

*rem pupilli salvam fore*; and her third noways belonging to them, though the tutor was liable for it in respect of his intromission therewith, yet it being not *qua* tutor, but as assignee to the executory, it was extrinsic to his office, and so could not bind his cautioner.

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1693. *February 14.* IRVINE of Inchery, and OLIPHANT, his tutor, *against* SPENCE and WEYMES.

THE Lords found, seeing the tutor died during the count and reckoning, that they would not suffer his heir to be cited *incidenter*, but that they behoved to raise a formal process of transferring against him. It were good the Lords fixed this variation, for at other times they allow parties to be heard *incidenter*.

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1693. *February 14.* JAMES DEANS of Woodhousely *against* SIR JAMES PRIMROSE of Elphiston.

THE Lords at first repelled that defence of Sir James's, that being minor, *non tenebatur placitare*; seeing it was only a redeemable right by the back-bond, and a trust; and *2do*, his goodsire, Sir Archibald Primrose, was never infest thereon: but Sir Archibald's heirs of line not being cited, the Lords stopped process till that was done; and found it not sufficient, that the heirs of Sir William were cited, who was heir of tailie and provision in this tenement.

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1693. *February 14.* The CHILDREN OF MR. JAMES FITHIE *against* The EARL OF NORTHESK.

THE Lords found no process in the exhibition, if insisted in *primo loco*; for they thought a debtor not bound *edere instrumenta contra se*, by producing a bond which he alleges was paid, given up, and retired: But found the presumption of liberation *ubi chyrographus est apud debitorem* may be taken off by a more pregnant and positive one, that it came not by payment into the debtor's hand, but by some other indirect and sinister way; *viz.* that here it was confirmed by their mother in their father's testament, (which the Lords found a sufficient title to the children as nearest of kin, without taking a dative *ad non executam*; but did not find that upgiving, in the confirmed testament, a sufficient probation of the existence of this bond,) and was lying beside her the time of her death; and her cabinet being broken up, the said bond of 8000 merks was taken out of it, and at last came into the hands of one of Mr. John Johnston, a broken man, who trans-