

by him, yet the said apprising should be always redeemable by the heir and his creditor, upon payment of the true sums, seeing the tutor might have interrupted the legal by timeously using an order. No. 217.

*Harcarse, No. 986. p. 278.*

1686. January. PATRICK WILLIAMSON *against* LADY BORTHWICK.

No. 218.

The Lady Borthwick, debtor to Thomas Littlejohn, tailor, in £.300 of an account, having granted bond for it, for behoof of the creditor's children, to his brother Andrew Littlejohn, who was tutor testamentary to some of them, and acted as pro-tutor for the rest; and she being pursued by one Williamson, the husband of the eldest daughter, for her proportion, in respect that Andrew was not curator to her;

It was alleged for the Lady, that Andrew being tutor to some of the children, and the defender ignorant of their ages, and the sum not divided among them, she was *in bona fide* to grant bond to Andrew, and had paid him £.200 of the money.

Answered for the pursuer: Debtors pay to pro-curators upon their peril. Again, the pursuer's wife not having subscribed Andrew's discharge, the same was not valid, suppose he had been her curator; *multo minus* when he was no curator.

The Lords were of different opinions about the point, if the defender's *bona fides* in these circumstances, did liberate her as to what she had paid; but there being £.100 still resting, which exceeded the pursuer's share, they decerned the defender to make payment of the pursuer's proportion, which took off the debate.

*Harcarse, No. 987. p. 279.*

1686. February 25. KENNEDY *against* CUMMING.

No. 219.

The action between Janet Kennedy and her tutors, and Matthew Cumming, merchant in Glasgow, being advised, the Lords found the confirmation of Janet Cunningham's testament by Matthew Cumming was informal and unwarrantable, making the goods confirmed in her testament as if they had been her husband William Hewat's, on this pretence, forsooth, that in the two years of her viduity she had not time to acquire them, and so they behoved to be presumed to be her husband's; and therefore ordained the Commissary to rectify this, and to confirm the testament of new *gratis*; and ordained the substitutions in the bonds filled up by Matthew Cumming to be altered, and formed conform to the first destination, except as to the 3000 merks; and that he should restore the whole writs upon inventory: And as to Campbell of Ormadill, the tutor, in regard he had not made inventory, conform to the 2d act of Parliament 1672, therefore declared he should get no allowance from his pupil of any expenses he had debursed.

*Fountainhall, v. 1. p. 406.*