land will certainly follow this rule, and not find Watt liable for money already arrested in his hands by the course of law. As to finding security, I do not relish it. We are not to take notice of what happens in another country: The ordering security to be found would look as if we were doubtful of our own powers; and might be so held in England: this might afford an argument for the English judges to find the attachment effectual.

KAIMES. Here is my difficulty: Had the debtor paid to the assignees before the process came on here, his *bona fides* would have exempted him from second payment. But now there are two attachments at once; one in this country, one in England. Shall we ordain this man to pay here, and, at the same time, leave him to pay again in England?

PRESIDENT. There is a regular arrestment and a forthcoming. How can we suffer goods to be drawn out of this country by means of the accident of the debtor being attached in England? It is said he may pay twice. No: I will not suppose that judges in England will do otherwise than we ourselves would do in such a case: We would set the man at liberty. To make him pay twice would be a monstrous injustice. I cannot doubt of his defence being found good. It is below the dignity of this court to make the creditor-arrester find caution. The ordering caution to be found would give a handle for misleading the English judges to do wrong.

GARDENSTON. Arrestment and forthcoming are equivalent to payment; and we can never suppose that the English judges will disregard the legal defence of payment.

On the 7th February 1769, "The Lords preferred the arresters without caution."

*Act.* J. Douglas. *Alt.* A. Crosbie. *Reporter*, Stonefield. *Diss.* Kaimes; and, as to not finding caution, Monboddo.

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1769. *February* 10. THOMAS DUNDAS of Fingask *against* MRS AGATHA DRUMMOND of Blair.

[*Faculty Collection, IV.* 335; *Dictionary*, 15,035.]

WARRANDICE—SUPERIOR AND VASSAL.

**Heir of one selling with Procuratory and Precept, not bound to enter with the superior.**

AUCHINLECK. I have always considered that when a man sells an estate, with an obligation to infeft, *a me*, or *de me*, and, for this purpose, grants procuratory and precept, that this is a good and regular obligation; but, as soon as he grants the procuratory and precept, he is *functus*, and the disponee has right to use either the one or the other. If the disponer had not a complete title, there is recourse against him; but, if he had, he has no farther concern. Why should we oblige a disponer to keep up lands in his rights after he has sold

them? According to Mr Dundas's argument, he ought to continue the lands in his charters, were it for 500 years. The present question is of great moment to the land rights in Scotland. If this were an estate held of the crown, the argument would be the same; and thus Mrs Drummond would be obliged to take out a charter from the crown for the single conveniency of the vassal: and this obligation might often recur, to her great detriment and expense, without any possibility of advantage.

PITFOUR. The reason of the obligation to infeft, and of the warrandice, is in case the disponer happens not to have a full right to the lands.

MONBODDO. It seems to be admitted that Mrs Drummond might enter if she pleased. The question is, Whether does the warrandice oblige her to enter? If Mr Dundas had a precept, and no procuratory, he might have compelled Mrs Drummond to enter. Why should his right be diminished by having both procuratory and precept?

PRESIDENT. When there is only a precept, there remains a superiority,—a real estate in the superior; but, when there is a procuratory, there is a right defeasible at the will of the vassal; and this makes the difference.

GARDENSTON. Had this method of disappointing the superior been lawful, it would have been discovered long ago.

On the 10th February 1769, "The Lords found that Mrs Drummond could not be obliged to enter with the superior, and therefore assoilyied, and found expenses due;" altering the interlocutor of Lord Monboddo.

*Act.* H. Dundas. *Alt.* R. M'Queen. *Diss.* Monboddo. He was much hurt with this interlocutor: he said to me, "Will you leave us no law?"

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1769. *February* 10. JOHN BADENOCH *against* GEORGE, &c. KELMANS.

### MINOR.

**Decree having been pronounced against a Minor having a tutor, and the reclaiming days having, through negligence, been allowed to elapse—*found* that the Minor was not entitled to be reponed on the head of minority and lesion.**

JOHN Badenoch was a minor, having a tutor. In a process, at the instance of Kelman, against him, the Lord Ordinary, after pleadings, both *viva voce* and written, upon the merits of the action, in which the minor's pleas were fully stated, decerned against him. A representation was prepared against this interlocutor, but it was omitted to be lodged until after the lapse of the reclaiming days, and was, in consequence, not received; and the decree was extracted. In a reduction of this decree, at the instance of the minor, it was

PLEADED,—The pursuer has no occasion to maintain that, where a minor's cause has been fully and fairly heard, and a decree has been pronounced, which has become final, minority affords any reason for opening up the decree: But he maintains that minority is a good reason for restoring a party against the