

1685. *November.*NISBET *against* SMITHS.

No 10.

An assignee, executor of a pro-tutor, sued the heir as representing his father. *Answered*, The pro-tutor had not accounted, and the intromission was after the assignation. The pursuer was required to find caution for the event of the accounting.

AGNES NISBET, as executrix to her husband, having pursued Isobel and Esther Smiths, for payment of certain debts, due by John Smith, their father, whereunto the said Alexander Herriot, the pursuer's husband, had acquired assignations; *alleged* for the defenders, That Mr Alexander Herriot being their uncle upon the mother's side, he had acted as tutor, or pro-tutor, and had intromitted with the rents of the lands before he had acquired assignations to these debts, and therefore they could not be liable for payment of the same, before the pursuer, as executrix, should count and reckon for the husband's intromission; and they had raised an action of count and reckoning, which they repeated. *Answered*, That Mr Alexander Herriot was assigned to the debts before his intromission; and albeit the assignation had been after, yet this pursuit being for a clear and liquid debt, and the defence resolving in compensation, and the intromission not being liquid, nor constituted, it cannot be sustained to stop the pursuer's diligence for these debts.—THE LORDS sustained the defence, that the pursuer's husband acted as tutor, or pro-tutor, before acquiring the assignations to the debts.

Fol. Dic. v. 2. p. 50. Sir P. Home, MS. v. 2. No 726.

. Harcarse reports this case:

1685. *February.*—AN assignee, executor of a pro-tutor, pursuing the heir as representing his father;

It was *alleged* for the defender; That the defunct being pro-tutor to the defender, *intus habuit*, and he has not counted as pro-tutor; and the assignation was after the intromission.

Answered; The cedent had right to the defunct's father's bonds in his own time; and the presumption ought only to hold where the tutor *durante tutela* acquired right to the defunct's debts, which is presumed to be acquired *nummis pupilli*.

THE LORDS, by one supernumerary vote only, repelled the defence, and ordained the pursuer to find caution for the event of the pro-tutory action; and that which principally moved them to pronounce this interlocutor, was, because the pro-tutor had not been called to account after elapsing of several years. Many of the Lords were of opinion, that the defence should be sustained, and the pro-tutory, count and reckoning, go on in this process.

Harcarse, (TUTORS and CURATORS.) No 983. p. 277.

. In conformity with the above was decided the case Lord Melvil against Montgomery, 13th December 1676, *voce* TUTOR and PUPIL.