1712. *June* 19.

MARGARET DICK, and DAVID CUBBISON, her Husband, for his interest, *against* ROBERT RORISON of Marsculloch, and Others.

No 26.
A father, as administrator in law to his child, having disponed a wadset right to the reverser, which the pupil was entitled to as apparent heir to the wadsetter last infeft, the reverser was found obliged in an exhibition *ad deliberandum*, at the apparent heir's instance, to produce the wadset right, notwithstanding of the disposition.

ALEXANDER GORDON of Earlstoun, in *anno* 1646, granted a wadset of the lands of Culmark, to Robert Canon of Blackmark, who disponed the same to John Canon of Furmistoun in liferent, and Nathaniel Canon his son in fee. This wadset descended by succession to Margaret Dick, daughter to Lieutenant John Dick, and grandchild by the mother to Nathaniel Canon. Earlstoun paid the wadset sum to Lieutenant Dick, and got from him, as administrator in law to his daughter, a conveyance of the wadset to Robert Rorison, who had acquired the reversion from Earlston. Margaret Dick, apparent heir to Nathaniel Canon, did, with consent of her husband, pursue exhibition *ad deliberandum* against Robert Rorison, and Thomas Gordon now of Earlstoun, wherein the pursuer called for production of the wadset-right.

Alleged for the defenders; They cannot be obliged to exhibit the wadset-right; because the pursuer and her predecessors are denuded thereof by Lieutenant Dick's disposition in favours of Robert Rorison, which is produced.

Replied for the pursuer; The disposition by her administrator of law is null; because, 1*mo*, He had no power to alienate an heritable subject without the authority of a Judge, that is, the Lords of Session, *l.* 5. *l.* 25. *l.* 27. *C. de Admin. Tut. Stair, Instit. lib.* 1. *tit.* 6. § 18. 2*do*, The right of the wadset was not established by infeftment in the pupil's person, as heir to her predecessor.

Duplied for the defenders; Tutors cannot indeed of themselves alienate heritable rights, where there is no antecedent obligation upon the pupil, or his predecessors so to do; but, where there is such an antecedent obligation, they may alienate, *l.* 5. § 3, 6. *ff. de Reb. Eor. qui sub Tut. l.* 1. *C. quando decreto opus non est.* So that as the reverser might have compelled the wadsetter to renounce and take his money, there was no necessity to wait the interposing of a judicial authority. And our law allows tutors, in many cases, to do deeds of alienation; as to grant charters and precepts of *clare constat.* 2*do*, It is of no import, that the pupil had no right in her person; for, if once it be established, that an administrator of law could grant a renunciation of this wadset, then the warrandice in the renunciation or disposition will debar the minor from quarrelling it; as a disposition by an apparent heir will be good against him after he is served.

THE LORDS found the defender obliged to exhibit the wadset-right to the pursuer, notwithstanding of her father's disposition thereof in favours of Rorison.

Fol. Dic. v. 1. *p.* 284. *Forbes, p.* 598.

*** Fountainhall reports the same case:

No 26.

GORDON of Earlston, in 1646, grants a proper wadset of his lands of Culmark to one Robert Canon, redeemable for 4000 merks. This right comes by progress into the person of Margaret Dick, as heir to Helen Canon her mother. Earlston dispones these wadset-lands to one Robert Rorison, which gave him right to the reversion of the foresaid wadset; and he resolving to redeem it, applies to Lieutenant John Dick, father to the said Margaret, who, on payment of the sum, dispones the wadset to Rorison, as father and administrator of the law to Margaret his daughter, then a pupil; and finds a cautioner that she shall ratify at her majority. The said Margaret being now married to David Cubbison, and finding her father had misapplied the money, and was insolvent (both he and his cautioner), pursues both Earlstoun and Rorison in an exhibition *ad deliberandum*, to produce the whole rights relating to that wadset; and the LORDS having found, that they were obliged to produce all writs granted in favours of those persons to whom she is apparent heir, or by them to persons *in familia*, whereof she and her predecessors are not denuded; but as to rights whereof they are denuded, found the defenders ought first to produce the writs denuding them. In obedience to which interlocutor, Earlston and Mr Rorison produce the disposition of the wadset granted by Lieutenant Dick her father, and so being absolutely denuded, they were bound to produce no farther. 2*do*, Her father, as tutor and administrator, might have been compelled, by using an order, to accept the money, and having, to shun expenses, done it voluntarily, the same exoners them sufficiently. 3*tio*, She has no interest to urge any farther production, neither she nor her mother being entered or infeft. *Answered*, Her father, as administrator, had no power to alienate any heritable subject belonging to her, without the decree and authority of a Judge; of which kind this wadset heritably secured by infeftment is, and which just caution and security we have borrowed from the Roman law, *l.* 25. *C. de administrat. tutor.* Payment may be made to pupils and their tutors, but so *ut prius sententia judicialis hoc permiserit, vid. l.* 5. *l.* 27. *eod.* § 2. *inst. quib. al. licet. vel non*, with which our law perfectly accords, as Stair observes, *lib.* 1. *tit.* 6; and without this barrier pupils would be exposed to ruin by the treachery or prodigality of their tutors, who, lifting their money, might squander it at their pleasure, or pay their own debt with it; whereas, if it be done on citation of the nearest of kin, and on a decree of the Lords, they would see it re-employed again to the pupil's behoof. And whereas, it is pretended, that, by using an order of redemption, they would have compelled him to take his money, and transmit the wadset to Rorison, the reverser, Earlstoun's assignee, it is *answered*, This position is denied; for this being a part of the minor's heritable estate, *non tenebatur placitare*, and so the father could not have been compelled to accept it during his daughter's minority; and without application to the Lords, as the common pa-

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 consignation, 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 authoritas necessaria non est ut tutorum solicitudini consulatur si defuncti voluntati pareat: Nam pronior 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 delibe randum*.

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,

1*mo*, Such a production would certainly exclude Boal himself, and therefore all who represent him; 2*do*, If the pursuers were served heirs, and infeft, 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 acknowledgement, 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.