

No 10.

an oath upon reference, or an attestation in writing, (Edg. 11th Feb. 1724, Guthrie *contra* Marquis of Annandale, *voce PRESCRIPTION*), especially, if, as in this case, it be given after he is dismissed from the service.

Upon the same principles, a decree against the institutor cannot interrupt the prescription in favour of the master. Indeed, here, the decree was taken against Lee himself as the proper debtor, and not as having contracted as manager for others.

THE LORDS repelled the defence, that the defender is not liable for the accounts pursued for; but sustained the defence of the triennial prescription. See PRESCRIPTION.

Act. *Lockhart, Crosbie.*Alt. *Rae.*

G. F.

*Fol. Dic. v. 3. p. 200. Fac. Col. No 23. p. 238.*

1778. July 8.

CREDITORS OF PATRICK McDOWAL *against* CHARLES McDOWAL.

No 11.

A factor, appointed by the Court of Session, has no power to enter into submissions.

CHARLES McDOWAL brought an action of declarator, valuation, and ranking, against the Creditors of his deceased father Patrick McDowal of Crician, as heir served *cum beneficio inventarii* to his father; and obtained a judgment, finding, that he was entitled to hold his father's real estate at a proven value.—Afterwards, in the course of the ranking, on the application of the creditors, a factor was named by the Court, to whom Charles McDowal was ordained to pay over the proven value of the lands.

This factor having died, a petition was given into Court in the name of Charles McDowal, and a part of the creditors, for having a new factor appointed; in which they set forth, that it would be expedient to vest the new factor with powers to enter into submissions, on behalf of the creditors, with the said Charles McDowal, and others they may have claims against. The prayer of the petition was to nominate Alexander Orr factor, 'with power to submit, as to him shall appear most eligible, for the interest of the creditors.' The petition was intimated to certain persons, as doers for the other creditors.—On the 5th March 1759, it was remitted by the Court to an Ordinary, to hear parties procurators, and report; who, on the 8th March, reported, 'That, having heard parties procurators, they consented that Mr Orr be appointed factor, with the powers, as craved in the prayer of the petition.'—On which the Court nominated Mr Orr to be factor, 'for the purposes mentioned in the prayer of the petition, with the usual powers.' A submission was entered into betwixt Mr Orr and Charles McDowal, for settling the claims which the creditors and he had against each other; and a decret-arbitral was pronounced.

Upon the death of Orr, a new factor being appointed, an action was brought

at the instance of the creditors, and their factor, for setting aside this decree-arbitral.

No 11.

*Pleaded* for the pursuers; Orr had no sufficient powers to enter into this submission on behalf of the creditors. He had nothing more than the '*usual powers*' of a judicial factor conferred on him: Under these, that of referring to arbiters the rights of parties is not included: Neither could this power have been conferred on him by the mere authority of the Court in the act of factory. The interposition of the Court can go no further than to the preserving of the subject, and its rents and interests, for behoof of those concerned. To this extent the Court are supported, on grounds of equity, in assuming the powers of a proprietor, and vesting them in their factor; but they cannot go the length to exercise the more eminent rights of property over the subject, such as the compounding of claims, or referring the rights of parties to arbiters. Parties themselves cannot be obliged by a Court to enter into a submission of claims brought before it for decision; *a fortiori*, the Court has no power to appoint a factor to enter into such a submission in the name of the parties.

*Answered* for the defenders; A judicial factor, appointed with nothing more than the usual powers, is understood to be possessed of considerable discretionary powers in the management of the subjects.—In case of disputed claims, he may choose whether to bring his action in the supreme or inferior court.—He may rest satisfied, if he thinks proper, with the judgment of the inferior court, though given against him. If this sort of discretion is vested in the factor, there seems to be no reason why he should not exercise it in another form, by submitting the claim to an arbiter, in place of bringing it into a Court of law. Instances (it was said) have occurred, where the judicial factor has exercised this power of submitting claims, and it never was challenged in any case until the present.

But, at any rate, the Court, on the same principles of equity which lead them to assume the administration of the subject in other respects, may confer a special power to enter into submissions on their factor, when they judge that measure to be expedient. This power was specially conferred in the present case by the Court. The words *usual powers*, adjoined to the act of factory, do not take away the power to submit claims, which is one of the purposes mentioned in the prayer of the petition.

All the creditors must be considered as concurring in the petition for naming the factor with this power, either by joining in it as petitioners, or by having it intimated to their agents, and consenting to it by their lawyers, when remitted to the Lord Ordinary.

The case of *Brown contra Scoular*, 17th June 1758, *voce TUTOR and PUPIL*, was founded on, as establishing that a factor, *loco tutoris*, has a power to submit, when appointed only with the usual powers.

*Replied* for the pursuers; Nothing could authorise a submission of this kind, but an express authority, or mandate, to the factor, under the hands of the

No 11. creditors themselves.—The process of ranking was sleeping at the time the petition was given in.—No authority is produced from the creditors whose names are assumed to the petition ; and the loose and hurried proceedings before the Lord Ordinary can infer no consent on the part of the other creditors.

The office of a factor, *loco tutoris*, is very different from that of a judicial factor on a sequestered subject ; and, from the nature of it, requires more extensive powers.—But there is no reason for supposing, that even his powers extend to the submitting of claims.—In the case of Brown *contra* Scouler, the decree-arbitral was acquiesced in by the minor and his friends ; and the challenge was brought by the party who contracted with the factor ; against whom it was pleaded, that he was barred *personaliter exceptione*.

Besides the defences above-mentioned, the defender founded on some transactions after the decree-arbitral, as implying an homologation of it by the creditors.

The COURT were of opinion, that, under the usual powers of a judicial factor on a subject, that of referring claims is not included : And it was said by several of the Judges, that the Court could not grant such a power on the application and consent of only part of the creditors :—That, even though there were an application from the whole creditors, it was not the province of the Court to grant such a power.

The judgment was, ‘ finding that the factor had no legal or sufficient powers to enter into the submission on which the decree-arbitral proceeded ; and that the same were not sufficiently homologated by the creditors, so as to supply said original defect ; therefore reduce,’ &c.

Act. D. Rae, Ch. Hay.

Alt. Crosbie.

Fol. Dic. v. 3. p. 201. Fac. Col. No 30. p. 49.

### S E C T. III.

#### Rules of accounting.—Right to salary.—Malversation.

No 12.

1692. December 15.

BRUCE of Bordy *against* KEIRIE of Gogar.

As at what period chargeable with the price of victual sold.

THE LORDS thought the margining the act by Charles Oliphant unwarrantable, bearing a restriction of Harry Dow's sum of 20,000 merks to 13,000