

1708 and 1709. HARY DOW *against* DAVID SEATON of NORTHBANK, &c. CURATORS of ANDREW CASSY of KIRKHOUSE.

1708, *July 10.*—ANDREW CASSY of Kirkhouse having chosen Seaton of Northbank, elder and younger, his goodsire and uncle by the mother, and Mary Seaton his aunt, being a widow, and Hary Dow, writer in Edinburgh, to be his curators, three making a quorum ; and Mr David Seaton, younger of Northbank, being named by the other three to be factor, for managing the minor's affairs, and to lift his rents, and annualrents, but not principal sums without the rest of the curators' consent :

Hary Dow finding that the other three acted all without owning him, and had lifted £428 sterling he had in the African company, beside other sums, and were embezzling the minor's estate, and though he had not intromission with a sixpence, yet he would be equally liable *in solidum*, having accepted ; and his estate would be subject to make up the minor's loss and damage, by their malversing :—he raised a process against Mr David Seaton and the other curators, craving, He may either be exonerated, and loosed from the curatory, or else, that they might account to him for their intromissions, and find caution to warrant him at the minor's hands, who might charge him, when he came to be major, with the whole, his estate being 6000 merks by year : which danger is sufficient to sink and ruin him. And, in case they will not secure him against the minor, craves, they may count for what they have already intromitted with, and be removed as suspect and malversing.

The first answer given to this process, was a disclamation under the minor's and the other two curators' hands.

The Lords saw this was an evident collusion betwixt the father, son, and sister, the other three curators, who combined together against Hary Dow, and that the minor was imposed upon to concur with them. And they being the great protectors of orphans, therefore they sustained process, notwithstanding of that disclamation.

The *second* defence was,—They were content to discharge and liberate him of the office, by a writ, signed by the minor and the other three ; and so his interest ceased.

ANSWERED,—Their discharge could never liberate him from the minor, who could revoke it when he pleased, and make him liable for their administration ; and yet, if they would find sufficient caution to free him of all cost, skaith, and damages he may incur, he was willing to renounce the office.

The Lords found, he having once accepted, he could not be legally freed ; but, if they found him caution, they were not so interpose. Then having considered his process, they found he had sufficient interest to call them to account for his own security, according to the law, *tit. Dig. et Cod. de Satisfat. Tutor.* And they having entered on counting, and Mr David Seaton being absent through sickness, Hary Dow extracts a decret against him, for £38,000 Scots he had intromitted with of the minor's money and rents.

Of this decret Mr Seaton gives in a suspension, on thir reasons :—*1mo*, That it is in absence, without probation, libelled at random. *2do*, That, having counted with the minor, and the other two curators, he has obtained their discharge : so Mr Dow has nothing to say when his actings are approven ; and, the sum being so vast, he must have suspension without caution or consignment.

ANSWERED,—The auditor will declare how many diets he assigned, and Mr Seaton always tergiversed. And, for the discharge he has impetrated, it evidently shows his *animum grassandi in rebus pupilli* ; and is a sufficient ground of removal, conform to the *tit. de Suspecto Tutore*.

The Lords thought his clandestine counting to his own father and sister, and taking their and the minor's discharge, was a gross palpable act of malversation ; and, therefore, refused to pass his bill of suspension, till he exhibited the minor's whole writs, upon oath, in the clerk's hands, that Hary Dow may have inspection thereof : And suspended his factory in the mean time, that he might have no farther intrusions ; and ordained him to find what caution he could ; and, in supplement thereof, to consign a disposition of his whole estate, heritable and moveable : and, at discussing, they would consider whether to remove him as suspect from the office, or not, the presumptions of his malversations being so very pregnant.

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1709, *February 25.*—Hary Dow, as curator to Cassy of Kirkhouse, having obtained a decret against Mr David Seaton of Northbank, for a considerable sum, (*supra*, 10th July 1708 ;) and he suspending, but not able to find caution, got it passed, on consigning a disposition to his lands and estate. And his affairs turning into disorder, Hary Dow applies to the Lords, craving, That the disposition may be given up to him, to take infettment on it ; else he will be cast behind all the creditors, who will be preferred on the diligence they were carrying on against him.

Though this was the first time that ever this was demanded, yet it seemed necessary, else these consigned dispositions might be elusory, by the summary prevention of other creditors. But the Lords qualified the deliverance, That it should only be effectual for the sum which shall be found due at discussing the suspension ; and, on the payment thereof, should be extinct.

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1709. *February 26.* SIR WILLIAM MENZIES *against* JANET JOHNSTON.

SIR William Menzies, on his remit of Parliament, pursues Janet Johnston, relict of Captain Wood, brewer, for relief of a proportional part of a sum paid by him to the public, for their tack of the excise.

ALLEGED,---You cannot insist for the sum libelled, because I offer to prove that I agreed with you, on certain conditions, for a lesser sum ; and which terms I am willing to fulfil.

ANSWERED,---I am not bound to swear, because, the transaction having been to be perfected in writ, there was *locus pœnitentiæ*, aye till it was extended and delivered.

REPLIED,---That was indeed the rule, but, where the affair was transacted by a *pactum liberatorium*, it was an exception, both in the common law and ours ; as the Lords found, 12th December 1661, *Hepburn*, and 8th February 1666, *Ker*.

The Lords found he was bound to depone in this case, but made it before answer.

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