The Lords, in respect of her offer of caution, repelled the tutor's defence, and decerned in her poinding of the ground.

There was likewise an action pursued against her, at the instance of some of the Earl her son's tutors, for delivery of his person to them.

ALLEGED,—It is *res hactenus judicata*, by which the custody of his person is adjudged to me. ANSWERED,—You must condescend before whom the same was obtained. REPLIED,---I need say no more but in general terms; and it is enough I condescend *in termino*.

The reason of their shunning to be more special was, That, by an Act of Privy Council, she was preferred to the custody of her son, and a special condescendence might bring in a debate betwixt two supreme judicatures, How far the Session can cognosce on the justice of the decreets pronounced by the Privy Council, or rescind and alter the same. For avoiding of which interfering, the tutors gave in a petition to the Lords, representing, That my Lord was within a few months of his pupillarity, and that, at his age of fourteen, he was to choose his curators, and it was fit he should be free; and therefore craved he might be sequestrated in some indifferent person's hand, that he might not be wholly influenced by my lady, his mother, in his election; as the Lords had lately done in the case of *Joanna Hamilton, daughter to my Lord Bargeny*.

ANSWERED,—This demand was irregular; seeing there was a depending process, at their instance, for delivering up his person, where *lis erat contestata*; and they behoved to prosecute and abide the event of that, and not crave a summary sequestration.

The Lords refused the desire of the bill, in respect of the state of the process, and that only four tutors craved it; whereas there were five on the other side.

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1705. *December* 22. JOHN IRVING of SKAILS *against* WILLIAM GRAHAM of MOSKNOW.

JOHN Irving, late of Skails, pursues a reduction, improbation, and declarator, against Mr William Graham of Mosknow, of all rights of apprising and disposition he has on the said lands of Skails.

ALLEGED,—You have no title to pursue this action, being only apparent heir, who may indeed pursue for exhibition *ad deliberandum*, but not reductions of this nature; for, *esto* I were assoilyied from your instance, yet it would not be *res judicata*, nor an absolvitor against others who might afterwards intent the like pursuit, being *res inter alios quoad* them.

ANSWERED,—He passed from the conclusion craving reduction, which can be only sought by one having right; yet he, as apparent heir, might very well insist in the improbation, and offer to prove that the bonds on which the apprisings were led against his predecessors were false, or that the dispositions alleged denuding them were likewise forged; for, if he were pursued on the passive titles, for paying the sums contained in his father's or grandfather's bonds, he might very well, as apparent heir, reply on their falsehood, and offer to improve the same. And though he were not allowed to carry on the process of improba-

tion for want of a title, yet her Majesty's advocate might insist to try the falsehood, *ad vindictam publicam.*

The Lords thought it might be a very dangerous preparative, if apparent heirs, (where they and their predecessors had been out of possession for a long time,) were allowed to open the charter-chest of the present heritor and possessor, under the pretence of falsehood; seeing that pretence might give a handle to apparent heirs to disturb peaceable possessors, where their predecessors have been clearly denuded, either by legal diligences or by voluntary conveyances; especially seeing they may reach their design by a more legal method, in granting a bond for a sum of money, and causing their trustee adjudge thereon, and he may pursue the reduction and improbation: neither will this be a passive title, unless he possess by virtue of that adjudication, when he has taken a right to it. On the other hand, it may be hard against apparent heirs, to debar them from proponing falsehood against such deeds, otherwise their ancestors' inheritance may be evicted from them by false and patched-up grounds. And as to what is said of the Queen's advocate insisting alone, that he cannot do, unless the writs were produced and in the field; else he cannot crave certification *contra non producta;* otherwise he might disquiet all the heritors of Scotland, and open their charter-chests.

The Lords, generally, thought an apparent heir could not pursue such an improbation where they had been long out of possession; but, in regard the point was new, they resolved to hear it first in their own presence, ere they made a rule. Dury indeed observes, that once the Lords sustained an apparent heir to pursue a count and reckoning, for extinguishing a debt of his father's by intromission, as being his father's trustee, 16*th March* 1637, *Home*; but Stair, *lib.* 3, *tit.* 4, observes this was not followed, as being unreasonable.

There was another question started among the Lords, Where one offers to improve a bond as false, by the witnesses inserted, what if, after a long time, they should depone that they do not remember whether they were witnesses adhibited or not, or whether that be their real subscription or not? Many thought that a witness's saying *non memini* would neither annul nor improve a writ, unless they positively depone that they were never witnesses to such a man's subscription; but this point fell not to be decided at this time. See Stair, *lib.* 2, *tit.* 2, where he gives an instance of this case; as also Balmanno's decisions, *voce* Improbation. *Vol. II. Page* 302.

1705. *December* 26. ROLLAND of DISBLAIR *against* The TOWN of ABERDEEN.

KATHARINE Rolland, relict of Doctor Guild, having mortified, for bursars to the College of Aberdeen, the lands of the mill of Murtle, and likewise the lands of Disblair, under certain conditions therein mentioned; Rolland of Disblair, her nephew, raises a reduction thereof upon the head of deathbed, and gets witnesses examined, to lie *in retentis;* who seemed to prove that she died shortly after, without going either to kirk or market.

In which process it was ALLEGED for the Magistrates of Aberdeen,—That he could not quarrel the said mortification; because he had homologated the same,