No. 317.

The pursuer also founded on the case, 6th March, 1761, Roebuck against Duke of Hamilton, (not reported) where the Court interponed their authority to a lease of a very similar kind.

The pursuer was allowed a proof of his condescendence; and having established it to the satisfaction of the Court,

The Lords found and declared, That the tack was a necessary and proper act of administration on the part of the pursuer, and for the interest and benefit of his pupil; and therefore interponed their authority thereto, and ratified and approved of the same, and whole clauses thereof.

Lord Ordinary, *Bannatyne.* Clerk, *Pringle.*

*R. D.* *Fac. Coll. No.* 171. *p.* 390.

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1802. *May* 20. BLAIRS *against* MITCHELL.

No. 318.
In what circumstances a tutor or curator is entitled to useful advances beyond the interest of the pupil's provisions?

David Mitchell, merchant in Down, executed a settlement of all his effects in favour of David, his eldest son, taking him bound, among other provisions, "to pay to each of Alexander and James Mitchells, my younger sons, the sum of £.150, and to each of Mary and Marjory, my daughters, the sum of £.100 each; which sums are to be paid to each of my said children at their respective marriages or majority, with interest thereof from my decease till the said term's payment, with a fifth part more of each principal sum of penalty in case of failure, the interest being intended as a fund for the children's maintenance from the time of my decease till the principal sums fall due." In case of the death of any of the children before marriage or majority, it was also provided that their provision should fall to the surviving children. David was appointed tutor *sine quo non.* He took charge of the education of his brothers and sisters; in the course of which he borrowed various sums of money from William Blair, writer to the signet. For these it was necessary to raise letters of horning and caption, and to arrest the funds belonging to him in the Stirling Bank. A multiple-poinding was brought by the Bank, (February, 1795) in which, besides Blair, the widow and younger children of the deceased David Mitchell also appeared, who insisted, that the common debtor was not at liberty to expend upon their maintenance and education more than the interest of their respective portions: While, on the other hand, the representatives of Blair contended, that a tutor was entitled to claim reimbursement for whatever was *utiliter impensum* upon his pupil.

The Lord Ordinary, 12th November, 1800, found, "That the money to be expended for the maintenance of the children from the time of the late David Mitchell's death till the principal sums fell due, is limited to the interest thereof; and therefore, that credit is not to be given to David Mitchell, junior, for any advance beyond that sum."

The children of William Blair reclaimed, and

No. 318.

Pleaded: In many instances, it must be very much for a pupil's advantage, that an encroachment should be made upon his provision, for the sake of fitting him out, and enabling him to engage in some profession, as a means of support in future life. Formerly the law may have been more strict upon this point; but it is so laid down by Ersk. B. 1. Tit. 7. § 24.

Notwithstanding the clause in the settlement, that the interest was intended for the maintenance of the children; and that the provisions of those who died before majority or marriage, were to accresce to the others; the majority of the Court differed from the Lord Ordinary, and thought, that whatever the tutor expended *utiliter* upon the pupil, he became a creditor to that extent upon the provision bequeathed to him, and would be entitled to retain it accordingly.

"The Lords, &c. In respect there is no evidence of any useful advances beyond the interest of the provisions, adhere to the Lord Ordinary's interlocutor." And a reclaiming petition, containing a condescendence of what were alleged to be useful advances, was remitted, 15th June, 1802, to the Lord Ordinary, to inquire into the truth of the facts.

Lord Ordinary, *Craig*. For Blair, *Maconochie*. Agent, *J. Brunton*, Solicitor.
Alt. *Smyth*. Agent, *Jo. Smyth, W. S.* Clerk, *Pringle*.

*F.* *Fac. Coll. No.* 41. *p.* 84.

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1804. *February* 29. VERE *against* DALE.

No. 319.
The Court cannot authorise the sale of a pupil's heritable estate, except upon urgent necessity.

Daniel Vere succeeded to the estate of Stonebyres, when an infant, his affairs being under the management of tutors nominated by his father. The free rent of the estate at this time was about £.246. It is situated on the banks of the Clyde, opposite the cotton-works erected by David Dale, merchant in Glasgow, in the vicinity of Lanark.

In 1787, an agreement was entered into between Mr. Dale and Mr. Vere's tutors for a perpetual feu of eighty acres, for payment of £.160 of price, and 12*s*. 6*d*. feu-duty yearly for every Scotch acre. An applcation was made to the Court of Session, in the name of the tutors, to interpone their authority to this transaction. All who were interested in the successsion were called as defenders.

A proof was taken, exhibiting the then rent of the lands. This appeared to be about £.16 16*s*. and the feu-duty to be paid by Mr. Dale was £.50 4*s*. 8*d*. At that time, the Court found and declared, "That the feuing of the said lands, in terms of agreement, entered into with the said David Dale, is for the utility and advantage of the said pupil; and authorised, and hereby authorise, the pursuers, to feu to the said David Dale, his heirs or assignees whomsoever, the said linn-fields and mill-lands of Stonebyres, lying, bounded and described in manner foresaid, to be holden of the said pupil, and his heirs and successors in the lands and barony of Stonebyres, for payment of the feu-duties, and other prestations, and under the