

the years that the pursuer was entertained in the curator's family so high, as that he got allowance of 100 merks yearly upon that consideration. No. 207.

Harcarse, No. 976. p. 276.

1683. *February.* **TOLQUHOUN** *against* **SIR DAVID THORIS.**

No. 208.

Found that one having acted as pro-tutor, by taking the pupil into his family, managing his affairs, and intending a process before the council, for recovering the pupil back to his family, from some persons that had seduced him away, he, the pro-tutor, could make no advantage by a gift of the pupil's ward and marriage he had got, but was obliged to denude thereof upon re-payment of the sums he paid for it. In this process the import of curators authorising their minor, not jointly by signing together *unico contextu*, but separately, was debated, but received no interlocutor.—See No. 216. p. 16308.

Harcarse, No. 977. p. 276.

1684. *January.* **VISCOUNT of OXFORD** *against* **HIS CURATORS.**

No. 209.

Found, that when a pupil's tenants are not able to pay the by-gone rents before the tutory, and the current rents, the tutors may forbear to exact what the tenants cannot spare without hazard of laying waste the lands by the tenants being disabled; albeit it was alleged by my Lord Oxford the pupil, that there was no fear of casting the lands waste, for that other tenants, able to pay the rent, would have been got; but here the curators had been so cautious as to procure a precognition by warrant of the Lords, conform to which they had acted when their pupil was abroad.

Harcarse, No. 978. p. 276.

1684. *January.*

THE TUTOR of LUDE *against* **THE LAIRD of LUDE and HIS CURATORS.**

No. 210.

In a tutory account, the Lords found, that the tutor might consume the flying customs, viz. hens, capons, and chickens, (not geese) without being liable to his pupil for the value; and likewise they allowed him some stones of butter yearly, in respect he being tutor in law, and living in a different shire from where the pupil's estate lay, had frequent occasion to come there to manage the pupil's affairs.

Harcarse, No. 979. p. 277.

1684. *November 12.* **—————** *against* **CUNNINGHAM.**

No. 211.

The writer of a testament was named therein tutor-testamentary, having, without confirming or protesting against any acceptation of tutory, procured a gift of his

No. 211. pupil's ward and marriage, and having two years after the gift consented to a discharge with the pupil of some rents, without designing himself either tutor or donatar; and having afterwards pursued as donatar;

It was alleged: That the pursuer could have no benefit by the gift, being to be looked upon as tutor; and his acceptation of the office was inferred from the foresaid circumstances, especially he being the pupil's uncle.

Answered: The pursuer's writing himself tutor in the testament can import no acceptance; and his consent to the pupil's discharge being posterior to the gift, cannot be joined to make any qualification of acceptance, and tutors are only liable from the date of their acceptance.

The Lords found him liable as tutor.

Harcarse, No. 982. p. 277.

No. 212. 1685. January. BURNET of Craigmyle *against* BURNET.

In a reduction at the instance of Sir Alexander Burnet of Craigmyle against Thomas Burnet his brother, of an act of curatory, whereby the said Thomas Burnet did chuse his curators before the Bailies of Aberdeen; the Lords found the act of curatory was null, in respect the nearest of kin that was cited to see the curator decerned, did not dwell within the Bailies' jurisdiction.

Sir P. Home MS. v. 2. No. 649.

No. 213. 1685. February. LAIRD of LAMINGTON *against* JOHN JOLLY, Arrester.

William of Lamington being pursued upon a contract entered into with his uncle Robert, whereby he was obliged to pay 600 merks yearly to his uncle; he proponed the exception of minority and lesion.

Alleged for the pursuer: The reason of minority and lesion is only competent by way of revocation and reduction *intra annos utiles*; both which have been omitted by the defender.

Answered for the defender: The contract is *ipso jure* null without revocation, as being entered into by him without consent of his grandfather, who was administrator in law, and in place of curator to him.

Replied: Though a father be administrator in law to his children, in place of curator, so as deeds without his consent are null, that cannot be extended to a grandfather; seeing it is usual for minors to chuse curators when they have a grandfather, but not while the father lives, and a grandfather could not be liable for omissions; so that he not being liable as tutor *passivè*, he can have no active title *qua* grandfather.

The Lords found, that the want of the grandfather's consent and subscription did not make the contract null *ipso jure*, and repelled the defence, in regard no revocation or reduction was raised in due time.

Harcarse, No. 713. p. 202.