

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 obligations to the defender. Answered, The said note cannot be considered as a back-bond, but as a distinct separate obligation, 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 obligation might have been granted upon occasion of the bond. This point was not determined.

Page 44, No. 197.

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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 appraisers of that estate raised a declarator of extinction of Lundie's apprising, upon this ground, That the apprising was led, and the debt appraised 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 obligation 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 obligation, *ex quasi contractu* with the heir, cannot fall under the diligence of the defunct's creditors affecting the *hereditatem 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 far: and it were absurd to think that a debtor should have any right or obligation 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 competentiae*, 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