

never so clearly made out that the debt was once resting ; and the pursuer having no other mean of probation but the defender's oath, it doth sufficiently prove the payment. No. 252.

The Lords found, That the ticket being in the defender's hand, the oath proves, that the sum contained in the ticket was paid to one of the pursuer's tutors in presence of and with consent of the rest, and the ticket retired ; and therefore found the defender not liable, and assolizied.

*Forbes, p. 475.*

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1711. *January 18.* AITON of Kinnaldie *against* SCOT.

A tutor having submitted his pupil's claim, and the pupil being charged upon the decree-arbitral, the Lords had no occasion to determine the general point, if tutors might submit, because they found the decree-arbitral could not afford a summary charge against his pupil, but only an ordinary action ; but they declared, that they would decern the pupil to implement, unless he could instruct evident lesion. No. 253.

*Fountainhall.*

\* \* This case is No. 22. p. 14997. *voce* SUMMARY DILIGENCE.

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1711. *November 14.*

SIR PATRICK AIKENHEAD'S CHILDREN of the First and Second Marriage.

In the action betwixt Sir Patrick Aikenhead's children of the first and second marriage, mentioned 26th June 1711, another point fell to be debated ; that the friends and tutors finding that there was not a sufficient estate to fulfil the conditions of both contracts, they entered into a contract of communication, by which they were to bear a proportional loss ; the benefit whereof the bairns of the second marriage claimed, that their eldest brother might be restricted thereto, and not get his full provision made up. Objected, that tutors cannot bind their pupils by transactions upon their means, especially where he was so well founded as to be a preferable creditor, his mother's contract being *prior tempore* and so *potior jure* ; and it were of very dangerous consequence to allow tutors to transact clear rights ; for that is no ordinary deed of administration, but a downright alienation ; and therefore being to his manifest lesion, he craves to be reponed *ex capite minorum et lesionis* ; and it is evident the friends' main design by that contract was to preserve and ingather the father's estate, that the subject of their payment might not perish, nor be consumed and dilapidated by their entering into pleas. Answered, it is very true, there be cases in which minors are restored against their tutors transactions, as appears *ex L. L. 22, 25, 36, 41 C. De transact.* Yet it must be

No. 254.  
What are the powers of tutors to transact ?