Plantations finding him only liable in the Exchequer prices. ALLEGED,—This was before Dumfermline got the tack.

The Lords resolved to hear this farther. *Vol. I. Page* 661.

1678, 1682, 1683, 1684, 1688, *and* 1695. WILLIAM HAMILTON of WISHAW *against* ANDREW LUNDY and LORD MELVILL.

[See 30th November 1677, Oliphant against Hamilton.]

1678. *November* 20.—IN the count and reckoning betwixt William Hamilton of Wishaw and Andrew Lundy, and my Lord Melvill, his assignee, Pitmedden being auditor, he found a tutor, *ante redditas rationes*, could not legally and validly assign any debt owing to him by the minor's father; because, *ex eventu* of his intromission with the minor's estate, and after counting, he may be found *intus habere*, and to be paid, and that debt to be discounted. See *8th December* 1671, *Scot; item, 25th January* 1677; and *12th January* 1678. This wants not difficulty; for though, in the R. law, *l.* 20, *C. de Adm. Tut.* pupils and minors had a hypothec in their tutors' and curators' goods, which affected them so as to hinder transmission, yet our law has given them no such privilege by hypothec or pledge. See *25th July* 1679, *Cleland.*

In the same cause the two following points were reported to the Lords:—1*st.* Wishaw, having produced a bond, under Andrew Lundy's hand, bearing, That he had received a bond of Culfargie's, to Sir John Brown of Fordel, for 4000 merks, and that he should either restore it or pay the same; and Wishaw, craving compensation thereon, conform to the alternative, Lundy ALLEGED the ticket was null, because it wanted both writer's name and witnesses. Wishaw offered to condescend upon the writer, and to prove, by extraneous witnesses, that it was Lundy's subscription, and that Lundy had Culfargie's ticket; all which were sufficient to adminiculate the defect and want of the witnesses. The Lords found the condescendence upon Robert Carmichael, in Sanquhar, as the writer of it, sufficient; but found the presumption, that the said ticket was once in Lundy's hand, not sufficient to supply the want of the other witnesses, unless Wishaw will offer to prove that Lundy pursued Culfargie on the said bond. I hear of a practick, in 1675, between *Vans* and *Malloch*, allowing a null bond to be adminiculated; which is contrary to this, and also to what was decided *19th July* 1678, between *Tillicoultry* and *Rollo*. Then Wishaw craved Lundy's oath of calumny on the truth of his subscription.

The *second* controverted point was, Wishaw contended Lundy behoved to defalcate the sum of ——— of his comprising; because, being executor *qua creditor* confirmed to Sir John Brown of Fordell, he had suffered John Hamilton to recover, as another creditor of Fordell's, a decreet against him as executor; which was collusive; and he would not have done unless he had obtained satisfaction for his own sum first; he, *quoad* the superplus, being countable to co-creditors as any other executor is. The Lords found the presumption, founded on the decreet recovered by Hamilton against him, not relevant to infer collusion; and therefore rejected that article, except Wishaw would prove

that Lundy or Oliphant did actually get payment of the sum confirmed. Sir G. Lockhart approved of this decision.

Then Wishaw ALLEGED that Lundy had been *in mora* in not doing diligence. ANSWERED,—An executor-creditor *non tenetur ad diligentiam. Vid. ult. June* 1671, and *4th February* 1679, *Wright*, anent this question, If an executor-creditor be obliged to do diligence, and if he will be liable to ascribe and accept the sum in payment to himself, if he neglect to seek it, and so let it perish. But it is thought *juris indubitati*, that he may suffer another creditor to evict it, especially if he thinks himself secure *aliunde*. *Vol. I. Page* 20.

1682. *February* 16.—Lord Melvil, and the Heirs of Andrew Lundy, were assoilyied from William Hamilton of Wishaw's reduction, on Pitmedden's report. *Vol. I. Page* 174.

1683. *November* 16.—In the cause, my Lord Melvil and Andrew Lundie's Bairns against William Hamilton of Wishaw, the Lords did not incline to sustain process at the bairns' instance; though they produced a retrocession and back-bond from Melvil, (he being always paid of certain sums;) in regard he was out of the country, and no procuratory from him; unless they would find caution *de rato*.—Wishaw took advantage that Melvil durst not appear since the late plot, and Monmouth's disgrace. *Vol. I. Page* 243.

1684. *January* 3.—The Laird of Dunlop and Hamilton of Wishaw's case being debated on the tutory, the omissions, and minority, the Lords recommended to them to agree; and named Pitmedden to endeavour it. Wishaw had declined to debate because Melvil was absent. Now they cause Dunlop insist against him. *Vol. I. Page* 256.

March 7.—My Lord Melvil and Lundie's cause, against Hamilton of Wishaw and the Laird of Dunlop, mentioned 3d January 1684, was advised. "The Lords find the discharge imported by the contract, whereof the tenor is proven, does not extend to nor comprehend the omissions during the time of the pupil John Brown; but that, notwithstanding thereof, the tutor must count at the instance of the apprisers from John Brown the pupil, or Wishaw, coming in their right; the apprisers being such as have not subscribed the contract importing the discharge; to the effect the apprising at Andrew Lundy the tutor's instance may be extinguished by the importing and proving the said omissions, and the apprised lands disburdened thereby: but reserve to the tutor, before the auditor, his particular defences against the omissions; but find the discharge does liberate the tutor for his omissions during the time of Antonia Brown, she having renounced to be heir, and reduced her service; and the privilege of making the tutor liable for omissions being personal to the pupil, not to the creditors of her father: and find the tutor must be liable for the haill rents of the lands that the tutor was in possession of, the time that he deduced his apprising; unless that he do condescend that he was legally debarred from the possession." *Vol. I. Page* 280.

1688. *February* 17.—The case of Hamilton of Wishaw against Andrew Lundy, for proving that his comprisings were paid by his tutor-accounts, being advised, the Lords assoilyied Lundy, both from omissions and intromissions. *Vol. I. Page* 498.

1695. *January* 18.—William Hamilton of Wishaw against the Earl of Melvil. The case was, If Andrew Lundy, tutor to Sir John Brown of Fordell's son, should count for the money-rent due at Martinmas 1654, seeing the pupil

died at Yule that year; for it was urged, the tutor had but five weeks wherein to do diligence, and so could not be liable.

The Lords found him not accountable for the money-rent of that term, and far less the victual-rent, which uses not to be delivered till after Christmas.

The next point was, An alternative obligement in the said Andrew Lundy's case,—*viz.* to cause Fairny allow £1000 of the sums due to him by Fordell, or else to deduce it out of the first end of his own debt. This was ALLEGED to be conditional and penal, and which could not take effect till he had been required and interpelled: but the Lords found no necessity of any requisition.

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1695. *January* 18. ROBERT TAYLOR *against* CAMPBELL of GLENFALLOCH and the EARL of BROADALBINE.

ROBERT Taylor against Campbell of Glenfalloch and the Earl of Broadalbine, for a spuilyie and restitution of the damages. ALLEGED,—If it be pursued as a spuilyie, *pœna suos tantum debet tenere auctores;* and the chieftains and heads of the clans cannot be liable. If it be insisted in as a depredation, then that is a crime, and must be first cognosced and tried in the justice-court. ANSWERED,—Damage and interest, arising from a criminal fact and delinquency, may be insisted in before the Lords, being only *ad civilem effectum;* and here it would have no criminal effect, because the crime was pardoned by the king's indemnity, both *quoad vindictam publicam et privatam;* and the 100th act 1587, and subsequent acts anent quieting the Highlands and Borders, and naming judges, are not privative of the session.

The Lords repelled the defence of competency, and sustained themselves judges. *Vol. I. Page* 661.

1695. *January* 18. ROBERT DOUGLAS of KIRKNESS *against* SIR WILLIAM BRUCE of KINROSS.

THE Lords found, Seeing Kirkness craved to be reponed against the transaction, conform to the clause in Sir William's back-bond, he must consign, not only the 3000 merks then paid to his tutors, but also the annualrents thereof since the term of the said back-bond; but that Sir William must not only restore him to his right, but also to his possession he then had of St. Serfe's Inch: and that being proven, then Sir William behoved to hold count for the whole rent of the land since his entry, unless he would instruct that he had then, in his person, rights which were preferable to Kirkness, and would have excluded him; but that he could not found on rights he had purchased since, to debar them. *Vol. I. Page* 661.