

No 26.

rents and protectors of all defenceless orphans, tutors may swallow up their pupil's means; but the truth is, here was neither order of redemption, offer of the money, nor consignment, but a plain collusion to the minor's ruin. *Replied*, Tutors may not alienate their pupil's heritage, where there is no previous obligation on their predecessor to denude; but here the clause of reversion obliged them to take their money, which a tutor might lawfully do. And, to refuse it, were the pupil's detriment, to cast out unnecessary expenses in defending against a declarator of redemption, wherein, at the long run, they behoved to succumb, for the brocard *quod non tenetur placitare*, takes no place where it arises *ex delicto vel obligatione defuncti*. And this agrees with the common law, *l. 2. C. quando decreto opus non est*, it is determined that *præsidis auctoritas necessaria non est ut tutorum sollicitudini consulatur si defuncti voluntati pareat: Nam prior debet esse prætor ad consentiendum patri, l. 5. § 3. & l. 7. § 2. D. dict. tit.*—THE LORDS found her title as apparent heir was sufficient to crave exhibition of the wadset-right, though she was not served; and that the disposition to her father, denuding her, did not exclude her from calling for the grounds of that right; but thought the objection against her father's disposition, that it was made *sine decreto judicis*, and so null, fell not in properly to be considered *hoc loco*, but would occur to be decided after the whole writs were in the field.

*Fountainhall, v. 2. p. 741.*

1716. July 11. RUTHERFOORDS against LOCKHART of Cleghorn.

No 27.

A debtor, against whom an apprising is led, having ratified it by a deed under his hand, this is sufficient to bar his apparent heir from pursuing an exhibition of the apprising *ad deliberandum*.

IN a process of exhibition *ad deliberandum*, at the instance of Helen and Rachael Rutherfoords, as representing Sandilands of Boal, against Lockhart of Cleghorn, the pursuers having called for exhibition of an apprising, led at the instance of the defender's authors against Boal; and he having produced a ratification of the said apprising by Boal himself, he *contended*, that he had sufficiently exhibited; and that the pursuers, as apparent heirs, had no more to say; and that because,

*imo*, Such a production would certainly exclude Boal himself, and therefore all who represent him; *2do*, If the pursuers were served heirs, and infert, the defender would exclude them upon this right; much more then will it exclude their exhibition *ad deliberandum*, where they have no established title.

*Answered* for the pursuers; That the ratification was only an acknowledgment, that the apprising was legally deduced, which is nothing to the present case; it not being the question, Whether it was formal or not? but, Whether it ought not to be exhibited as it stands? Besides, that, for aught yet appearing, the apprising may have been satisfied within the legal; and therefore a ratification of it does not complete the right so as to exclude the pursuers.

' THE LORDS found the pursuers have no right to call for the apprising libelled, the same being ratified by the person himself against whom it was led.

No 27.

Act. Muir.

Alt. Arch. Hamilton.

Clerk, Sir James Justice.

Fol. Dic. v. 1. p. 284.

Bruce, v. 2. No 15. p. 19.

## S E C T. III.

What writs may be called for.

1633. February 26.

L. SWINTON *against* L. WESTNISBET.

No 28.

Action of exhibition *ad deliberandum* was sustained of all writings made by the defunct to the defender, a stranger.

THE L. Swinton, as apparent heir to John Swinton his brother, and to Robert L. Swinton his father, pursues L. of Westnisbet, and his spouse, for exhibition of the writs of the lands of Swinton, as being in their hands, and also of all bonds made by his said brother to the defenders, or their children, that after sight thereof the pursuer might advise if he will enter heir to his said father, or brother, or not; wherein it being *alleged*, that the pursuer, as apparent heir, could have no action to pursue for any writs made by the pursuer's brother to the defender, it never being libelled, that these writs were either the proper writs of John Swinton, and his apparent heir, nor yet common to them with the defenders, without which they ought not to be exhibited to the apparent heir, specially tending to found an action to the pursuer against themselves. This allegiance was repelled, and the pursuit sustained, at the apparent heir's instance, for production of the writs and bonds made by the pursuer's brother to the defenders, albeit the same contained nothing in favours of the maker, nor of his apparent heir, nor heirs; to this effect, that the pursuer, after sight of these writs, might consider if he would enter heir or not to the maker; for, as he had liberty in law to advise within year and day, if he would enter heir or not to his brother, so the year not being expired, he might use all the means conducing for that end, which might inform if he would enter heir or not, the chief whereof was the sight of these bonds.

Act. Nicolson &amp; Stuart.

Alt. Advocatus &amp; Cunninghame.

Clerk, Gibson.

Fol. Dic. v. 1. p. 284. Durie, p. 677.