

(FORMALITIES OF THE DILIGENCE.)

1737. July 22. CREDITORS OF NEWLAW *against* SAMUEL BROWN.

No 7.

In an adjudication, the letters of special charge were executed against a minor, not against his tutors and curators. The adjudication not reduced; but restricted.

In the ranking of the creditors of Newlaw, it was *objected*, That an adjudication, to which Samuel Brown had right, was void, in respect the decret of constitution, upon which it proceeded, was taken out against a minor, without proof of any passive title; neither did it libel upon, nor bear production of, the letters of general charge.

*Answered* for Brown: That he now produces, not only the said letters, but the execution thereof, dated prior to the summons of constitution; so that, *de facto*, there was an antecedent passive title, relevant to support the decret; and, though these were omitted to be marked as produced, the producing of them now should be sustained, at least to the effect, to make the adjudication subsist for a security.

THE LORDS found the production of the general charge is not now sufficient, in respect the same was not founded on in the decret of constitution; but allowed Samuel Brown yet to prove the passive titles libelled.

In the *next* place, it was *objected* to another adjudication of Brown's, in the year 1703, That, taking the letters and executions of special charge, which are not produced, as narrated in the decret of adjudication, it does not appear they were executed against the tutors and curators of the apparent heir to the common debtor.

*Answered*: The objection comes now too late, after thirty-three years that the adjudication has stood unquarrelled: the minor himself, as well as tutors, &c. were lawfully cited; consequently, they ought then to have appeared, and objected, if they had any thing to say. This they not only omitted, but allowed the adjudication to remain unquarrelled ever since the date thereof; after which, the adjudger is not bound to produce the letters of special charge, seeing the law presumes them easily lost; and, therefore, as the decret bears production of the letters and executions, after so long a time, *omnia præsumenda solemniter acta*; which general presumption is confirmed in the present case, when it is considered; *1mo*, That, in marking the production, the decret bears executions of special charge, which, in the proper meaning of the words, supposes more than one, and there could be none other but the executions against the tutors, &c. *2do*, The tutors, &c. are cited in the summons of adjudication, which is a strong presumption that the special charge would likewise be execute against them, as was determined in a parallel case; 14th February 1706, Ker of Moriston, (*See JURISDICTION.*)

*Replied*: The creditors are not insisting to have the executions produced; they are willing to hold them to have been of the same tenor as narrated in their competitor's right; but they cannot suppose there were executions, which are nowhere mentioned in the decret. The brocard, *omnia præsumuntur*, does not apply; for though an execution, which appears actually to have been done, may be thereby presumed formal, yet it would be very absurd to maintain,

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That, by this maxim, an execution should be presumed, which does not appear ever to have had a being. As to the argument drawn from the clause in the decret, referring to the letters and executions thereof, it was *answered*, There is nothing more common than to speak of executions, although there is but one; surely the overly mentioning thereof, in a relative clause of a decret, does not prove that a party was called, who is not once said to be called through the whole of it. The fact being then fixed, that the special charge was not executed against the tutors, the effect must be the same as if it had not been executed at all; for an execution against a minor is good for nothing, if his tutors are not cited, as, in that case, he cannot deliberate whether to enter or not; of course, a decret, which is liable to such defects, must be null and void.

THE LORDS found the objection, That it does not appear the said letters were executed against the tutors and curators, but only against the minor, not relevant to reduce the adjudication *in toto*, but only to restrict the same to a security for principal sum, annualrents, and necessary expences.

*Fol. Dic. v. 3. p. 7. C. Home, No 69. p. 118.*

1741. July 3.

ANDREW HUNTER of Lochrinny against ELIZABETH and MARGARET HUNTERS.

IN the process of declarator of expiry of the legal of three adjudications, pursued at the instance of Lochrinny against the defenders, it was *objected*, That the special charge, whereon one of them was founded, is blank in the lands, and consequently null, the defenders father not being infeft at the time.

*Answered*, That although the defenders in that adjudication, were only in a state of apparenacy the time of leading thereof; yet, as he was afterwards infeft in the lands of Greenan, one of the three parcels adjudged, his posterior infeftment must accrefce, and validate the adjudication as to that parcel.

*Replied*, That an adjudication, only taking the right out of the person of their father, such as he had it at the time of the adjudication, which, in this case, was none at all but a mere right of apparenacy; his posterior infeftment can never accrefce, no more than an adjudication could be made to carry an estate, purchased after the date thereof.

*Duplied* for the pursuer, The simile, though just, does not apply: For here the lands of Greenan were a part of the heritage that belonged to the common debtor, and which fell under his right of apparenacy to his father; and, it being instructed that he was infeft in these lands, though after the date of the adjudication, such infeftment must accrefce to the adjudger. And as to the objection, that the lands are not filled up in the special charge, it is believed, he cannot be in a worse situation, than if no such charge had been produced, the decret nar-

No 7.

No 8.

An adjudication, of which the special charge was blank in the lands restricted; and the question reserved, whether it ought not to be annulled *in toto*?