

The Lords found, That the pupil had interest to call for exhibition and delivery of all writs that were in his father's possession *quovis modo*, and ordained the tutor to exhibit all, without prejudice to any party having interest to crave the delivery of these writs, if they belonged to them.

*Stair, v. 1. p. 247.*

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not only for such as belonged to the defunct, but for such as were in his possession at his death.

1665. February 4.

BEG against BEG.

Thomas Beg in Edinburgh having a son of his first marriage, and providing his children of two subsequent marriages to his means, the son of the first marriage pursues his father for his mother's third, and craves annual-rent therefor, he being minor, and his father his tutor of law, and therefore liable, as other tutors, for annual-rent.

Which the Lords found relevant.

*Stair, v. 1. p. 264.*

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1665. June 10.

SWINTOUN against NOTMAN.

Swintoun in his testament, having named his wife tutrix to his children, and Notman and others, overseers; his relict within a year was married, and so her tutory ended. Shortly after Notman, received from her a number of several tickets belonging to the defunct, and gave his receipt thereof, bearing that he had received them in his custody, and keeping. Thereafter, he uplifted the sums, contained in some of the tickets, and gave a discharge to the relict, and second husband, of some particulars, and consented with the pupil, to a discharge to a debtor, which expressly bore him to be tutor testamentary, and did intromit with the rents of some tenements, and disposed upon some sheep. Whereupon Swintoun, the pupil, pursues him as tutor or pro-tutor, not only for all he intromitted with, but for the annualrent thereof, and for all the rest of the defunct's means, which he ought to have intromitted with, and to have called the tutrix to an account therefore, and condescended upon the insight and plenishing of the defunct's house, the goods in his shop, he being a merchant, the debts in his account books, and those due by his tickets, not only received by Notman, but by others, and for the remainder of his sheep, and other moveables, and for the rest of his rents, not uplifted by Notman. It was alleged for Notman; *1mo*, That that member of the libel was not relevant, whereby he was pursued, not only for that he intromitted with, but what he omitted, because a pro-tutor is not obliged as far as a tutor for the pupil's whole means; but this far only, that whatsoever he intromits with, as to that he is obliged as a tutor, to employ it, and preserved it, and so is liable for annual-rent therefore, and in that he differs from another *negotiorum gestor*, who is not liable for annualrent, but he is not liable for other particulars of others kinds, that he meddled not with; as albeit he had meddled with the tickets, yet that

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would not oblige him to meddle with the account books, plenishing, or cattle, there being no law to oblige him ; neither was there any possibility, that he could meddle therewith, being neither obliged, nor able to do, having no active title in his person ; for overseer *non est mōmen juris*, and by our custom, it doth oblige to nothing, but is as the *fidei commissa* were in the ancient Roman law in the arbitrement of him to whom they were committed, without any obligation or legal compulsion, *ex mera pietate* ; so that his being overseer could oblige him in nothing, and his meddling thereafter to preserve the means of the pupil, when his tutrix and mother had superinduced a second husband, ought not to be hurtful to him ; otherwise no overseer will meddle in any case with any thing of the pupil's, whereby their means may be destroyed. *2do*, He cannot be liable as tutor notwithstanding of the discharge subscribed by him *hoc nomine* ; because albeit that would prove him tutor, where the case did not otherwise appear, seeing the contrary is manifest, that whereas the discharge bears him tutor testamentar, the testament produced, bears him only to be overseer, *et falsa designatio non obest*. *3dly*, The ticket or receipt of the bonds cannot oblige him for all these bonds, but such thereof, whereof he uplifted the money, and only for that time that he uplifted the same ; especially seeing the ticket bears, that he received them in his custody, which any friend might do, especially an overseer ; and does not import his purpose of intromission. The pursuer answered to the first, that his libel was most relevant, not only for intromission, but omission ; because a pro-tutor in law is obliged, in all points, as a tutor, not only *pro commissis sed pro omissis* ; and albeit he had no active title, whereby to intromit, that cannot free him from being liable *passive* more then a vitious intromitter, or one behaving as heir ; but he ought either to have forborne, or procured to himself a tutory dative ; and unless pro-tutors be universally liable, pupils will be destroyed, because any body will meddle with their means, knowing they are liable for but what they meddle with, and the annualrent thereof, which perhaps will not be made out against them ; but if they be universally liable, they will either wholly abstain, or orderly intromit, by procuring a title : and albeit overseers be not liable in the first place, yet they are *tutores honorari*, liable after the other tutors are discussed. As to the third, the receipt of the bonds, albeit, it bear in custody, yet it is proved by the writs produced *quod se immiscuit*, by uplifting the sums contained in some of the bonds, and therefore is liable for the whole.

The Lords having heard and considered this case at length, found, that seeing there was no law, nor custom of ours, to make a pro-tutor liable in all points as a tutor, and that the civil law obliges not, but only we ought to consider the equity and expediency thereof ; and therefore they found, that they could not condemn the defender for omissions, seeing there is no antecedent law, nor custom : And therefore found, that as overseer, he was obliged to nothing, and that as intromitter, he was liable for what he intromitted with, and the annualrent thereof, after his intromission ; and found him liable for the hail bonds in his tickets, seeing he meddled with a part of the money thereof ; and found, that if he had meddled with

a part of the sheep, that would make him liable for the whole sheep of that flock, and the annual rent thereof; and found, that his being designed tutor, contrary to the testament, did not instruct; but the Lords declared, that in cases occurring in all time coming, they would find pro-tutors liable in all points as tutors, and ordained an act of sederunt to be made thereupon and published in the House, to all the whole advocates, that none pretend ignorance.—See No. 141. p. 16269.

*Stair, v. 1 p. 279.*

No. 148.

1665. June.

WATHERSTONE *against* Her Tutors.

In a process pursued at the instances of Margaret Watherstone and John Lermont, her husband, against her tutors, for making count, reckoning, and payment, of her father's moveables pertaining to her, it being alleged, That they could not be further charged than the inventory contained in her father's confirmed testament, it was answered, That the inventory being given up and confirmed by the tutors themselves, the pursuers offered to prove, by their own oaths, that they introduced with more than was confirmed, and greater prices than those confirmed. Replied, That they were not holden to swear contrary to the oath in testament. Answered, *Sibi imputent*, and tutors giving up inventory in name of their pupils, should do it so faithfully as they may not be liable to circumvention and omission therein, else minors would be in no security, who in such cases are more privileged than others.

The Lords repelled the allegiance, and ordained the tutors to swear; but withal, if any thing after oath should be found omitted, or ill appreciated, that the same shall be confirmed by a dative before sentence.

*Gilmour, No. 151. p. 107.*

No. 149.

Are tutors accountable beyond the inventory sworn to?

1665: November 30.

DAVID BOYD *against* ISOBEL LAUDER and JOHN TALZIFER.

David Boyd pursues John Talzifer, as representing his father, on all the passive titles, and Isobel Lauder, his mother and tutrix, for her interest, and condescends upon his behaving as heir, by uplifting of the mails and duties of his father's lands, by his said tutrix. It was answered, That he being a pupil, his tutrix's intromission could not infer that passive title against him, as hath been frequently sustained these many years. It was answered, That was but since the Usurpation; but before, the tutor's intromission did always infer this title, and the pupil could only pursue his tutor for his damage.

The Lords found the pupil not liable on this passive title, by his tutor's intromission.

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A pupil does not incur a passive title, by the intromission of his tutor.