perish, by Kite's breaking *medio tempore*, and therefore should not recur against me, the drawer. Duplied, Where a bill is not payable at sight, but at a day, there is no need, by the custom of merchants, to protest that bill for non-acceptance, but only for not payment; and I was not *in mora*, because, by your letter, you was willing to have given me the bill on another. The Lords found the registration and charge warrantable; but desired to try what was Mr. Kite's condition at the time the bill fell due, if it could have been recovered, then, if demanded, and if it was lost by the delay, and he only broke afterwards. No. 20.

Fountainhall, v. 2. p. 64.

1710. *July* 27. COLONEL JOHN ERSKINE of Carnock, Supplicant.

No. 21.

The Lords, upon a petition given in by Colonel John Erskine, craving a warrant to the Clerks to register a bond of presentation granted to him by John Anderson, Sheriff-clerk-depute of Aberdeen, and Alexander Charles, procurator there, found, That the bond could only be registered in order to conservation, and not in order to diligence, in respect it bore only, constitute our procurators.

Fol. Dic. v. 2. p. 403. Forbes, p. 437.

1711. *January* 18.

AYTON of Kinnaldy *against* MARGARET SCOT.

No. 22.
No summary diligence against a pupil for a debt contracted by his tutor.

Sir John Ayton of Kippo having disponed his estate to Ayton of Kinnaldy, he burdens him with 2500 merks, to be paid to Scot of Balmouth, his nephew; who dying, Margaret and Marjory Scots, his sisters, as executrixes to him, pursue Kinnaldy for payment of the foresaid legacy. He defends, That it was extinct by their brother's death, and not transmissible. The affair being dubious, they enter into a submission to two of the Lords of Session; and, in regard the said two gentlewomen were pupils, Mr. Rolland, their father-in-law, submits for them, and takes burden; and a decreet-arbitral following, Kinnaldy is decerned to pay the 2500 merks to them, but without any annual-rent. Accordingly, Kinnaldy makes payment of it to Rolland, the tutor, and recovers his discharge; but not thinking himself sufficiently secure, he registers the decreet-arbitral, and, raising horning thereon, charges Margaret to give him a discharge. She suspends, on this reason, That the charge is most unwarrantable and illegal, (and the writer who raised it deserves censure); because, though our names be in the submission, yet we are not submitters, but only the said Mr. William Rolland taking burden for us *tanquam quilibet*, without so much as designing himself our tutor-dative; and though we be decerned to give a discharge, yet that is *ultra vires compromissi*, we not being submitters, and are minors lesed; seeing, if the plea had been prosecuted, we would have got more in the event than this decreet gives us; neither can tutors submit or transact their pupils' interest, but on their own peril, if it be

No. 22. not advantageous; and therefore it could be no ground of a summary charge against them, but only the foundation of an ordinary action. Answered, That a tutor having submitted his pupils' claim, and signed in their name, if a decreet-arbitral follow, decerning the pupils, and the tutor in their right, to perform such deeds, and bearing a clause of registration for letters of horning to pass thereon, the same will be a good ground for a summary charge against the pupils, when they come to majority; the tutor's deed being theirs, he integrating their legal incapacity to act. And as pupils have the benefit of transactions made by their tutors, in their name, so they must likewise be bound *ex facto tutoris;* and if there be any prejudice, they have the privilege to seek restitution *in integrum;* and decreets-arbitral now are the strongest of all sentences, being only impugnable for bribery, corruption, or falsehood. It is true, tutors have no power to submit or transact their pupils' clear liquid rights, where there is no *lis, nec metuitur*, or is heritable; for their submitting on such is *species alienationis*, unless the authority of a Judge be interposed; but in dubious, controverted cases, it may be good service to the pupil *vexationis redimendæ gratia* to prevent expenses, and the risk of losing the cause: And, in January, 1691, the Lords sustained a transaction made by Fletcher of Aberladie's tutors, whereby they bought the widow's life-rent at five or six years' purchase, and she died within the year; but, in that case, the minor had ratified it upon oath, never to revoke it, being before the prohibitory act in 1681. The Lords did not determine how far tutors might bind minors by submissions, but only found, That the decreet-arbitral could not afford the ground of a summary charge against the pupil, but only the foundation of an action, in which they would be decerned to implement and fulfil, unless they instructed evident lesion.

Fol. Dic. v. 2. *p.* 404. *Fountainhall, v.* 2. *p.* 627.

1713. *July* 29.

GEORGE MONTGOMERY and his LADY *against* MR. JOHN MONTGOMERY of Wrae, his Father.

No. 23.

The Lords appointed a bill of horning to pass against Mr. John Montgomery, for implement of the marriage-articles betwixt his son and his lady, albeit the contract bore only a consent to registration in the books of Council and Session, that all execution might pass thereon in form as effeirs, without any express consent, that a decreet might be interponed thereto; for a decreet of the Lords is interponed by registration of the articles, warranting all execution in general; which can never be understood to entitle the parties only to an action, seeing that was competent without any clause of registration.

Fol. Dic. v. 2. *p.* 403. *Forbes, p.* 715.

See APPENDIX.