

1703. November 17. GRAY and SOMERVEL against ABERCROMBIE.

MARGARET ABERCROMBIE, relict of Alexander Gray, as tutor-dative to Katharine Gray, her daughter, buys from Mr William Abercrombie, minister, her brother, a house in Edinburgh; whereof the narrative runs in these terms: 'Forasmuch as the said Margaret Abercrombie had, for herself, and in name and behalf of Katharine Gray, her daughter, made payment of a certain sum of money to the said Mr William;' and, in the receipt and exonerating part, he discharges the said Margaret and her daughter, and their heirs and executors; and therefore dispones the tenement to the said Margaret Abercrombie, she being in life, and failing of her, to the said Katharine Gray, and the heirs of her body; which failing, to return to the said Margaret Abercrombie, her heirs and assignees whatsoever; whereupon they are infeft. Margaret Abercrombie marries Nicol Somervel for her second husband, who becomes curator to the said Katharine Gray, his stepdaughter; and she dying in her minority, by her testament, nominates her mother her sole executor and universal legatar. Last of all, Margaret the mother dying, she conveys, by disposition, any right she had to that tenement in favour of the said Nicol. Anna Gray, cousin to the foresaid Katharine, and her nearest of kin, serves heir to her, and quarrelling Nicol Somervel's right, he transacts with the said heir, and buys in her right. Mr William Abercrombie finding his sister infeft in the tenement, he serves heir to her by help and staple, and then raises a reduction *ex capite lecti* of Nicol's right; whereupon he, in name of Anna Gray his cedent, intents a declarator against the said Mr William, to hear and see it found and declared, that the said dwelling-house was bought by the mother, tutrix to her daughter, with her said pupil's money, and the substitution unwarrantably made to the tutrix her heirs, failing the heirs of her pupil's body, contrary to law, and the trust reposed in tutors, by which their deeds accrete to their pupils, and cannot be misapplied to their own benefit and profit; it being contrary to the faithfulness of tutors to substitute themselves to their pupils, and thereby defraud their pupil's heirs, and divert the natural channel of succession to their own advantage, and the prejudice of these heirs, who were *alioqui successuri*; and therefore concluded, that the said Mr William might be decerned to denude himself of the right of the said tenement in favour of Anna Gray, and Nicol Somervel her assignee. *Alleged, imo,* Anna Gray, Katharine's heir, founds on the disposition made to the said Katharine and her mother; *ergo* she cannot quarrel the substitution contained *in gremio* of that same disposition; for you cannot approve and reprobate the same writ, nor accept it *pro parte*, and repudiate it *pro reliquo*. *Answered,* This brocard of law does not hold in the case of minors; for if tutors acquire real rights to them, and clog them with unjust and undue substitutions, they may get the substitution by which they and their heirs are lesed to be declared null, and yet still claim the benefit of the real right.—THE LORDS repelled the first allegiance, in respect of the answer. *2do,* *Alleged* for the defender, That Nicol Somervel could never quarrel the said dispo-

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fiction, nor Margaret Abercrombie's, because he had homologate the same, by accepting of a right from the said Margaret. *Answered*, He was making no use of the right he had from the said Margaret, his wife, but allenarly founded on Anna Gray the heir's right.—THE LORDS found no homologation in the case. *3tio, Alleged*, Money being a fungible; so that if any buy a house with another person's money, and take the right in his own name, he becomes fiar and proprietor of the purchase; and the owner of the money, with which it was bought, has no direct action for declaring the land to be his, as *surrogatum* in place of his money, but has only a personal action for repetition of his money: And goods bought are not hypothecate for the price, as was found, 24th January 1672*, and 14th June 1676†; and our law has not adopted that privilege given to minors in the civil law, whereby they affected their tutors goods, especially where their mother and her second husband were the tutors. *Answered*, It is very true, if tutors, or any other person intrusted (such as factors, mandatars, &c.) acquire rights in their own name, though with their pupil's or constituent's means; yet if the transmission be simple and absolute, without bearing any relation to their pupils, the real right becomes so in their person, that the other has only an action against him; but here the right taken by Margaret Abercrombie to the house, both in the narrative and dispositive clause, shews, it was the pupil's money, and acquired for her use and behoof: And which is fortified by the mother's count-book, all wrote with her own hand, bearing, what particular sums of her daughter's she lifted to pay the price.—THE LORDS repelled the *third allegiance*, in respect of the answer. The *fourth* defence was, That he, as heir to his sister, cannot denude; because the money uplifted to buy the house was moveable, and the pupil, in her testament, had made her mother her universal legatrix, which made her both debtor and creditor *confusionè*, and being *legatum liberationis*, was equivalent to a discharge of her tutor-counts. *Answered*, Sundry of the sums uplifted were heritable, excluding executors; but, however, a house being purchased with the pupil's money, the minor could neither by testament nor legacy dispose on that heritable right, nor the pupil's heir be debarred from claiming the house.—THE LORDS found it would be relevant, if she had counted for the pupil's whole means, and was discharged, or if she had bought this house with her own money, and held count for all her daughter's means, over and above; that any of these two did elide the presumption of its being purchased with the pupil's money; but found the being nominate universal legatrix did not amount to a discharge: And finding it proven, by the tenor of the disposition, and her count-book, that it was her pupil's money, therefore they declared in Anna Gray and Nicol Somervel's favour, and decerned Mr William, as heir to his sister, to denude; and refused to take in the *actio tutela contraria* in this place to stop the declarator, but prejudice of insifting, as accords, against the said Nicol to clear his curator-accounts.

Fol. Dic. v. 1. p. 48. Fountainhall, v. 2. p. 189.

* The case alluded to is Boylston against Robertson and Fleming; *Stair, v. 2. p. 54, voce Surrogatum.*

† The case meant is Cushnie against Christie; *Stair, v. 2. p. 425. voce HYPOTHEC.*