

No 37.

A woman, minor, entered into co-partnership, and her tutors paid part of her money to the company, and expended the rest on her maintenance. The money had borne no interest. Found that her money might be employed in the joint trade, but could not be diminished by her aliment.

1715. June 28.

ISABEL DUNCANSON, and her Assignee, against JAMES DUNCANSON.

ROBERT DUNCANSON of Garshake, by his latter will, provides the said Isabel his daughter, (a minor) in 500 merks, payable by her eldest brother, the said James Duncanson, out of the readiest moveables, at her marriage or majority, but bearing no annualrent; and in the same testament, there is subjoined a nomination of tutors and curators to his children, of whom three to be a quorum, and the eldest brother *sine quo non*, with power to them to intromit with his rents, &c. for the children's education. Isabel coming to be *in confinio majoris atatis*, enters into a co-partnership with another woman, who was a shop-keeper; and in regard she was to furnish the half of the shop with wares, her said brother paid out for her L. 22 Sterling for goods, and bestowed the remaining balance of the 500 merks for her board, cloathing, &c. and took a discharge of the tocher from her, being authorised by her other curators, who, as taking burden for her, do subscribe the same with her.

Of this discharge, she and Thomas Hall, her assignee, raised a reduction *ex capite minorennitatis et læsionis*, and it was *alleged* for them, as to the L. 22 Sterling, That the brother could not be in *bona fide* to pay the same, either to or for the minor, since he was expressly bound up by the words of the testament, whereby the tocher was only payable at majority or marriage. Nor, *2do*, Did the consent of the other curators validate the discharge, since himself was *sine quo non*; nor could he be *auctor in rem suam*, and consent to a discharge granted to himself.

Answered for the defender, *1mo*, That as the stock bore no annualrent, so although it had, so small a sum could never be a fund for the minor's maintenance; and therefore his bestowing part of the stock for putting her in a way of living, was certainly both prudence and piety, and is nothing that is *novum*, but a course very commonly taken by parents with their own children; specially that the goods purchased were not absolutely intrusted to herself, but another who was habit and repute to be of integrity and skill in the trade, joined with her. *2do*, Since he could not be *auctor in rem suam*, the authority of the other curators in this case was undoubtedly sufficient; it being universally received, that when any affair occurs betwixt a minor and one of his curators, the authority of the others is sufficient, since otherwise affairs of this kind could never be extricated.

The pursuer having also insisted for reducing the discharge as to the balance paid out for board, cloathing, &c.; it was *answered* for the defender, That since the stock bore no annualrent, it behoved to be diminished for entertaining the minor; for although the defunct, in his will, appoints the rents of his estate for years to come to aliment his children, yet these are not the subject of a testamentary disposition.

Replied for the pursuer, That by the current of decisions, it has been determined, that the heir is bound to maintain his brethren and sisters, in case of their having no fund of their own for their aliment; as 29th January 1663, Children of Netherly *contra* the Heir, No 50. p. 415.; 11th February 1663, Frazer *contra* Frazer, No 51. p. 415., nor is there any thing more conform to nature and humanity. So that the pursuer needed not make any other use of the destination in the testament than to shew the defunct's *enixa voluntas*, that the children's portions should be paid to them entire at the terms he had appointed.

No 37.

THE LORDS found, That the curators might employ the minor's stock in joining with a person held and repute of knowledge and reputation in trade; but found, that the stock could not be diminished for the aliment.

Act. *Hall & Colvil.*Alt. *Smollet & Bruce.*Clerk, *Roberton.**Bruce, v. I. No 110. p. 136.*1724. *November 28.*A. *against* B.

No 38.

A woman, minor, had a bond granted to her, bearing interest, and during her minority she married. The husband, as her curator, pursued the debtor for payment, who *objected*, that he could not be obliged to pay to him, for though he was curator to his wife, yet he had not made up inventories, nor found caution, as a curator ought to do.

It was *answered* for the husband, That the law had made him curator, without the necessity of making up inventories, or finding caution.

THE LORDS were of opinion, That it was *jus tertii* to the debtor, and he had no right to make the objection, though the wife's friends might possibly be entitled to do it; because by the husband's uplifting the money, he brought it under the *jus mariti*, which it was not formerly, and thereby the woman might be prejudged.

*Edgar, p. 123.*1735. *July 25.* HAY of HOPES *against* HEPBURN of Monkrig.

No 39.

A Commissioner of Supply, by the nature of his office, is a judge, and also liable as cautioner for the collector; and, therefore, it being *objected* against a Commissioner of Supply, in a question which of two was legally chosen collector, that he was minor, the objection was sustained. See APPENDIX.

Fol. Dic. v. I. p. 576.