

ground which would have freed him from payment ; and therefore did assign a long day to the Earl of Winton to pursue and obtain decret against George Mowat or his representatives, who, being made liable for the payment of the duties of the lands during his intromission, might refund the money which Kinghorn had paid, or free both Kinghorn and Winton, at the hands of the Earl of Errol, from whom it was alleged that Mowat had a tack of the said lands, which did endure, after the sale thereof, to the Earl of Marshall, and was not excepted out of his right ; whereby the Earl of Errol might have compensated Mowat upon the tack-duty ; which being founded upon writ, as it was competent against Mowat, the cedent, so it was competent against the assignee.

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1673. February 19. ROBERT MALLOCH *against* GRAHAM of GORTHIE and his TUTORs.

IN an exhibition at Malloch's instance, against John Mitchell, clerk of the stewartry of Stratherne, as depositary of a bond of 4200 merks granted to the deceased Mungo Graham of Gorthie, upon express condition not to be delivered up until the pursuer should receive a disposition of the lands of Cairns, whereof he was heir of tailyie, to Mr Alexander Malloch, from Katherine Malloch, who was heir of line : As likewise, a bond of £1000 due to herself *proprio nomine*, with an assignation made to Gorthie for his relief and security, as being cautioner to the said Katherine for her said debt, and a sum of money given to her for her right and good-will : As likewise, in the said exhibition, Gorthie's apparent heir was called, and his tutors for their interests, bearing a declarator, that the foresaid bonds should be delivered back again ; in so far as it was referred to Gorthie's tutors' oaths, that, *viis et modis*, they had gotten the said bond delivered by Mitchell to them since the intenting of this action ; and, by Mitchell's oath, who was the depositary ;—that it was consigned and deposited in his hands upon express condition not to be delivered up but upon the fulfilling of the foresaid conditions, *viz.* the delivery of the disposition of the estate, and the bonds granted to the heirs of line, with the assignation made to the deceased Graham of Gorthie ; otherwise it ought to be declared that the said bond, of 4200 merks, should never be obligatory until the said conditions should be fulfilled :—

It was ALLEGED for Gorthie, That the bond called for, being now in his own possession, could not be taken away by the oaths of his tutors ; for, by our law, the depositions of a writ is not probable but *scripto vel juramento partis* ; and it were of a most dangerous consequence that children, having rights to bonds granted to their father, should be taken away by their tutors' oaths : and John Mitchell's oath could not be taken to make up any alleged conditions of depositions, seeing the bond was put in his hand as a notary for taking a seasine, in name of the deceased Gorthie, of the said lands, conform to the precept of seasine contained in the said bond ; which being a necessary and just cause, and after taking of the seasine, the bond being delivered back, his oath can never be taken to prejudice the defender, who is a minor, and knows nothing of these alleged conditions of depositions.

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It was REPLIED, That the exhibition and declarator was well founded, notwithstanding of the defence ; seeing tutors, being intrusted and nominated by the father, their oaths are receivable for proving the conditions or depositions of writs, as the father himself, if he had been alive, his oath would have been taken thereupon : for the law presumes that tutors will never swear any thing to the prejudice of their pupils ; and if they shall depone that they got the bond from Mitchell since the intenting of this cause, then, in law, his oath ought to prove the terms of the deposition ; otherwise the bond must be looked upon as an undelivered evident : neither can his having of the bond be attributed only to that reason, that he might take seaisine thereupon, seeing he being the writer of the bond and assignation, and of the disposition, which was the cause of the bond ; he was likewise clerk of the stewartry, and so might take seaisine whenever he pleased, without an express order. Likeas, in fortification of the summons and reply, the conditions of the deposition were offered to be proven by the communer's and witnesses' oaths, inserted in the bonds and writs ; and it was craved that the Lords would examine them *ex nobili officio*.

The Lords, having considered this case as being of consequence and difficulty, did refuse to examine witnesses *ex officio* to be a ground for taking away this bond from a pupil who was innocent and knew nothing of these transactions : and, as to the finding it relevant to be proven by the tutors' oaths,—the minor and tutors themselves declared, that they were content that it should be found relevant to be proven, by the tutors' oaths, that they had gotten the bond since the intenting of this cause, being clear to depone thereupon : otherwise the point of law had been very difficult to have been determined ; and it seems their oaths could not take away their pupil's bond : so that the only remedy in law was to make Mitchell, the depositary, liable for fraud and circumvention, in deceiving his trust in giving up the bond ; and the tutors, if they were *participes fraudis*, by taking indirect ways to get the same.

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1673. February 28. BAILIE JOHNSTON, FRANCIES KINLOCH, and OTHERS,  
Merchants and Tradesmen in Edinburgh, *against* SIR ANDREW RAMSAY,  
LORD ABBOTSHALL.

IN the reduction and declarator raised at the instance of the pursuers, who declared that they insisted in the declarator only *ad hunc effectum*, that, as to the future, it might be found and declared,—That the magistrates within burgh, and especially the burgh of Edinburgh, ought to be yearly changed ; and that no persons of a higher degree than a merchant should be capable to exercise the office of a magistrate within the said burgh ; and, consequently, that Sir Andrew Ramsay, Lord Abbotshall, being advanced to be a Senator of the College of Justice, and so of a higher quality and rank than a trafficking merchant, ought to be declared incapable to be elected in all time coming. Which declarator they founded upon these grounds and reasons,—That the privilege of the burgh of Edinburgh, being most ancient, and continued for many years,—that they should have the election of their own magistrates yearly out of such as