

1758. June 17.

ALEXANDER BROWN, Factor for the Executors of WILLIAM SCoulAR,  
against ALEXANDER SCoulAR.

William Scoular died in October 1748. His heritable subjects descended to Alexander Scoular, his eldest son; his moveable effects divided amongst his relict and five younger children. Application was made to the Court of Session; and John Watson was appointed factor *loco tutoris*, on account of the infancy of four of the children.

Mr. Watson discovered, in the course of his management; that Alexander Scoular had abstracted part of his father's moveable estate, to the prejudice of the executors; and having brought an action against him before the Sheriff, he acknowledged his intromission, to the extent of £.10.

Mr. Watson gave up this factory; and Alexander Brown was appointed by the Court in his place, in February 1754. This was done upon the application of the relict and all the children; the eldest of whom, Helen Scoular, was before this time married to Robert Hunter, who concurred in the application. Brown insisted in the process before the Sheriff, against Alexander the eldest son; and a proof was taken with respect to his intromissions; in consequence of which the Sheriff found it proved, that the defender had intromitted with leather belonging to his father, to the extent of £.10 15s.; and with lime and sand to the extent of £.1 5s.; and with certain quantities of bark, but found no evidence as to the extent or value thereof; and with several barrels of oil, but found no proof of the value thereof.

This judgment of the Sheriff was brought before the Court of Session, by advocacy, when a further proof was allowed; upon which a submission was entered into by Alexander Scoular, on the one part, and by Alexander Brown, the factor, with the special advice and consent of Anne Donaldson the relict, and of her second husband, on the other part; submitting to Mr. Francis Garden all claims and demands which the executors of the deceased William Scoular, and Anne Donaldson, his relict, had against Alexander, or that he might have against them, and particularly the process then depending.

The arbiter again examined Alexander Scoular, and several other witnesses; and upon the 17th of August 1757, pronounced a decret-arbitral, finding Alexander Scoular liable in £.127, as the price and value of his intromissions, £.52, as the expense of process, and £.40 in name of damage and *solatium*.

Alexander Scoular brought a reduction of this decret arbitral; and the Lord Colston Ordinary "found, That Alexander Brown, *qua factor loco tutoris*, had no power to submit any claims competent to the pupils; and, *2dly*, That he had no power to submit the claim competent to Helen Scoular their sister, who was major, and married, not only at the date of the submission, but also at the date of the factory granted to Alexander Brown."

Pleaded for Alexander Brown, in a reclaiming petition, That a factor *loco tutoris* for managing the affairs of an infant is entitled to submit, where such submis-

No. 289.

Whether a factor *loco tutoris* has power to enter into a submission?

No. 289. sion appears a prudent or rational act of administration ; since it is now an established point, That a tutor may effectually submit : And though a factor *loco tutoris* is not in very respect equal to a tutor ; yet he is entitled to act *tanquam bonus paterfamilias* ; though in every act of administration he is answerable for the risk, if it shall turn out against the interest of the pupil.

*2dly*, In this case Alexander Scoular sought and obtained this submission, when he knew the character with which the factor was vested ; and therefore he is barred *personali exceptione* from objecting to the petitioner's title or powers, when he was satisfied to submit with him in that character ; and the submission itself expressly sets forth, that Alexander Brown entered into the submission as factor. If a person contracts with a minor, he is not entitled to be relieved from his bargain, because the minor has a right *intra annos utiles* to reduce it, if to his prejudice. At any rate, Alexander Scoular can only demand caution, that he shall be kept safe from any challenge upon the part of the executors.

As to the *second* objection to the decret-arbitral, Helen Scoular, and her husband are ready to join in the discharge to Alexander. *2dly*, The act of factory was obtained upon their application, as well as that of the younger children ; and therefore the factor was authorised to act for her, as well as for the infants ; and must be understood to have taken burden for her, by entering into the submission, and to be bound to procure her consent.

Answered, It has been considered a doubtful question, How far tutors, properly authorised, whose office gives them the total administration both of the pupil's person and estate, have power to submit, so as to bind their pupils when they come to be of age, unless where the tutor takes burden upon him for them ? but it can admit of no doubt, that a factor named by the Court for the special purpose of managing the moveable effects of the defunct, can have no power to submit the claims of those for whose behoof he is appointed factor.

By the sequestration, the whole moveable effects, in this case, were put into the hands of the Court ; and by them no power to submit was delegated to the factor.

In this case, the sequestration and factory did not singly respect the interest of the infants.—The relict had her share.—The daughter of the first marriage, and her husband, had also a share ; but as they could not divide with the infants till the debts were called in, they joined in the application for a sequestration and factory ; but this consent could not imply any intention to authorise the factor to enter into a submission for them.

As the factor exceeded his powers by entering into the submission, and his deed could not therefore bind the children or relict, neither can Alexander Scoular be bound. Nor is this objection barred *personali exceptione*. The submission appears plainly to have been entered into upon an erroneous supposition, that the factory entitled the factor to submit ; and this mistake cannot render it binding upon either party. It is of no consequence, that the children are now willing to ratify the submission.

“ The Lords found the decret-arbitral binding upon Alexander Scoular, and

remitted to the Lord Ordinary to proceed accordingly; and found Alexander Scoular liable in the expense of extracting the decret." No. 289.

Act. R. Dundas.

Alt. Lockhart.

Clerk, Kirkpatrick.

Fac. Coll. No. 108. p. 193.

1758. January 10. CRAGIE, Petitioner.

A factor *loco tutoris* applied to the Court, for directions and authority in making certain purchases of land. The Lords remitted to the Ordinary to enquire into the facts set forth in the petition, and afterwards, upon report, authorised the factor to make these purchases.

No. 290.

Sel. Dec. Fac. Coll.

\* \* \* This case is No. 179. p. 7455. *voce* JURISDICTION.

1758. August 2.

CHILDREN OF DUNCAN FISHER *against* Their Tutors and Curators.

Duncan Fisher executed a nomination of tutors and curators to his children in the following terms: "I do nominate and appoint James Fisher, my father, Margaret Macneil, my spouse, during the widowity of the said Margaret Macneil, *allearly*; and failing them by death, Donald Macneil of Collonsay, Angus and Alexander Macneils, James Campbell writer, James Campbell of Oib, James Campbell of Raschilly, any two of them being a quorum, curators and tutors to Angus, James, and Barbara Fishers, my children, &c. with full power to them, or their said quorum, to manage my said children their persons and estate," &c.

No. 291.  
Quorum of  
tutors and  
curators.

Duncan Fisher having died, and also James Fisher, who, with the wife, was named tutor in the first place, a question occurred, Whether, by the death of James, the first nomination was vacated, so as to make place for the second nomination? or, Whether, on the other hand, the wife was entitled, under the first nomination, to act alone?

"The Lords found, That the first nomination of tutors and curators has not failed by the death of James Fisher."

Reporter, Colston.

Fac. Coll. No. 131. p. 243.

1759. February 16. SCOTS *against* ELIZABETH SCOT.

A gentleman, by a deed executed some time before his death, nominated and appointed his relict, her father, and her two brothers, and another gentleman, to

No. 292.  
Whether the  
mother or  
the tutors of