

S E C T. III.

Situation of a Factor, and of an Executor, relative to the Creditors of a Defunct.

No 20.
Where a factor was appointed by the Court, for the infant children of a debtor, to manage the estate belonging to their father, a creditor having pursued for payment of a debt, the Lords found, the proper method was, that the pursuer should obtain himself decerned executor-creditor to the defunct-debtor, and confirm the moveable effects in the factor's hands, as still *in hæreditate jacente* of the debtor.

1747. November 25. ELIAS CATHCART *against* WILLIAM HENDERSON.

A FACTOR appointed by the Court of Session for the infant children of Quintin Dick, to manage the funds which belonged to him, was convened in a process by one of Quintin's creditors to pay a debt due by Quintin contained in a bill. The defence was, That there was no passive title upon which he could be made liable; that the creditor had no other method but to take a decree of constitution against the infant children; and thereupon apply to the Court for a warrant against their factor. The LORD ORDINARY having assoilzied the factor, the matter came before the Court upon a petition and answers. The Judges were all clear, that there could be no necessity of taking a decree upon the passive titles in this case; and that such a decree could not pass, because no passive title could be specified against the children, who were not the intrmitters. Elchies was clear, that the action was competent against the factor, as intrmitter with the defunct's effects. *See SERVICE & CONFIRMATION.* Arniston thought it hard to give a creditor thus an opportunity of a start in diligence, where there can be no *pari passu* preference; and therefore, he declared his opinion, that the pursuer ought to obtain himself decerned executor creditor to his defunct debtor, and to confirm the moveable effects in the factor's hands, as still *in hæreditate jacente* of the debtor; to which opinion the plurality agreed. And so it was found, that the creditor must confirm.

*Fol. Dic. v. 3. p. 165. Rem. Dec. v. 2. No*83. p. 155.*

No 21.
In a competition among creditors of an executor, and a creditor of the person to whom the fund originally belonged; this last was preferred.

1779. February 12. JOHN TAIT *against* DAVID KAY.

DAVID BERVIE was debtor to Helen Simpson at the time of her death in a considerable sum.

Henry Simpson, her brother, having been confirmed executor, *qua* nearest of kin, David Kay, one of his creditors, charged him for payment, and arrested in the hands of Bervie, debtor of the deceased Helen Simpson. Others of Henry Simpson's creditors followed the same course, and David Bervie brought a multiplepounding.

Henry Simpson dying soon after, Alison Kay, his relict, expeded a confirmation, as executrix nominate to him; and, among other subjects, confirmed the debt due by David Bervie.