No 65. as to the question now before the Court, whether it should be extended to the objecting of a nullity, it was new and the rule had never yet been so far extended.

It was on the other hand said, That where no proof was necessary, the defender might safely object a nullity appearing *ex facie* of the deed; but that no man could, without acknowledging the passive titles, put the other party to a proof.

All however agreed to allow the petition to be seen; and upon advising the the petition with the answers, wherein there was nothing new said, the Lords, without further argument, 'found that the proponing the said defence was not an acknowledgment of the passive titles, and remitted to the Ordinary to proceed accordingly.'

Fol. Dic. v. 4. *p.* 43. *Kilkerran,* (Passive Title.) *No* 4. *p.* 368.

1743. *July* 2. Hutchison *against* Menzies.

No 66.

Hutchison obtained decree in absence, against Menzies of Troloss, to whose oath the passive titles having been referred, he did not depone. Menzies raised a reduction of the decree, wherein a proof of the passive titles was allowed, and accordingly a disposition was recovered, by which Menzies, under the character of apparent heir, disponed the estate belonging to his father, to trustees, for behoof of his creditors. He thereby also bound himself to make up his titles, and gave the trustees full power to infeft him. He delivered over to them the writs in his possession, and empowered them to pursue for the rest. And lastly, he took the trustees bound for the surplus after payment of the creditors. In the end of the disposition he declared, that this deed was by no means to subject him personally, or his other estate, to pay of his father's creditors. The Lords found the disposition a passive title.—*See* Appendix.

Fol. Dic. v. 4. *p.* 42.

No 67.
Whether, although a decree had been pronounced *declaratorie*, finding a person liable on the passive titles, he could be distressed on a bond?

1745. *January* 29.
Elizabeth Ramsay *against* The Creditors of Clapperton of Wylliecleugh.

Both parties in this question founded on apprisings affecting the lands of Easter-Wylliecleugh, and mutually objected to each others titles, Elizabeth Ramsay the heiress of the family, on an apprising deduced by Hope-pringle of Torsonce, 4th June 1645, which was now in her person, and the Creditors of the deceast Richard Clapperton on one deduced by Alexander Kennier, which came into the person of a predecessor of their debtor.

Objected against Kennier's apprising, that it is destitute of foundation, nothing being produced to support it, but a decreet in absence, without grounds; and there is a certification standing against the bond, on which it is pretended to have proceeded. The decreet cannot support it, wanting support itself, since it was *ultra vires* in the judge to pronounce decreet where there was no debt; and want of power is an intrinsick nullity that may be proponed at any time; and thus the apprising must fall without aid from the lenght of time, since so long as it stands on the footing of a naked decreet, it can never be supported without its grounds. No 67.

Answered, That the foundation of the apprising was the decreet of constitution. An heir pursued on the passive titles (which was the case here) was laible to be distrest only in virtue of the decreet pronounced against him, and his predecessor's bond served only for an instruction of debt: If a decreet were pronounced *declaratorie*, finding a man liable on the passive titles, he could not be distressed on a bond; and it was doubted, if this bond had been lost in a few years, whether the decreet itself, mentioning the production, would not have been a ground of debt, much more was it now sufficient, after a possession on the apprising of eighty years (which was alleged) and though the parties had been sixty years in process, this was never mentioned till two years ago; the apprising was supported by the negative prescription, which excluded the reduction thereof, notwithstanding that on account of the continued processes, there was no positive prescription; for whatever might be said where a right was kept latent, yet where possession had been had thereon for so long, and the opposing party had not made the objection, the Creditors must be very well founded in their plea of prescription.

Objected, 2*dly*, The apprising is null, because John Ramsay against whom it is led, is charged to enter heir in special to - Ramsay his brother; and this charge is null, both from the uncertainty of the predecessor who is not named, and because the defender's brother had only a personal right to the lands; and therefore he ought to have been served with what is called a general special charge.

Answered, A pursuer's ignorance of the christian name of his debtor's predecessor, can never hurt him; and a charge to enter heir in lands, comprehends a charge to enter to whatever right the defunct had.

Objected, 3*dly*, The debt on which this apprising proceeds, belonged to one Nicolson, the letters are raised in his name, and upon the narrative of an assignation, decreet of apprising is pronounced in favours of Kennier, which exceeds the powers of a delegated Judge, such as a messenger is, and at any rate the apprising is null, as the assignation is not produced.

Answered, It is too late to object the want of the assignation, as there can be no doubt it once existed; and as a Sheriff can certainly decern in the name of an assignee, when process is raised in the name of the cedent, so may a messenger, who is Sheriff in that part.

No 67.

Objected to Torsonce's apprising, That part of the sum on which it proceeded, was a bond due to the Earl of Roxburgh, and assigned by his factor, and though factors might uplift, they could not assign.

Answered, This bond was payable to the Earl, his factors and chamberlains, and as factors could discharge, so it was thought they might assign, on receiving the full value, and the presumption was, this factor had accounted fairly with his constituent; besides, it was *jus tertii* to the Creditors to start this objection, which was only competent to the family of Roxburgh.

It was *objected*, That this apprising was satisfied within the legal, and it was endeavoured to be inferred from presumptive arguments, that possession had been obtained thereon, at, or shortly after it was led, and had continued so long as to operate an extinction by payment; but as the argument run into a great length, and was scarcely capable of being made intelligible in an abridgement; and besides there was no point of law to be determined, which it might be useful to observe as a decision, it was thought proper to omit it.

The Lords 18th December 1744, repelled the objections *hinc inde*.

Upon mutual reclaiming bills and answers, the Lords adhered.

Reporter, *Lord Strichen*. For the Creditors of Clapperton, *Lockhart & Hay*.
For Elizabeth Ramsay, *H. Home*. Clerk, *Forbes*.

D. Falconer, v. 1. *p.* 62.

No 68.

Whether the passive title can be inferred from the intromissions of a factor *loco tutoris*.

1747. *November* 25. Cathcart *against* Henderson.

William Henderson being appointed factor *loco tutoris* to the infant children of Quintin Dick, and having intromitted with the defunct's effects, which were all moveable, Elias Cathcart, a creditor of the defunct's, brought a process against the pupils and their tutor, on the passive titles, before the Sheriff of Ayr, and recovered decree.

At discussing the suspension of the decree, "the letters were suspended, because no passive title was proved."

The view the Lords took it in was, that infants could not incur a passive title by intromission, nor could the intromission of a factor appointed by the Lords involve them in a passive title; and that therefore the proper method for the creditor was to confirm executor-creditor.

But in this the Court was not unanimous; for several of the Lords were of opinion, That where a factor, appointed to infants *loco tutoris* intromits, action is competent on the passive titles against the infants and against the factor *tutorio nomine*, in the same way as such action would be competent in case of tutors intromitting.

Fol. Dic. v. 4. *p.* 41. *Kilkerran*, (Passive Title.) *No* 8. *p.* 371.