

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.

No. 150.

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

No. 150. The pursuer then insisted against the tutrix for paying so far as she had intruded. It was answered, That she was but called for her interest, to authorise her pupil, but not to pay, neither could she be liable to pay, unless a decree had been first established against the pupil, and then it had been arrested in her hands, and pursued to be made forthcoming.

And yet the Lords found the tutrix, *hoc ordine*, liable.

Stair, v. 1. p. 317.

No. 151. 1665. December 5. HILL against MAXWELLS.

It was found justifiable in a tutor to apply heritable bonds to the reparation of the dwelling-house, since the benefit thereof was to accresce to the heir, and not to the executor.

Stair.

* * This case is No. 2. p. 14355. *vide* SERVICE AND CONFIRMATION.

No. 152.

In singular cases and circumstances, the Lords *ex officio*, and before answer, take the oath of the tutor in causes against the pupil.

1666. January. HAY against OGSTOUN.

Mr. Francis Ogstoun, servitor to the Lord Advocate, having died, and having left a legacy to Mr. John Hay, servitor to one of the Clerks of Session, who lived not long after him, and there being withal an alleged bond, granted by the said Mr. Francis to the said Mr. John, for 1000 merks, which he assigned to John Hay, his son, the said John Hay, with concurrence of John Hay, writer in Edinburgh, his curator, and which curator is also executor to the said Mr. John, pursues Jean Ogstoun, sister and executrix to the said Mr. Francis, for payment; who alleges, That she having but lately come to Edinburgh, after the decease of her brother, and of the said Mr. John Hay, her brother's papers were delivered to her as executrix, by the same pursuer, who is executor to the father, and curator to the son, and that without mention of any bond granted by her brother to the said Mr. John; but, on the contrary, it is unlikely he would have left him a legacy, without mentioning the debt, that it might be known whether the legacy was by and attour the debt, or in satisfaction thereof; and therefore craved, that the said John might *ante omnia* give his oath, whether or not this bond was retired by Mr. Francis in his own name as satisfied, and found amongst Mr. Francis's papers, and what he knows anent the payment thereof, in whole or in part, before Mr. John assigned the same to his son.

Which the Lords found reasonable, notwithstanding it was answered, that his oath could not prejudice the minor, who is assignee; reserving the consideration of what the oath should work at the time of the advising.

Gilmour, No. 179. p. 129.