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.