1724. *January* 25.

WILLAM LOTHIAN *against* GEORGE SOMERVILLE, and Others, Tutors to James Waterston.

No. 259.
Tutors may be removed as suspect, for neglecting the regulations of law, relative to inventories, although the deed of nomination should contain a dispensing clause

In a process of removing of the said tutors as suspect, it was pleaded for the pursuer, that they ought to be removed, and that the tacks set by them of the minor's lands should be declared void, and of new set by public roup, because they had not made up inventories in terms of the act of Parliament 1672; in as much as the inventories produced by them were only simple duplicates made up clandestinely, and signed only by two of the defenders, given privately to the Clerk of the Bailiary of Lauderdale, to be registrated for conservation, without any citation of the nearest of kin, without any concurrence of a Judge, without any judicial act made upon the production thereof, and without being presented to or signed by the Judge; all which were required by express statute.

It was answered for the defenders, 1*mo*, That they who had been nominated by the defunct where themselves the nearest of kin to the pupil both on father's and mother's side; 2*do*, The defunct had by his nomination dispensed with the nice formalities of law in making up inventories, having declared, that inventories of his effects made up and subscribed by the said tutors should be as authentic for making the amount of his moveable subjects and other effects, as if the same were *confirmed* legally by a Judge; 3*tio*, That there were no relations in the next degree to the tutors who could be called; for there were none within the fourth or fifth degree of kin to the defunct, either on the father's or mother's side, who were majors, or within the kingdom, when the inventories were made up.

It was replied for the pursuer, that this valuable law, which is so carefully calculated for preventing the embezzling of pupil's effects, should be most exactly observed in every particular. And as to the first defence, it was not relevant, because these tutors ought to have cited whoever were nearest of kin after themselves, which is a most equitable interpretation, and founded upon the words of the act; for it is obvious, that when it requires the tutors and curators to take the concurrence of the nearest of kin on the father's and mother's side, it must be understood of the nearest besides and excluding themselves, because it would be absurd to think that the law was designed only for extraneous tutors, who very rarely are named; and the act of Parliament relates to all tutors without distinction. It was replied to the second, that dying persons could not dispense with this public and useful law, more than they could provide that a tutor should not be liable *ob dolum aut latam culpam*. To the third it was replied, that they ought to have called the nearest, who were majors and within the kingdom, in however remote a degree; and if there were none such, (which was neither true nor probable) they ought at least to have taken the concurrence of the Judge, which the act of Parliament directs to be done when the nearest of kin do not concur.

No. 259. The Lords sustained that qualification of the libel relevant to remove the defenders from their office, viz. That they entered into the management of and intromitted with their pupil's means and estate, without making up inventories in the terms of the act of Parliament 1672, and found it proved; and therefore removed the defenders from their office, and declared the tacks of the lands set by them should end at Whitsunday next, &c.

Act. *A. Murray.* Alt. *H. Dalrymple, jun.* Clerk, *Mackenzie.*

Edgar, p. 8.

1725. *December.* EARL of BUTE and M'KENZIE *against* CAMPBELL.

No. 260. A discharge granted by a curator, without concurrence of the minor, found not to give liberation to the debtor, it being pleaded, That the deeds of a curator, without consent of his minor, are equally void as deeds of a minor without consent of his curator.—See APPENDIX.

Fol. Dic. v. 2. *p.* 487.

1727. *July* 25. CUNNINGHAM of Enterkin *against* His CURATORS.

No. 261. One cannot quarrel his curators for concurring with him in a deed which he omitted to revoke *intra annos utiles.*

Enterkin having insisted against his curators for damages and interest, as consenters with him in a deed, whereby he pretended to be enormly lesed, the curators' defence was, That he had not revoked or reduced the deed *intra annos utiles;* and as he could not now insist against the person in whose favours the deed was granted, neither against the curators, who consented to it.

Answered for Enterkin: He is not in an action of reduction against those who were benefiters by the deed in question, but in an *actio directa tutelæ* against his curators. These are different actions, having no connection or dependence one upon another; the one *must* be insisted in within the *quadriennium utile*, the other *may* any time within the long prescription.

Replied for the curators: Enterkin cannot quarrel them for concurring with him in a deed which he never revoked. The curators cannot be liable if he was not lesed; and if he has not revoked, the law presumes *præsumptione juris et de jure*, he was not lesed.

"The Lords found the curators not liable, Enterkin not having duly revoked and reduced *intra annos utiles.*

Rem. Dec. No. 98. *p.* 191.