

No 9. Donaldson, whereby he being authorised by William Donaldson his tutor-dative, convened William Brown, merchant in Edinburgh, for exhibition and delivery to him and his said tutor, of certain bonds and obligations made in favour of his said umquhile grandfather.—*Alleged*, That the tutory-dative was null, in respect that the King could not dispoise it, the pupil being a foreigner born in Germany, as his father was before him, and had never been in this country, and so the pupil was not sufficiently authorised.—*Replied*, That the King might give a gift of tutory, vacant in his hands, to any pupil having goods and gear within his dominions.—THE LORDS sustained the pursuit at the pupil's instance, thus authorised, because it was not so much a tutory-dative, as a power of administration of the pupil's goods within this kingdom, which the King might lawfully give to any, as well as the father could have done by his latter-will; and withall they ordained the tutor to find sufficient caution.—Next, *alleged* no process at the pursuer's instance as apparent heir, because *non constat* whether he was or not.—THE LORDS ordained, in respect that the pursuer was a foreigner, that it should be verified he was apparent heir *cum processu*.

July 11. 1628.—IN this action between Skelton, authorised by Donaldson his tutor-dative, and William Brown, the bonds being exhibited, *alleged* against the delivery, That the defender could not deliver them to the tutor-dative, because he offered to prove that there was one Sim named tutor-testamentar by Captain Donaldson to his grandchild Skelton. Notwithstanding of this allegiance, the LORDS ordained the writs to be given up to the pursuer, in respect he had found sufficient caution (Sir Robert Hepburn) by which William was put *in tuto* to deliver the bonds to the tutor-dative.

Spottiswood, (TUTORS and CURATORS.) p. 345.

1759. February 6. MARY COLLINS *against* LORD BOYD.

No 10.

A person residing without the jurisdiction of the Court, cannot be received as a judicial cautioner.

IN the question betwixt Mary Collins and her trustees against Lord Boyd, 2d July 1755, *voce* PAPIST, the Court ordered Lord Boyd to pay the whole sum to the pursuer, on her finding caution, that Janet Boyd, the nun, would never claim her share due by Lord Boyd.

Lord Boyd *objected* to the cautioner, That he did not live within the jurisdiction of the Court; and that as this was a judicial act or obligation, the cautionry being ordered by the Court, no cautioner could be received who was not amenable to it.

Answered, This is not a *cautio judicio sisti et judicatum solvi*. It is not properly a judicial act or obligation. It is a common cautionary obligation, that a person living in a convent shall not claim her share of the money due by Lord Boyd; and therefore any responsible person may be received as cautioner, whether amenable to this Court or not.

‘THE LORDS refused to accept of a cautioner residing out of the kingdom.’

No 10.

This question was advised upon a report, without any pleading, or any papers given into Court upon it.

For Lord Boyd, *Lockhart*.

J. C.

Fol. Dic. v. 3. p. 231. Fac. Col. No 161. p. 288.

1792. May 18. ANN STEWART *against* SOPHIA HOOME.

DAVID HOOME STEWART of Argaty, by a deed of entail, in 1768, disposed to George Stewart his brother, residing in Annapolis in Maryland, and to a series of substitutes, his lands, under ‘the following conditions, appointed to be ingrossed in the infeftments to follow thereon; viz. That the said George Stewart, and his foresaids, shall be burdened with and obliged to pay the whole just and lawful debts that shall happen to be resting and owing by me at the time of my death, in so far as the same shall not be paid out of my moveable subjects, and also to pay an annuity of L. 25, provided by me to each of Janet and Jean Stewarts, my sisters, during their joint lives after my decease, and L. 35 to the survivor of them, and likewise to pay L. 500 to James Stewart, my younger brother.’

No 11.
A person born in America, while that country was subject to Great Britain, and domiciled there, is not to be considered as an alien, but a subject of Great Britain residing in a foreign country.

George Stewart succeeded, and made up titles under this deed. After his death, Ann Stewart, his widow, having claimed from Sophia Hoome, his granddaughter, then in the right of the estate, a terce out of the lands in which he died infest, it was *objected*, That the estate having been settled on her husband and the other heirs, under the burden of the provisions granted, and debts contracted by the entailer, these burdens must have the effect at least of limiting her claim. In support of it she

Pleaded, Where lands are disposed as burdened with debts or particular sums of money, such debts or sums are considered to be real *liens*; but where the disponee or heir is only taken bound to pay, they remain personal.

Thus, ‘a purchaser of lands having obliged himself to pay a certain sum to any person his author should please to nominate, this clause, *though in the infestment*, was found not real to affect singular successors;’ Stair, 25th June 1664, Canham *contra* Adamson, *voce* PERSONAL and REAL. So also, Fountainhall, 19th November 1685, Lord Ballenden, *IBIDEM*. Fountainhall, 14th June 1687. Home, July 1687, Creditors of Marjoribanks, *IBIDEM*. 19th July 1780, Allan *against* Cameron’s Creditors, *IBIDEM*.

Now, by the clause mentioned above, the burdens in question, though *appointed to be ingrossed in the infestments*, being laid, not on the lands, but on the heirs, are therefore merely personal. As it is clear they could afford no ground of competition with purchasers, or real creditors secured by infestment, so they can as little affect the claim of terce, which, as it is founded on the husband’s sasine, can only be made to yield to rights preferable to it.