1685. *March.*

BURNET, Brother to CRAIGMYLE, *against* MR. ALEXANDER JOHNSTON, Curator.

No. 214.

Found that a curator, not having made inventory of the pupil's estate, and left doubles conform to the act of Parliament, ought to be removed as suspect; although it was alleged by the curator, that the pupil had but one bond of 10,000 merks for his estate, which was due by his brother, and so known to his relations that there needed no inventory; and found, That though a tutor, by act of Parliament, was not to have expenses he had been at himself for attendance on the minor's affairs and processes, yet he ought to have allowance for what he expended upon the processes, the same being profitable to the pupil, and also for the pupil's aliment and education.

Harcarse, No. 984. *p.* 278.

1685. *December.*

DURHAM of Omachy *against* GRIZZLE BARCLAY, the Tutor's Relict.

No. 215.

One Durham, tutor or pro-tutor to Omachy, having, as was alleged, taken a right during the tutory to some lands wherein the pupil's father died in possession, and abstracted the minor's rights; the Lords found, that the tutor or pro-tutor could not invert the pupil's possession, and appointed him to be re-possessed, seeing the tutor did not enter *via juris*; and reserved the point to be debated thereafter.

Harcarse, No. 984. *p.* 278.

*** P. Falconer reports this case:

Durham of Omachy having pursued an action of removing against the Lady Ethie Betton, wherein he libels, that Duncan her husband was his tutor or pro-tutor, and that Durham of Omachy his grand-father, to whom he was apparent heir, died in the possession of the lands of Ethie-Betton, and that the said tutor had destroyed, or given back the pursuer's grand-father's right to the said lands, and had taken a new right in his own name; and lest it should be interpreted to be to the behoof of the pupil, (being acquired by the tutor) the same has been destroyed, and a new right taken in the relict's name; and therefore, the minor ought to be restored to the possession in which the grand-father died, and that the defender ought to be removed;—it was alleged for the defender, that the defunct having no heritable right, but allennarly temporary rights, such as a right to the liferent, and a gift of ward, the tutor might acquire an heritable right after that was elapsed, and continue in the possession by virtue thereof; and therefore cannot be obliged to cede the possession, seeing the pupil had no right, which might be the title of his possession. It was replied, that the tutor being

No. 215. master of the pupil's writs, the pursuer was not obliged to debate what right his grand-father had, but he ought to be put in his grand-father's possession by the tutor, seeing the tutor cannot allege, that he was excluded by any from the possession *via juris*. The Lords found, that the pupil was not obliged to debate, what was his grand-father's title, but that he ought to be reponed to the possession of his grand-father, the time of his death, continued by the tutor and his relict since his death, reserving to the relict, to recover the possession by virtue of her title, as accords of the law.

P. Falconer, No. 110. *p.* 77.

1686. *January.* THOIRS *against* LAIRD TOLQUHOUN.

No. 216. In a reduction at the instance of Sir David Thoirs, advocate, against the Laird of Tolquhoun, of a disposition granted by John Forbes, Sir David's author, to Tolquhoun, of the lands of Craigfintry; the Lords found, that Tolquhoun being pro-tutor to John Forbes, that the said John Forbes and Sir David, as having right from him, ought to have the benefit of the compositions of the rights acquired by Tolquhoun of his pupil's estate during the time of his tutory.

Sir P. Home MS. v. 2. *No.* 773.

1686. *January.* M'DOUGAL *against* APPLECROSS.

No. 217. In a reduction and improbation at the instance of Sir Andrew M'Dougal, as having right to an apprising against my Lord Lovat, compearance being made for Applecross, who had right from the tutor of Lovat to a prior apprising.

It was alleged for the pursuer, that Applecross's apprisings having come in the person of the tutor of Lovat during the tutory, it must be presumed acquired with the pupil's means, and for his behoof.

Answered for the defender: The allegeance of *intus habes*, or of acquiring to the minor's behoof, is only competent to the pupil and his heirs, and not to a creditor or successor by diligence; and it is only competent against the tutor and his heirs, and not to a creditor or successor by diligence; and it is only competent against the tutor or his heirs, and not against his singular successors in lands and real rights.

Replied for the pursuer: Rights in the person of the debtor are affectable by the comprising. It was so found in the case of James Cleland and Lamington, against a singular successor in personal rights; and there is the same reason why the like should hold in real rights.

The Lords sustained the allegeance and reply for the pursuer, and found, that the same was competent to him against a tutor's singular successor *ante redditas rationes*; and found, that though it did appear in the event of counting, that the tutor had counted *qua talis*, without claiming allowance for the apprising acquired