

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.*

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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 Craighintry; 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.*

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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 allegiance 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 allegiance 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

by him, yet the said apprising should be always redeemable by the heir and his creditor, upon payment of the true sums, seeing the tutor might have interrupted the legal by timeously using an order. No. 217.

*Harcarse, No. 986. p. 278.*

1686. January. PATRICK WILLIAMSON *against* LADY BORTHWICK.

No. 218.

The Lady Borthwick, debtor to Thomas Littlejohn, tailor, in £.300 of an account, having granted bond for it, for behoof of the creditor's children, to his brother Andrew Littlejohn, who was tutor testamentary to some of them, and acted as pro-tutor for the rest; and she being pursued by one Williamson, the husband of the eldest daughter, for her proportion, in respect that Andrew was not curator to her;

It was alleged for the Lady, that Andrew being tutor to some of the children, and the defender ignorant of their ages, and the sum not divided among them, she was *in bona fide* to grant bond to Andrew, and had paid him £.200 of the money.

Answered for the pursuer: Debtors pay to pro-curators upon their peril. Again, the pursuer's wife not having subscribed Andrew's discharge, the same was not valid, suppose he had been her curator; *multo minus* when he was no curator.

The Lords were of different opinions about the point, if the defender's *bona fides* in these circumstances, did liberate her as to what she had paid; but there being £.100 still resting, which exceeded the pursuer's share, they decerned the defender to make payment of the pursuer's proportion, which took off the debate.

*Harcarse, No. 987. p. 279.*

1686. February 25. KENNEDY *against* CUMMING.

No. 219.

The action between Janet Kennedy and her tutors, and Matthew Cumming, merchant in Glasgow, being advised, the Lords found the confirmation of Janet Cunningham's testament by Matthew Cumming was informal and unwarrantable, making the goods confirmed in her testament as if they had been her husband William Hewat's, on this pretence, forsooth, that in the two years of her viduity she had not time to acquire them, and so they behoved to be presumed to be her husband's; and therefore ordained the Commissary to rectify this, and to confirm the testament of new *gratis*; and ordained the substitutions in the bonds filled up by Matthew Cumming to be altered, and formed conform to the first destination, except as to the 3000 merks; and that he should restore the whole writs upon inventory: And as to Campbell of Ormadill, the tutor, in regard he had not made inventory, conform to the 2d act of Parliament 1672, therefore declared he should get no allowance from his pupil of any expenses he had debursed.

*Fountainhall, v. 1. p. 406.*