

1000 pounds, contained in the laird of Wedderburn's bond, addebted to the minor and his father before, notwithstanding that it was contended, that he should be answerable therefor, in regard that the cutator alleged, that the tutor had done no diligence against the debtor, neither personally by horning, or caption, nor really by comprising, without which doing of diligence, by the space of three years within his tutory, he *alleged* that he cannot be freed of that sum; for albeit the tutor *answered*, that he spared to deburse any of his pupil's money against the debtor, who was then irresponsal, and from whom he would not have gotten any better payment, for all the execution that might have been used, and so he might have done the pupil prejudice, by debursing and spending of his money needlessly; and which possibly, in respect of the event, would not have been allowed to him; yet the curators *replied*, that he ought to have done diligence, because he can never be freed, except he had used horning and caption, at least against the debtor, whereby to have discharged that duty, which was incumbent to him in his office, and he cannot excuse himself, by the insufficiency of the debtor, and the wasting of the pupil's goods thereon, seeing the debtor was not then bankrupt. THE LORDS found, that the tutor was not astricted to be answerable for this debt, for his said negligence, and that he needed not, neither to have used horning or caption, or comprising against the said debtor, except that the curators might shew, and make it known and alleged, that by the doing of the foresaid diligence, he would have recovered payment of the debtor; and that so the debtor is in worse case now, than he was in the foresaid time of the tutory.

Act. Nicolson.

Alt. Belsbes.

Clerk, Gibson.

Fol. Dic. v. 1. p. 241. Durie, p. 379.

1667. July 9.

STEVEN against BOYD.

No 40.

If the pupil's debtors be unquestionably *solvendo*, the tutor can have no occasion to do diligence, but if a debtor or his cautioner be *vergens ad inopiam*, the tutor is bound to do all diligence for uplifting the sums, unless the debtor become entirely bankrupt suddenly, which the tutor could not foresee, in which case he is not liable.

A tutor is bound to do diligence according to the circumstances of the debtor; if there is land, he must apprise; if goods, poind; if sums, arrest; and, *in subsidium*, to use personal execution.

Fol. Dic. v. 1. p. 241. 242. Stair.

\*.\* See this case, No 35, p. 500.