A reclaiming petition was refused, (25th January 1798,) without answers. No 142.

Lord Ordinary, *Stonefield.* For Davidson, *Montgomery.*
Alt. *Rolland, Geo. Fergusson.* Clerk, *Gordon.*
D. D. *Fac. Col. No 52. p. 118.*

1798. *March* 6.

LADY CHRISTIAN GRAHAM, and Others, *against* The EARL of HOPETON.

No 143.
Heritable bonds, taken by a tutor, who was heir at law, for money belonging to his ward, and adjudications led for personal debts, found to be moveable as to succession.

The price of tithes, sold by a tutor, by judicial authority, in the event of the ward's death, belong to his executors.

GEORGE, Marquis of Annandale, was cognosced insane in 1758; and the late John, Earl of Hopeton, his nephew, was appointed his tutor in law.

Earl John was succeeded in 1781, by his son, the present Earl, who was named curator-dative to the Marquis.

The Marquis died in April 1792, possessed of a valuable landed estate.

The Earl of Hopeton was his heir at law.

Lady Christian Graham and others had right to his executry; and soon after his death, they brought an action of count and reckoning against the Earl of Hopeton, both as the Marquis's curator, and as representing Earl John, the former tutor.

The defender produced his own and his father's accounts, to which a variety of objections were stated by the pursuers.

The Lord Ordinary having taken the cause to report on informations, the following points *inter alia* occurred for the determination of the Court.

I.—It did not appear that Earl John had made up tutorial inventories. The pursuers, therefore, *contended*, That in terms of the act 1672, cap. 2. the expenses disbursed by his Lordship in the management could not be sustained as an article of credit in his accounts; March 1685, Burnet against Johnston, *voce* TUTOR AND PUPIL; Jan. 1686, Murray against Gordon, IBIDEM; 11th June 1709, Riddoch against Forsyth, IBIDEM; 10th July 1788, Henderson against Duff, IBIDEM; 25th January 1793, Kilpatrick against Macalpine, IBIDEM.

Answered; The objection resolves into a claim for a penalty; and therefore, although it might have been relevant in a question with the late Earl, it cannot be stated against the present defender, in accounting for his father's intromissions.

Replied; The present action is in no respect penal. The pursuers claim nothing but the moveable funds of the Marquis in the hands of the defender. They only object to a counter claim on his part, expressly dissallowed by the act 1672. Supposing, however, the objection were penal, the special enactment of that statute would be sufficient to create an exception to the rule of common law, as to penal actions.

No 143. *Duplied*; The same defence is competent to heirs against penal claims, whether they be brought forward by way of action or exception, Stair, 10th July 1666, Cranston against Wilkinson, *voce* PERSONAL AND TRANSMISSIBLE; Forbes, 15th Dec. 1710, and 17th Jan. 1711, Lord and Lady Ormiston against Hamilton, IBIDEM. Nor does it alter the case, that the claim arises from statute.

THE LORDS found, 'That any claim which might have been competent to the pursuers against the deceased John, Earl of Hopeton, on account of his not having made up judicial inventories in terms of the act 1672, is of the nature of a penal action, and does not transmit against the defender James, now Earl of Hopeton, as heir to his father.' *See* PERSONAL AND TRANSMISSIBLE.

II.—When the present Earl of Hopeton was appointed curator-dative to the Marquis, he made up curatorial inventories; and in the action for that purpose, he called Charles Hope Weir, William Hope Weir, and Captain Charles Napier, as the Marquis's nearest in kin by the father's side. Lady Charlotte Erskine, and Lady Christian Graham, however, stood more nearly related to him on that side, than the two last mentioned gentlemen. Neither of these Ladies were called; and on that account the defenders objected to the formality of the inventories, contending, that the citation of two of the nearest of kin on both sides was indispensable.

THE LORDS 'found no relevant objection stated to the form of the proceedings in making up inventories by the present Earl.' *See* TUTOR AND PUPIL.

III.—The defender and his father lent a considerable part of the rents of the Annandale estate on heritable bonds. They also led adjudications for some small moveable debts due to the Marquis. The defender, in his accounts, did not charge himself with either, contending, that they fell to himself as the Marquis's heir at law.

The pursuers, on the other hand, maintained, that no step taken by a tutor for securing the fortune of his ward, can have the effect of altering the course of his succession, particularly in a case like the present, where both tutors had been successively the heirs at law of their ward.

The arguments of the parties on this point, were similar to those stated in the report, 31st January 1793, Ross against the Trustees of Ross, No 102. p. 5545.

THE LORDS 'found, That the defender is not entitled to take credit for the money lent out upon heritable bonds, or secured by adjudications, unless he will convey the heritable bonds and adjudications to the pursuers, as nearest of kin to the deceased George, Marquis of Annandale, and as having right to his executry.'

IV.—The late Lord Hopeton had purchased, with the Marquis's rents, some small pieces of ground lying in the heart of the Annandale estate.

The pursuers *contended*, That the defender fell to account to them for the price of these lands. Scarcely any argument was used by the parties on this point, probably from its being thought to rest on the same principles with the last. No 143.

THE LORDS 'found, the defender is not entitled to take credit for the price of certain lands in the county of Dumfries, purchased by his father out of the executry funds, unless he will agree to convey these lands to the pursuers as nearest of kin to the late Marquis of Annandale, and as having right to his executry.' *See* TUTOR AND PUPIL.

V.—During the guardianship of the Earls of Hopeton, different heritors, of whose teinds the Marquis was titular, had purchased them, in virtue of decrees of sale of the Court of Teinds.

The defender maintained, that on the principle of the pursuers themselves, he was entitled, as the Marquis's heir, to retain their price, as the subject was heritable at the commencement of the curatory, and no subsequent alteration on it could affect the succession.

Answered; The subject in question was rendered moveable by the operation of a general law, from which the estates of pupils or fatuous persons are not exempted. A change effected in this manner on the nature of the property, is very different from one brought about by the voluntary act of the tutor, and must have the ordinary effect in regulating the right of succession.

THE LORDS 'found the defender accountable to the pursuers for the price of teinds sold in consequence of decrees of the Court of Teinds.'

VI.—The late Earl of Hopeton paid with the rents of the Annandale estate, upwards of L. 36,000 of heritable debts, and took discharges from the creditors, who had, before payment, taken legal measures for enforcing it.

The pursuers *contended*, that the defender was bound to account to them for rents so employed,

His Lordship, on the other hand,

Pleaded; The presumption of law is, that a minor will attain majority, and that a fatuous person will recover the use of his reason. It is the duty of a tutor, therefore, in the exercise of his office, to consult his immediate interest, without attending to the contingent benefit, which in the case of his death before either of these events, may arise to his heir or executors, by following one course of management in preference to another. *Ex parte* Bromfield, 1st vol. Vessy junior, 453; Oxenden *v.* Lord Compton, 2d vol. Vessy junior, 69, and fol. 261. Now, the payment of the debts affecting the estate, was not only a proper, but a necessary act of administration on the part of the tutor, and the course which every wise man, in the full administration of his property, would have followed; and these debts being absolutely extinguished, by the discharges

No 143. of the creditors, they cannot be revived, so as to constitute a claim against the heir.

Answered; That the application of the rents to the payment of the heritable debts, was a proper act of administration, is indisputable. But the tutor, in place of discharges, ought to have taken assignments from the creditors, for behoof of the Marquis, and those entitled to succeed to his executry; and he will not be allowed to shelter himself under the form of a deed. In whatever manner he may have employed the moveable funds of his ward, he must account for their whole amount to his executors, otherwise he would be virtually regulating his ward's succession, and be at the same time *auctor in rem suam*, although the Court have already found that he can do neither, by determining the question as to the heritable bonds in favour of the pursuers *.

THE LORDS, considering this point to be attended with difficulty, 'before answer, ordered a hearing in presence on it.'

When the cause was again advised after the hearing, one Judge thought the claim of the pursuers should be sustained. His Lordship observed, that, as the necessity of appointing a tutor arose from the defect of judgment in the ward, his powers should reach no further than necessity required; and it seemed to be neither necessary nor expedient, that any act of management should have the effect of regulating the ward's succession.

The rest of the Court were of an opposite opinion. Intestate succession (it was observed) is in general governed by the state of the property at the defunct's death. This rule indeed admits of exceptions, as in the above case of an heritable bond, or adjudication obtained by a tutor; but, in the present case, the pursuers seek to revive and redintegrate debts which do not exist, in order that they may succeed to funds which have been most properly applied by the tutor to relieve the estate of the proprietor, without any sinister view to his succession. There was no equity between the executors and the heir which could have this effect. In so urgent an act of administration, the tutor was bound to consult the interest of the proprietor alone, without attending to eventual consequences.

THE COURT (6th March 1798) 'found, that the defender is entitled to take credit for the sums applied by his father in payment of certain heritable debts constituted by infeftment on the estate of Annandale.' *See* TUTOR AND PUPIL.

VII.—After the Marquis had been 37 years in a state of fatuity, the defender employed between L. 20,000 and L. 30,000 of his moveable funds in rebuilding a mansion house and deer-park, and in making ornamental plantations. The Marquis had no other mansion-house on his Scots estate, which, at his death, produced L 8000 a-year. He had one, however, on his English property, in which he resided.

* All the other branches of the cause were decided 17th May 1797. *See* APPENDIX.

The pursuers *contended*, That this expenditure was irrational, *ultra vires* of the tutor, and could not be admitted as a charge in his accounts. No 143.

The defender, on the other hand, *argued*, That the nonage, or incapacity of a proprietor, ought not to put a stop to the improvement and embellishment of his estate; that the expenditure was suitable, and such as the Marquis must have approved of, had he reconvalesced.

THE COURT 'found the defender is not entitled to take credit for the money expended in buildings at Raehills, or in making and inclosing the ornamental plantations immediately connected therewith.' *See* TUTOR and PUPIL.

VIII.—The Earl took credit for sums employed in supporting the Marquis's political interest in the county of Dumfries, and also for sums expended unsuccessfully in searching for lead on the Annandale estate.

The pursuers objected to both these articles; the notion of supporting the political interest of a lunatic was absurd; and it was contrary to the duty of a tutor to embark in hazardous speculations.

Answered; 1*st*, The preservation of the political consequence of a great family is a proper act of administration. 2*dly*, The appearances of lead were promising in the opinion of persons of skill, which rendered it the duty of the tutor to make the experiment.

'THE LORDS sustained the objections to the sums taken credit for by the defender, as the expense of political operations in the county of Dumfries, and of searching for mines.'

A reclaiming petition for Lord Hopeton against the third and fourth branches of the judgment, was refused without answers. *See* PERSONAL AND TRANSMISSIBLE.—TUTOR AND PUPIL.

Lord Ordinary, *Swinton.* Act. *Solicitor-General Blair, Rolland, Tait, Hope,*
Arch. Campbell junior. Alt. *Lord Advocate Dundas, Geo. Fergusson,*
H. Erskine, Mat. Ross. Clerk, *Home.*

R. D. *Fac. Col. No* 66. *p.* 150.

Bygones upon an adjudication, whether heritable or moveable. See ADJUDICATION.

Heritable and moveable, *quoad fiscum.* See ESCHEAT.

Heritable and moveable, *quoad* husband and wife. See HUSBAND and WIFE.

Bonds containing substitutions, when the substitution is at an end, so as to go to executors. See SUCCESSION.