

1665. *December 20.*      *BOYDE against TAILZEFER.*

IN the case betwixt Boyde and Tailzefer, a pupil being convened as behaving himself as heir by intromission, &c. because his tutor in his name did intromit, by giving discharges *nomine tutorio*; FOUND, This intromission of the tutor could not bind a passive title on the pupil, in respect *pupilli non habent animum gerendi se pro hærede*; but declared the tutor liable for what he had intromitted with, according to the extent thereof.

*Act. Dinmuire. Alt. Maxwell.*

*Advocates' MS. folio 55.*

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ABOUT this time also, FOUND, that one being infest *cum curiis*, though base, may hold courts.

*Act. Lockhart. Alt. M'Keinzie.*

*Advocates' MS. folio 55.*

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1666. *January 1.*      *LADY BUTE'S Chaplain against Her SON.*

THE lady Bute, after proclamation with her own chaplain, gave a discharge of the half of her jointure in favours of her own son. The chaplain, after the marriage, reducing this discharge, because granted after the proclamation of the bands of marriage betwixt him and her; by which the lieges were put *in mala fide* to contract with her to his prejudice; and she not being *sui juris* the time of the discharge, it cannot bind him:—

ANSWER,—He knew of that discharge the time of the granting thereof; and so he knowing, and not declaring his dissent before marriage, that must import ratification and homologation of that deed done by his wife, then his affianced spouse; because, *cum prohibere potuit non voluit*, and his silence imports a consent.

This the Lords repelled, and reduced the discharge, and noway found his knowledge to import a consent; for though he knew it, yet that cannot prejudge him in law from seeking the ordinary remedy in law, *vis.* to reduce; since, as he knew it, so he knew it to be null, and noway obligatory.

*Act. Maxwell. Alt. Wedderburne.*

*Advocates' MS. folio 55.*

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1666. *January 20.*      *STEVIN against YOUNG.*

IN this case, Stevin and Young and Barnes, the relict, FOUND that their being but one daughter gotten of a marriage to whom sums of money were provided by the contract, that this daughter could not be served heir of that marriage; there

being a son begotten by the father in another marriage, who could only be charged to enter heir to his father, to the effect he might employ the sums of money provided to that daughter; and that the said daughter being served heir, her service was null. *Item*, FOUND that the mother dying, though *regulariter non debetur legitima ex parte matris*, yet the mother's testament being confirmed though she had a husband living, the child behoved to have not only the third, which belonged to herself, but also the third belonging to her dead mother; not as *legitima*, but as the third which belonged to the child by the father's decease, which came in place of the mother's third.

*Act.* Sinclar and Dinmuire. *Alt.* Lockhart.

*Advocates' MS. folio 55.*

1666. *January 15.*

Jo. SCOT *against* HOG.

IN a case betwixt Jo. Scot, the Sawcer of Edinburgh, and one Hog, FOUND that the principal lands being dispoed by a base infeftment, and other lands in warrandice also base, and the acquirer of the lands being in possession thirty or forty years, and thereafter being evicted from him by a decreet; the said acquirer has recourse to the warrandice: though the heritor thereof alleged he could not call for the mails and duties of the warrandice, because he stood infeft in these lands by a public infeftment, holden of the superior, by virtue whereof he and his authors had been thirty or forty years in possession but interruption.

REPLY,—The pursuer being infeft, though base, in the principal and warrandice lands, long before this public right, and being in possession of the principal lands long before the defender's right, his possession of the principal must be reputed as possession of the warrandice; and so *fictione juris*, he being prior both in right and in possession, he ought to have a sentence against the tenants of the warrandice.

The Lords having gravely considered this case, both the importance, difficulty, and inconveniences of it, found, that though the defender's right was public, and clad with possession long before the pursuer's right, yet he ought to be preferred to the mails and duties of the warrandice lands, &c.

*Act.* Lockhart. *Alt.* Cunyghame.

*Advocates' MS. folio 55.*

1666. *February 12.* LORD LEE *against* PORTEOUS.

MY Lord Lee having bought the lands of Symonton, with the burden of some wadsets, in the which wadsets it is provided that after redemption the wadsetter should have a five years tack of the land for payment of a small duty, far within the rent of the money; and my Lord, having redeemed the wadset to which five years tack is subjoined, did raise a reduction on the old act of Parliament made in King James II.'s Parl. 6. cap. 19. declaring all tacks set for half mail or nearly, not obliging. Against this