No. 141. meddle also. The children did raise a process against the heirs of James Notman (who, being overseer, did meddle also with the defunct's goods) for all that did belong to the defunct intromitted with by him, or as he who ought and should have intromitted with the profits thereof, *super hoc medio*, that he was overseer nominated, and if so, pro-tutor, after the second marriage, and death of the relict, by subscribing discharges, and intromitting as tutor. It was alleged, That, as overseer, he could not be pursued, not being any ground of a passive title; nor as pro-tutor, where there was a tutrix nominated. And though he might be conveneable *rei vindicatione*, *in quantum* he did actually intromit with, yet not for what he did not intromit with; seeing albeit *suo periculo* he did intromit with some things for which he was countable, yet having no legal title by which he could legally intromit, or call and convene debtors and havers of the defunct's goods, he ought not to be pursued for what he did not meddle with, and far less ought to be pursued for the interest. It was answered, That the pro-tutor having meddled *eo nomine*, it ought to be imputed to himself that he had not a lawful title as tutor, who without doubt might have procured a tutory dative, which could not have been denied him; at least if it had, another would have obtained the same, and been forced to find caution: And therefore, seeing he *immiscuit se* as tutor, he must be liable as if he had been tutor nominated, or tutor in law, or tutor dative; in either of which cases he would have been countable for the whole estate and interest, and for *omissa* as well as *commissa*.

The Lords, before answer, ordained the pursuer to produce all the papers subscribed by the pro-tutor which he would make use of to prove the pro-tutory, with a full charge of the *commissa et omissa* by himself or by the tutrix, or by the rest of the overseers; and then, after consideration of his and their carriage, they declared they would consider *in quantum* he should be liable, whether for his own *omissa* as well as *commissa*, and whether for the *omissa* and *commissa* of the rest also.—See No. 148. p. 16273.

Gilmour, No. 114. *p.* 84.

1664. *December* 7. ECCLES *against* ECCLES.

No. 142.
A tutor's oath not relevant to prove a condition or agreement with the defunct against the pupil.

In an action of a count and reckoning betwixt the two infants, it was alleged for the defender, That he being pursued upon his father's back-bond, obliging him to make count and payment of the means of umquhile Fergus Eccles, his brother, to Thomas Eccles, and umquhile Andrew Eccles, the pursuer's father. It was answered, Upon condition that Mr. Hugh, the defender's father, should have the third part to himself, the question was concerning the manner of probation. The pursuer alleged, It was only proveable *scripto*, he being a pupil and his father dead. The defender alleged, It was proveable by the tutor's oath, being so likely in itself, that Mr. Hugh being the third brother should have the third share, and that Thomas, the tutor, did accordingly allow him the

third share; and there was produced a testificate of Balloche, that there was an agreement. No. 142.

Notwithstanding whereof, the Lords refused to take the tutor's oath, *ex officio*, seeing they found, albeit it were affirmative, it could not prove against the pupil.

Stair, v. 1. p. 236.

1665. *January* 10. KER *against* LOGIE. No. 143.

In a reduction of a tutory dative, at the instance of a tutor in law, betwixt Ker and Logie, the Lords found these reasons relevant, that the tutory dative was taken within year and day after the father's decease, albeit before there was a possibility before the serving the tutor in law, in respect of the surcease of justice betwixt May, 1659, and June, 1667, during which time there was no Chancellary open.

Newbyth MS. p. 17.

*** This case is reported by Gilmour:

John Ker having died intestate, leaving two young children, in May, 1659, after which time there was no Chancellary-office for the space of two years; and, in June, 1661, John Ker, goodsir and nearest agnate, did take out brieves for serving himself tutor in law, and caused execute the same; but, in the mean time, William Logie, goodsir on the mother's side, obtains passed in the Exchequer a gift of tutory dative; and thereafter he obtained two decrees against the said John Ker, by which he poinded his goods, and rendered him unable to find caution, till he obtained suspension, and got the decrees turned into a libel; and now the said John Ker pursues a reduction of the said tutory dative, upon this reason, that before the service *annus utilis* was not out-run, nor before the taking the tutory; and the reason why he did not find caution sooner was the defender's fault, who rendered him unable; and withal, the defender is suspected, his daughter having married a second husband, to whom she has children, so that it may be presumed he will let a part of these bairns' means fall to his other oyes; and a practick was alleged, in June, 1632, betwixt Irvine and Elsick, No. 123. p. 16260. It was answered, That *annus utilis* is not allowed in this case, the pursuer having time enough to prosecute his legal right, and might have done it long before the defender purchased the dative. And though it were true that the pursuer was poinded, yet that is no reason to make the pursuer's right good, and to reduce the defender's, it being a legal execution, putting the pursuer to no such incapacity as to excuse him so as to render his null right valid; and the practick meets not, for in that case the service and gift under the Quarter Seal were *debito tempore* expede, and the tutor did administrate, though he did not find caution.

The Lords preferred the pursuer to the subsequent dative, he finding presently sufficient caution, which was ordained to be done.

Gilmour, No. 124. p. 92.