Gosford reports this case:

No. 175.

The pursuers and defenders being five in number, and all of them being tutors dative, whereof four of them were nearest of kin on the fathers' side, and the pursuer related only by the mother, he did thereupon intent action: That seeing one of the cautioners of those on the father's side was dead, and had none to represent him, and that the said tutors on the father's side, without calling the pursuer, did either administrate, or when they did call him, did combine and outvote him; that either they should of new find sufficient caution to warrant the pursuer from all hazards, or else that he should have the sole administration upon sufficient caution to warrant them from all dangers. It was alleged for the defenders, that they being all conjunct tutors with the pursuer, and having found caution, they could not be removed from their office unless they could libel against them as suspect tutors by reason of malversation.

The Lords did sustain the defence, and found, that the ground of this pursuit was a mere novelty, and that the law allowed no remedy to put a tutor out of his office but as being suspected upon malversation; yet they ordained, that new caution should be found in the place of him that was cautioner for the tutor who was dead.

Gosford MS. p. 263.

1673. *January.* ——— *against* KIRKDELLS.

No. 176.

It was debated but not determined, if a minor or idiot, having had a tutor dative, if upon the tutor's death, there could be a tutor of law served, or only another tutor dative; and thereafter my Lord Nevoy got a tutory dative, but the interlocutor was delayed.

Harcarse, p. 296.

*** Harcarse mentions Castlehill's Practicks as his authority for this case, and for Nos. 169, 171, 172, and 173.

1673. *July* 9.

ALEXANDER, THOMAS, and WILLIAM FORBESSES, and their CURATORS, *against* FORBES.

No. 177.

A father being denounced rebel and fugitate for murder, pay-

In a pursuit at the instance of the said brothers, against John Forbes of Balfling, as executor to Forbes of Lesly, for payment of 1000 merks left in legacy by Forbes of Lesly, it was alleged that he had *bona fide* made payment to the pursuer's father, who was their administrator in law. It was replied, That that pay-

No. 177. ment made to him of a debt, as administrator to his children, was not sustained.

ment could be no ground of a defence, because he could not be reputed administrator the time of the payment, being denounced rebel by criminal letters, for not compearing to underly the law for a murder, and having fled out of the country where he lived before that time; so that the defender was not *in bona fide* to make payment. The Lords did repel the defence in respect of the reply, and found, that his being denounced and fugitive being notourly known, the defender was *in mala fide* to make payment to him, who could never have pursued or recovered decreet as administrator.

Gosford MS. p. 356.

1673. *December* 10.

JANET TENNENT and her SPOUSE *against* JOHN TENNENT.

No. 178. A tutor cannot acquire in prejudice of the pupil.

John Tennent having been tutor to Christian Tennent, his niece, did lend to Sir James Hamilton on bond, the sum of 1300 merks, *tutoria nomine*, and took the bond to her, and failing of her by decease to the said John himself, and his heirs. She having died thereafter, the tutor having uplifted the sum, the said Janet did pursue as nearest of kin to Christian the heir of the pupil, for payment of the sum, upon this ground, that the bond was moveable, and so fell to the executor; and any substitution made by the tutor in his own favour being against law, and to prejudice the nearest of kin who had only right, could not prejudge her. It was alleged for the tutor, that the sum of money contained in the bond was his own money, seeing by her father's testament all the free goods were £.27 Scots, neither could it be made appear that her father left any estate whereby he as tutor could have made up that sum; 2*do*, The tutor being nearest heir to the pupil, might have lent out of his own means, and taken bond in her name, and so might justly substitute himself, failing him by decease, it being in his power to uplift the same, or to compense *ante rationes redditas*. It was replied, that the bond being conceived as said is, the tutor having acknowleged the money to belong to his pupil and not to himself, who acted only *tutoria nomine*, the pupil, nor her nearest of kin, were not obliged to enquire or make out what way so much could belong to her, and it cannot be presumed that the tutor would have lent his own money upon such a bond. The Lords did repel the defence, and found the pursuers as nearest of kin, to have only right, notwithstanding of the substitution, which could not prejudge them as debtors to him for any sums of money that he had given out as his own.

Gosford MS. No. 646. p. 376.