

never so clearly made out that the debt was once resting ; and the pursuer having no other mean of probation but the defender's oath, it doth sufficiently prove the payment. No. 252.

The Lords found, That the ticket being in the defender's hand, the oath proves, that the sum contained in the ticket was paid to one of the pursuer's tutors in presence of and with consent of the rest, and the ticket retired ; and therefore found the defender not liable, and assolizied.

Forbes, p. 475.

1711. *January 18.* AITON of Kinnaldie *against* SCOT.

A tutor having submitted his pupil's claim, and the pupil being charged upon the decree-arbitral, the Lords had no occasion to determine the general point, if tutors might submit, because they found the decree-arbitral could not afford a summary charge against his pupil, but only an ordinary action ; but they declared, that they would decern the pupil to implement, unless he could instruct evident lesion. No. 253.

Fountainhall.

* * This case is No. 22. p. 14997. *voce* SUMMARY DILIGENCE.

1711. *November 14.*

SIR PATRICK AIKENHEAD'S CHILDREN of the First and Second Marriage.

In the action betwixt Sir Patrick Aikenhead's children of the first and second marriage, mentioned 26th June 1711, another point fell to be debated ; that the friends and tutors finding that there was not a sufficient estate to fulfil the conditions of both contracts, they entered into a contract of communication, by which they were to bear a proportional loss ; the benefit whereof the bairns of the second marriage claimed, that their eldest brother might be restricted thereto, and not get his full provision made up. Objected, that tutors cannot bind their pupils by transactions upon their means, especially where he was so well founded as to be a preferable creditor, his mother's contract being *prior tempore* and so *potior jure* ; and it were of very dangerous consequence to allow tutors to transact clear rights ; for that is no ordinary deed of administration, but a downright alienation ; and therefore being to his manifest lesion, he craves to be reponed *ex capite minorætatæ et læsionis* ; and it is evident the friends' main design by that contract was to preserve and ingather the father's estate, that the subject of their payment might not perish, nor be consumed and dilapidated by their entering into pleas. Answered, it is very true, there be cases in which minors are restored against their tutors transactions, as appears *ex L. L. 22, 25, 36, 41 C. De transact.* Yet it must be

No. 254.
What are the powers of tutors to transact ?

No. 254. also yielded on the other side, that tutors may warrantably transact, where the point is *in apicibus juris*, and *lis walde dubia et anceps*, as this certainly was. For where could there be a more proper subject for a transaction than to remove a doubtful plea amongst brethren, and done not only *in presentia*, but *cum unanimi consensu amicorum*? And that by law, a man notwithstanding his obligations in a first contract, may enter into a second marriage and provide a wife and children, so they be not irrational and exorbitant; and which might be a probable motive to induce the tutors to the bairns of the first marriage to enter into that contract of communication: And both by the common law and ours, tutors and curators have a power in such dubious cases to transact their pupil's claims, where the point is dubious, and the expense of prosecuting it may be as heavy and prejudicial to the pupil, as the abatement given by the transaction, which is always *in re controversa*. Hence Vinnius De Transactionibus, Cap 3. tells us, *Tutores vel curatores de re pupillorum vel adolescentium recte transigunt si jus illorum fit valde obscurum vel dubium*. And Ulricus Huberus on that title says to the same purpose, *Tutoris atque curatores de rebus pupillaribus transigere possunt si causa sit valde anceps et ambigua*: And Boekelman concurs in the same opinion. And with us in January 1691, there was a famous decision, Fletcher of Aberlady against his brother's tutors, where the Lords sustained a transaction made by them, with a lady, liferenting a part of their pupil's estate, whereby they transacted her liferent at five years purchase, though she had then a cancer in her breast unknown to them, and died within a few months after the bargain. See Stair, Tit. TUTORs. The Lords on the one hand thought tutors might in some extraordinary cases transact; and on the other it might be of very dangerous consequence to pupils, if all the bargains their tutors made should be sustained. The difficulty is, to steer betwixt this Scylla and Charybdis, and find out either a *medium participationis* or *negationis*; and at present they fell upon this medium, that if it was but a *modica læsio*, they would not reverse nor rescind this transaction; but only where enorm lesion appeared; and remitted to the Ordinary in the cause to hear them condscended on the extent of their lesion.

There was another point started, if the second contract of marriage be reduced *quoad excessum*, *a quo tempore* does it take effect, whether *ab initio* or only from the date of the interlocutor? for the younger children of the second bed contended they were *bona fide* possessors preceding the interlocutor. The other bairns alleged no *bona fides*; for you could not be ignorant, but I had the preferable right, and if you affect ignorance of it, that cannot excuse; for *ignorantia juris neminem excusat*: See 20th November 1662, Children of Wolmet, No. 12. p. 1730. But the Lords had no occasion to decide this point here. See No. 94. p. 977.

Fountainhall. v. 2. p. 671.