

No 20.
from a tutor-
dative with
whom he was
competing for
the office.

tutor-dative, and concurrerth to the allegiance, That he having the tutory legally established in his person, is not obliged *edere instrumenta*, to any who has not a valid tutory or other interest. It was *answered*, That it is not proper *ante exhibitionem*, to dispute the validity of either of the tutories; and the pursuer, though he were not tutor, but nearest of kin to the children, may have good reason to call for inspection of their writs, wherein they can have no prejudice, but much more, being tutor in law served.

THE LORDS repelled the allegiance *contra exhibitionem*, reserving to the parties to dispute their rights before delivery.

Gilmour, No 115. p. 85.

1666. July 14. FOUNTAIN and BROWN *against* MAXWELL of Nethergate.

No 21.
A person ac-
cused of fraud
in putting a-
way writs, was
found obliged
to show *quo
modo desit
possidere.*

BROWN, as heir to Mr Richard Brown, who was heir to Thomas Brown, pursued for exhibition and delivery of a wadset right, granted in favours of Thomas; wherein the LORDS having sustained witnesses to be admitted to prove, not only the having of the writs since the intending of the cause, but the having them before, and the fraudulent putting them away, which ordinarily is only probable by writ or oath, unless evidences of fraud be condescended on; in respect the matter was ancient, and the pursuer had long lived in England; now, at the advising of the cause, several of the witnesses were found to depone, that the defender, before the intending of the cause, not only had such a wadset right, but was dealing to get the same conveyed in his own person, which importing fraud,

THE LORDS would not absolutely decern him to exhibit, but found that he behoved, *docere quomodo desit possidere*, or otherwise produce, and therefore ordained him to compear that he might be interrogated, and condescend upon the particular writs.

Stair, v. 1. p. 397.

1667. December 5. FOUNTAIN *against* MAXWELL.

No 22.
An intromit-
ter with writs
found answer-
able for them.

ALBEIT the LORDS are tender in exhibition of writs, unless it be proven, that the defenders had the same the time of the intending of the cause; or had fraudfully put the samen away before, which is *difficilis probationis*; yet, in an exhibition at the instance of ——— Fountain against Maxwell of Nethergate, they decerned to exhibit, albeit it was not proven that the defender had the writs, at, or since the intending of the cause; in respect it was proven, the defender had meddled with the writs being in a charter chest, and had offered to transact concerning the same, and so was presumed to have put them away fraudulently; there being a great difference betwixt a transient having of