1684. *March.* ROBERT BROWN of CARSLUTH *against* JOHN IRVINE.

ONE being pursued upon his bond assigned, alleged, That the cedent, by a note under his hand, was liable to perform some obligements to the defender. Answered, The said note cannot be considered as a back-bond, but as a distinct separate obligement, seeing it is not of the same date with the defender's bond, nor contains any clause relative thereto. Replied, That it is offered to be proven, by the pursuer's oath, that he knew the said note was granted upon occasion of the said bond. Duplied, *Non relevat*, unless it were likewise proven that the note was designed to qualify the bond; it being consistent that a distinct obligement might have been granted upon occasion of the bond. This point was not determined.

Page 44, No. 197.

1684. *January and March.* WISHAW *against* The CHILDREN of LUNDIE.

ANDREW Lundie, tutor and creditor to Sir John Brown's children, having comprised his pupil's lands; the prior apprisers of that estate raised a declarator of extinction of Lundie's apprising, upon this ground, That the apprising was led, and the debt apprised for acquired, *durante tutela;* and, consequently, presumed to have been acquired by the pupil's money, till the contrary appear by the tutor's counting for intromissions and omissions. Answered for Lundie, That his omissions are discharged by Dunlop younger, the husband of Antonia, the apparent heir, to whom they belonged *jure mariti.* 2. A tutor's obligement for omissions, and accumulation of annual-rents, are personal to the pupil, and not communicable to the father's creditors by diligence; especially in this case where the pupil has renounced to be heir to her father. 3. *Esto* she had not renounced, yet a tutor's personal obligement, *ex quasi contractu* with the heir, cannot fall under the diligence of the defunct's creditors affecting the *hæreditatem jacentem*, seeing it was never *in bonis* of the defunct, but resulted, after his decease, to the pupil as creditor. Replied, All rights in the person of a debtor, that are transmissible to heirs or cessible to assignees, may be carried by the diligence of creditors; yea, even some rights, that are not cessible voluntarily, as tacks, rentals, reversions, conceived personally and taxatively, excluding assignees *per expressum*, may be so derived to creditors; as also, they may effect any personal faculty to redeem for a reasonable cause, or to uplift a sum whereof the fee is settled upon a third party, reserving a power to the granter to uplift the same, without consent of the fiar: and it were absurd to think that a debtor should have any right or obligement in his person beyond the reach of his creditor's diligence; though some personal privileges, or exceptions, not properly rights, are not cessible or derivable by diligence; such as the *beneficium competentiæ*, restitution upon minority, *jus deliberandi*, a husband or wife's revocation. 2. John, one of the pupils against whom the comprising was led, did not renounce; and so, by the diligence against him, he became debtor; and consequently the obligation of tutory may be derived to the pursuers. Nor can the sister Antonia's renouncing or revoking her service secure her, till she

purge all deeds, to their prejudice, done by herself or her husband by virtue of his *jus mariti ;* and, particularly, the discharge to the tutor: so that, till this be done, the apparent heir must be liable, at least *in quantum* the discharge extends to; for, otherwise, creditors might easily be frustrated by collusion between a minor and his tutors or curators; for, after these have intromitted many years, and their discharges to tenants are got up, or lost, so as the intromission could not be proven *scripto*, the minor might renounce to be heir, and discharge the tutor or curator of omissions, whereby the rents would, in effect, be probably lost to the creditors, seeing intromission could not be proven. Now, creditors of a minor, seeing his estate to be under the inspection and management of good tutors or curators, are apt to ly by from seeking possession, in confidence that these will intromit and uplift. The Lords waved to advise this debate, and recommended it to the parties to agree; seeing Lundy, after his apprising, was obliged to continue his intromission, and would be liable to *ought and should*, as an appriser.

In this cause there was an incident reduction upon minority and lesion, at the Lady Dunlop and her husband's instance, of a contract betwixt them and Wishaw, who was at the expense of the process; which Dunlop, upon some emergent difference betwixt him and Wishaw, disclaimed: It was alleged for Wishaw, That *res* not being *integra*, Dunlop could not withdraw his name, or disclaim the process; and, if he did, ought at least to be liable for damage and interest. This point was also laid aside, in hopes of the settlement. *Vide* No. 308, [*infra, eisd. part.*] and No. 327, [June 1687, *eisd. part.*]

Page 70, No. 298.

In Wishaw's case, [*supra*, No. 298,] it was alleged, That though John, as lawfully charged, and not renouncing, became debtor, and all obligations, real or personal, due to him, became liable to the compriser, consequently the obligement of tutory for commissions and omissions; yet that, being a moveable obligement, did not properly fall under the apprising, as a habile diligence, to affect the same. 2. Antonia having renounced, at least having revoked her service, and so turned the apprising against her, to the effect of an adjudication, she is not thereby debtor to the adjudger, nor her own state or obligement liable to them; and nobody, save her own creditors, can quarrel her discharge of the tutor's omissions. Answered, 1. Though the appriser had not properly any right to John's tutor's omissions, he might apply them, by a declarator, to extinguish the tutor's apprising, as having, or ought to have had, so much money in his hands, before leading of the apprising, as was equivalent to his debt. 2. Seeing the tutor, during Antonia's time, had right to intromit as tutor to her, she ought not to be allowed to renounce, but *re integra*, and upon purging his deeds. The Lords found the tutor's omissions, during the years John lived, imputable to extinguish the tutor's apprising; but, seeing Antonia renounced or revoked, that the tutor was only liable *tanquam quilibet* for his intromission during her time; and found, That the tutor having been in possession after his apprising, he must hold compt for the rents, and be liable for *ought and should*, as other comprisers.

Page 75, No. 308.