

granted to his brother a back-bond, and that it was lodged in Mr Patrick Middleton's hands, and that he had got it from him, and had burnt it. Kennoway next pursued a declarator of trust against Robert, and Lord Dun assoilzied, because there was no proof in terms of the act 1696. The pursuer reclaimed, and some of the Lords thought there was a fraud in Robert Ainslie, and therefore proveable by witnesses. I could not agree upon that footing, because every breach of trust may be accounted a fraud, so that would be a repeal of the act 1696. But I thought, that though the act made a written declaration of trust necessary, yet it did not follow that where such had been granted, and either lost casually, or stolen, or robbed, that therefore the right was lost, for still the tenor might be proved, or if stolen or robbed by the trustee, that theft or robbery might be proved by witnesses, and he obliged to make it up;—that here was sufficient proof against Robert of his unwarrantably abstracting and destroying the back-bond, and therefore the trust might be declared against him; and the Lords found accordingly; and renewed this interlocutor on a transference against his heir.

TUTOR—CURATOR—PUPIL.

No. 1. 1734, July 9. MILLER *against* DUNNING AND WEIR.

THE Lords refused the bill as incompetent by summary bill.

No. 2. 1735, July 24. CHILDREN OF EARL OF WEMYSS *against* THEIR BROTHER.

THE Lords demurred whether the tutors being only liable for intromissions but not for omissions they could be decerned personally for intromissions in their factors hands; and therefore the pursuer insisting only for decret against them for the interest, the same was restricted accordingly. 2dly, They found the clause committing the education of the children to their mother was not a condition of the aliment, and refused the bill *in toto*.

No. 3. 1735, Dec. 5. GRAHAM *against* THE EARL OF MARCH.

THE Lords were of opinion that the rule that a tutor cannot alienate without authority of a Judge extends to heritable debts as well as rights of property; but this being an alienation in favour of the debtor or reverser who had a right to compel him to receive his money, they found the authority of a Judge not necessary, and assoilzied from the reduction. The President doubted of this interlocutor. Lord Newhall thought a tutor had right to uplift heritable debts as well as personal. It was asked if this would extend to proper wadsets. But many of us doubted of that point, because a proper wadset is *pactum de retrovendendo*,—29th January.—5th December, The Lords adhered to the interlocutor marked 29th January last unanimously, at least *nem. con.*; and indeed it seems

implied in the act 1672 anent tutors and curators, *sed vide* Balfour, Title REDEMPTION OF LANDS, Cap. 20.

No. 4. 1736, Feb. 19. SCOTT of Rossie *against* STRACHAN of Balgavies, &c.

THE Lords unanimously found that the curators ought not to give allowance of the L.100 promised by Rossie to the tutor for undertaking the office. They would gladly have given the allowance, and thought the tutor deserved it, but they thought it not in their power and likewise *mali exempli*.

No. 5. 1736, July 30. M'WHIRTER *against* MACKILVAN.

THE Lords preferred the tutor of law and who was his pupil's next successor to the custody of his pupil, a girl of five years old, before the grandfather by the mother's side, (the mother having married a second husband) the tutor offering to aliment gratis. What moved them to do so was the smallness of the pupil's means whereof the interest was only about 40 merks *per annum*, which I own I thought no good reason, because neither seemed the tutor to be very rich.

No. 7. 1736, Dec. 10. WAUCHOPE *against* WAUCHOPE.

See Note of No. 6, *voce* MINOR.

No. 8. 1737, June 17. SIR ROBERT DOUGLAS *against* SIR JOHN SCOTT.

See Note of No. 12, *voce* PRESCRIPTION.

No. 9. 1737, Nov. 4. CARMICHAEL *against* PORTEOUS.

THE Lords found that it is not competent to the tutors to object to the pupil's right to the subjects intromitted with by them *tutorio nomine*; 2dly That there is sufficient evidence that there was a conveyance by the mother to the pupil's younger children, 28th June. 4th November, The Lords adhered to the above interlocutor.*

* There is a contraction here in the manuscript not easily deciphered, but which seems to denote that the President was against the interlocutor.

No. 10. 1739, Nov. 16. WATSON *against* DAVIDSON.

See Note of No. 10, *voce* ALIMENT.

No. 11. 1739, Dec. 4. E. M'WHIRTER *against* E. FOWLER.

THE Lords adhered to the Ordinary's interlocutor, and thought that such a general intromission and management inferred a protutory without ever assuming the name of tutor; in which I own I had a difficulty, and thought that would be no protutory by the civil law.—December 4th The Lords adhered, *remit*. Arniston, Tweddale, *et me*.