1670. *February* 21. ERSKINE *against* WILSON.

IN a reduction of a tutory-dative, pursued by Erskine against Wilson, upon this reason,—That Erskine was nearest agnate, and was to serve himself tutor-of-law: It was ANSWERED for the defender, That not only year and day was elapsed, but several years, during which there was another tutor-dative, who served until his death.

It was REPLIED, That the pursuer, within year and day, did come from Flanders of purpose to have administrate; but, being employed during the war in one of the King's ships, he was taken, and so made prisoner of war, until of late that he was liberated, and immediately after came home to serve himself tutor-of-law; and, therefore, being absent *reipublicæ causa, jure post liminii,* he hath right to the said office.

The Lords did sustain the answer, notwithstanding of this reply; and would not find, that every private person, who engaged in the war willingly for his own advantage, could be said to be absent *reipublicæ causa.* But thereafter, the defender offering to renounce, upon sufficient caution to the pupil, and a discharge to himself, his tutory was reduced.

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1670. *February* 22. SCOT *against* SCOT of THIRLSTOUN.

SIR Francis Scot of Thirlstoun being pursued, as heir to his father, for payment of 1000 merks, upon this ground, That his father, to whom he was heir, did attest a cautioner in a suspension, who was altogether insufficient, and is now bankrupt: It was ALLEGED for the defender, That the cautioner was *tentus et reputatus,* sufficient and responsible for the time; in so far, that he offered to prove that he had a room stocked with his own goods, which paid 600 merks of tack-duty.

To this it was REPLIED, That the defender's father, who did attest the cautioner, could not but know that he was insufficient; because he was his own chamberlain, or officer; and was debtor to him in considerable sums of money, near the worth of the goods he had in stock.

The Lords did sustain the reply to elide the defence; albeit it is sufficient to liberate the attestor, to condescend that the cautioner whom he attests has a visible estate: but here the knowledge of the debts did make a specialty.

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1670. *February* 22. The LAIRD of MELDRUM *against* JAMES and ALEXANDER LUMSDENS.

The said Lumsdens having a wadset of Meldrum's lands, worth 16 chalders victual of yearly rent, for the sum of 10,000 merks, wherein he was obliged to be accountable for the surplus of the rent, which did exceed the annualrent of the

money; after many years' possession, they did enter in a transaction, whereby Meldrum did discharge him of his whole intromissions, and gave him bond for £100 sterling; and Lumsden, on the other part, did assign Meldrum to three years' rent, as intromitted with by the Laird of Philorth, during his wadset, with warrandice from his own fact and deed. Lumsden having charged Meldrum upon the said bond, he did suspend upon this reason,—That, at the same time when he gave the bond, he got the said assignation to three years' rent, intromitted with by Philorth; whereas he offered to prove, by the charger's own oath, that he himself had intromitted all these years.

It was ANSWERED by the charger, That, as to his own intromission, he had a general discharge: And as to the assignation to Philorth's intromission, it was only taxative in so far as Philorth had intromitted; and he having quit a great deal of his annualrents, which exceeded the sum charged for, the letters ought to be found orderly proceeded.

The Lords, notwithstanding, did suspend the letters *simpliciter;* in respect that the charger was obliged to warrant from his own proper fact and deed; whereas he himself had actually intromitted: And found, That the conception of the assignation to three years' intromission by Philorth was as full and obligatory as if it had bore that Philorth had intromitted with the full rents all these years; otherwise it could not be interpreted but to be a clear cheat and fraud, if it should be taxed to Philorth's intromission; whereas he never intromitted, but the charger himself.

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1670. *February* 24. DOCTOR BALFOUR and his SPOUSE *against* WOOD.

IN the forementioned count and reckoning between Doctor Balfour and his spouse, and the heir of her tutor, Mr James Wood, there was an article of the charge, bearing that the tutor ought to count for the sum of ————————, given upon a wadset, which, being liferented, he ought to have comprised upon a charge against the heir to enter; of which comprising the legal might have been expired; and so the pupil had the irredeemable right of the lands after the liferenter's decease.

It was ANSWERED, That the pupil's father himself did lend his money upon the wadset, with a reservation of the liferent of the whole land: And the granter of the wadset being dead, and having neither heir nor executor, nor no other visible estate, the tutor was *in bona fide* not to comprise; seeing the annualrent of the sums upon the wadset might be yet secured by a comprising by the pupil and her husband, the pursuers, who could not allege any damage by the delaying thereof.

The Lords found the answer relevant to free the defender; as it would have done the tutor himself, who was not bound to give out money upon a naked diligence, which the pupil, being major, might do.

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