the disposition made by the wife, and found it good, it being proven that by the factory she had power so to do; but if there was no preceding debt owing by the husband, the LORDS found, that the factory (notwithstanding of the said general clause) gave her no power to dispoise of any of her husband's gear, in prejudice of his lawful creditors, except there were a just and lawful cause alleged and instructed, showing the same converted to the use and necessary affairs of her husband.

Act. *Sandilands.*

Alt. *Belibes.*

Clerk. *Hay.*

Fol. Dic. v. 1. p. 287. Durie, p. 374.

* * Spottiswood reports the same case :

JOHN DAVIE merchant in Edinburgh left a factory to his wife Isabel Johnston upon his going off the country, ' to gather in all his debts, convene and pursue therefor, &c. and generally to do all that he might do himself in his own business during his absence.' She assigneth to one John Smith her husband's creditor, certain goods appertaining to her husband; afterwards one Purves, another of her husband's creditors, arresteth the same goods. In pursuing whereof to have them made furthcoming, compeared John Smith, and *alleged* they were his, by virtue of his assignation and intimation thereof long before Purves his arrestment, who contended that Isabel Johnston could not, by virtue of that factory, make an assignation, seeing it gave her only power to crave in her husband's debts, and not to pay any of his creditors at her pleasure. THE LORDS sustained the assignation in respect of the general clause foresaid contained in the factory, Smith always verifying the debt for which the assignation was made to be true and just, and owing to him by John Davie himself.

Spottiswood, (FACTORY.) p. 125.