

1688. July 10.

CAPTAIN WILSON and his SPOUSE *against* FOWLIS of Ratho, the Curator's Heir.

No. 227.

Found that tutors or curators are obliged to employ moveable debts, or annual-rents of sums, or bonds uplifted by them during their office, upon annual-rent, within a year after their uplifting of the same, and that, *e contra*, they ought to have allowance for what they expend in alimending the pupil, or in paying of his debts or annual-rents; *2do*, Found that a tutor, at the expiring of his office, is obliged to stock the whole unuplifted annual-rents due before, conform to ancient practise; but that curators, after expiring of the curatory, are not obliged to stock unuplifted annual-rents, they being liable for the responsableness of the debtors, or for diligence; *3tio*, Found, that where tutor or curator are debtors to their minor, they are to be countable for the annual-rent due by themselves, as for annual-rent actually uplifted from other debtors; and the Lords declared they would so determine in time coming.

*Harcarse, No. 998. p. 282.** * Fountainhall's report of this case is No. 43. p. 505. *voce* ANNUAL-RENT.1688. July 12. JOHN REID *against* SIR ROBERT BERKLEY.

No. 228.

One being pursued for a legacy, alleged, That the sum legated was due by a bond secluding executors, which could not fall under testament.

Answered for the pursuer: That the defender being tutor, and nearest of kin to the testator, had to preclude his *testamenti factionem*, unwarrantably renewed the bond, which was conceived in his father's time to heirs and executors, with a clause secluding executors.

Replied: It is usual for provident men to adject a clause in their bonds secluding executors, for saving of quot and confirmation.

The Lords decerned against the defender; and found the renewing of the bond in other terms than it was before, unwarrantable; although, if the tutor had made it heritable, by an obligation to infest, the thing had been less questionable.

Harcarse, No. 1000. p. 282.

1688. July 12.

A. *against* B.

No. 229.

In this case, a tutor having uplifted his pupil's moveable sums, and, for better securing them, having taken an heritable security, and the pupil dying, and they, by the innovation of the security, falling to the tutor, who was his heir, the nearest

of kin quarrelled it as a deed to his own benefit and behoof, and which restricted the minor's power of disposal; for if they had remained moveable as they were left by the father, they would have fallen under his testament, and she might have disposed on them; but being heritable, she could not during her minority. The Lords found the tutor could not innovate the securities so as to prejudice the nearest of kin. No. 229.

Fountainhall, v. 1. p. 511.

1688. July 13.

CLARA and PATRICIA RUTHVENS *against* HUGH WALLACE.

Mr Ruthven, when he went abroad, having granted a factory with consent of his curators, to Hugh Wallace, and obliged him to count to a *quorum* of the curators; and he having accordingly counted to them for some years, and being pursued by Mr. Ruthven's sisters, craved to be assoilzied for the years he had counted. No. 230.

Answered: A factor to a curator is in effect in the case of a curator; and although the counting may give him the benefit of his having the curators *primo loco* discussed, yet the factor must be liable *in subsidium* to the minor's representatives, although he hath given up his instructions to the curators.

The Lords sustained the reply, and ordained the factor to depone, and produce what instructions he had in his hands.

Harcarse, No. 999. p. 282.

1688. July 28.

CAPTAIN GEORGE RAMSAY *against* LORD DALHOUSIE and TUTORS.

Mr. John Ramsay, third brother to my Lord Dalhousie, having, in absence of his second brother, served himself tutor of law to my Lord's children, upon the tutors testamentary lying off and neglected to accept, for whom Sir John Ramsay, one of the tutors testamentary, became cautioner, and was by him appointed factor, and acted as such several years; No. 231.

The testator's second brother, after his return from abroad, took out brieves to serve himself tutor of law; of which service a bill of advocation was presented, upon these reasons; *1st*, There is already a tutor of law served and retoured, whose service ought first to be reduced; *2do*, A *quorum* of the tutors testamentary had accepted, which excludes any tutor of law.

Answered: The first service of tutory was null *ex evidentiâ rei*, it being notour that John was but the third brother; *2do*, The tutors testamentary had lain off for several years, and suffered a tutor of law to serve; and Sir John Ramsay, one of the testamentaries accepting, had renounced the office, by becoming cautioner for the pretended tutor of law.