

No. 185. minors may chuse curators, who will have the administration of any other estate belonging to them.

Dirleton. Stair.

* * This case is No. 87. p. 8970. *voce* MINOR.

1676. *December 13.* MELVILLE *against* MONTGOMERY.

No. 186. A tutor, who had intromitted with the estate of his pupil, a Lady, was found not entitled to sue her husband, after the dissolution of the marriage, upon an assignation to a debt which had been due by her, as the tutor had not settled his accounts.

Gosford.

* * This case is No. 164. p. 9845. *voce* PASSIVE TITLE.

1677. *January 13.* FERGUSONS *against* FERGUSON.

No. 187.
Duty of a
tutor to do
diligence.

Helen and Elizabeth Ferguson, the only children of ——— Ferguson of Threave, and Janet Ferguson his spouse, pursue Simon Ferguson their tutor, and insist on this point, that by their father's contract of marriage produced, the lands of Threave are provided to the heirs of the marriage, and so did belong to them; and albeit their tutor raised briefes, and served the same *affirmative*, yet he did not extract the service nor retour, but did collude with Thomas Ferguson, brother to the defunct, who disponed the estate to the tutor's brother, and was served heir-male, the lands having been formerly provided to heirs-male, which might have been prevented, if the tutor had retoured the daughters' service, who are provided heirs by the contract of marriage, and thereby the tailzie is broken, and were accordingly served by an inquest. Several witnesses being adduced to prove this point, and among the rest the tutor's brother, who deponed, that the tutor and he being uncles to the pursuers, and having taken advice of lawyers, they found that the pursuer's father was infest as heir-male to his father, and that by his infestment the lands belonged to heirs-male, and that there being no new infestment upon the contract of marriage, changing the succession from heirs-male to the heirs of the marriage, that the contract being only personal, could not instruct a valid service of the daughters as heirs of the marriage; but found only a personal action against the heir-male, to fulfil the contract, and to enter and denude himself in favours of the heirs of the marriage, and that the heir-male being an insolvent vagrant person, if he had disponed, his singular successor being infest *ex causa onerosa*, would be secure, and the pursuers get nothing; for preventing

whereof, he did with advice of the tutor, take a disposition from the heir-male to the behoof of the pursuers, expecting nothing but his charges. No. 187.

The Lords, at the advising of the cause, found no malversation proved, and that the defunct not having obtained infeftment upon the contract to him and his heirs of the marriage, but having taken infeftment to him and his heirs-male, that the heirs of the marriage could not be served as heirs in the lands, not being *heredes investiturae*, but might have been served as heirs to their father in that clause of the contract, “providing the estate to the heirs of the marriage,” which would have been an active title, necessary for pursuing the heir-male to fulfil and denude, and that the entering of the heir-male was a necessary act; but this occurred to the Lords, that the tutor might and ought have raised an inhibition upon the contract against the heir-male, which would have prevented all hazard, and therefore found him liable for the pupil’s damage, and ordained him to obtain a disposition from his brother to the pursuers as heirs of the marriage.

Stair, v. 2. p. 493.

1677. January 23. TAILFER against SANDILANDS.

A curator having in his accounts given in an article of incident charges upon occasion of the minor’s affairs, viz. That he had met with agents and others in taverns, in relation to the pupil’s affairs, and had been at charges in drinking with them, extending to a considerable sum during the whole time of his charge; the Lords did not allow the same in the terms foresaid, but ordained him to condescend upon the particulars; and if he kept a book and diary of his disbursements, so that he might warrantably declare, that he had truly disbursed the particulars therein mentioned, they inclined to modify the same to such a sum, as they should find reasonable.

Dirleton, No. 435. p. 214.

1677. July 27.

MR. HUGH M^cALEXANDER of Dalreoch, against MR. FERGUS M^cALEXANDER, Minister.

In an action pursued at Dalreoch’s instance and his curators against Mr. Fergus M^cAlexander, who was served as tutor of law, for count and reckoning, likewise for exhibition and delivery of his whole writs, and particularly of a gift of ward and marriage of John M^cAlexander, the pursuer’s elder brother, granted to the Minister by the Lords of Exchequer; it was alleged that he was not obliged to deliver that gift, because it was granted to himself *proprio nomine*, and gave him right to the rents of the lands, aye and while the entry of a lawful heir, which

No. 188.

Actio contractaria tutela et curatele.

No. 189.

The nearest agnate, after behaving as pro-tutor, having procured a gift of the pupil’s ward and marriage, and