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then having served himself tutor-in-law, it was found, that the gift being procured before he was tutor, he ought to have himself the benefit of it.

was not yet expired. It was replied, that albeit he was not tutor the time of the gift, yet he behaving himself as tutor, and being the nearest agnate, in so far as he caused inventory the whole writs in the charter-chest, and caused open all other chests and cabinets, count and inventory the money, and so was pro-tutor in law; his obtaining of the said gift ought to be construed as gotten to the behoof of the pupil after he was served heir, and should accresce to him, and cannot be extended to this pursuer's ward, which did not fall after his eldest brother's decease. The Lords did find, that the gift being procured before he was tutor, and granted to himself, that he ought to have the benefit thereof, and that *pro tutor* not being a term in our law to be made out by deeds of behaviour, the benefit thereof could not be taken from him; and in respect thereof did sustain the defence, notwithstanding of the reply.

Gosford MS. p. 680. *No.* 1006.

No. 190.
Pro-tutor.

1677. *December* 20. COCKBURN *against* The VISCOUNT of OXFORD.

Mr. John Cockburn having charged the Viscount of Oxford for payment of a bond of 10,000 merks, and another of 5000 merks, and a yearly pension of 1000 merks; the Viscount suspends on this reason, that these bonds were elicited from him by the charger, who had been his pedagogue in his pupillage, and his Governor during his minority in his travels, and thereby had gained great power and insinuation with him, having induced him to go abroad to travel after he was married, without consent, and contrary to the mind of his friends, and contrary to an express prohibition of the secret council, prohibiting Mr. John to come near the Viscount, and that by his instigation he had spent vast sums abroad, whereof Mr. John had the intromission: and yet after his return, he elicited all these bonds, when the Viscount was but shortly past his minority. The Lords would not sustain these as qualifications of circumvention; but found Mr. John liable to count for his intromission, and that in regard of these circumstances, the Lords would allow probation of the intromission, and expences, by the counts and oaths of merchants abroad, who furnished the money, and granted commission for that effect. Whereupon reports were returned from Rouen, with the oath of Scouller, relating to his accounts of money, furnished to the Viscount, with the duplicates of the said accounts signed by him, with the oath of Monsieur Alexander, who delivered the money, or bills, upon Scouller's order; by which it did appear, that Scouller furnished the Viscount all the time of his being abroad, which was the space of four years, as appears by his accounts, extending in the whole to forty eight thousand pounds; and by the accounts it did appear, that they were made with Mr. Cockburn, as Governor to the Viscount, and that several of the articles did bear the delivery of the money to him, and the sending of bills to him, drawn upon Scouller's correspondents at Rome. The Lords found, the oaths and accounts sufficient probation to make the charger countable for those articles that

bare him intromitter. It was further alleged for the Viscount, that the charger must not only be countable for his intromission, but for the Viscount's whole expenses, it being proved by the reports, that he acted as Governor to the Viscount in his travels, which office imports a duty to look to the Viscount's affairs, that nothing were spent without good reason, which hath been the custom of all Governors of persons travelling abroad, who always made account of the whole expenses, and which is most necessary, otherwise all that go abroad to travel, may be abused at the pleasure of their Governors, if they be only countable for their actual intromissions, which they may easily palliate, and yet make the profits to return to themselves; and therefore, as all who act as tutors, curators, or factors, though without warrant, are as much liable, as if they had warrant; so in this case the charger having openly avowed, by written accounts, his acting as Governor, he must be liable to give a rational account of the whole expenses, especially seeing the charger had been Pedagogue to the Viscount, and did then count for his own expenses, and his continuing to act as Governor, was imported *quasi per tacitam relocationem* of the same office and duty. It was answered for the charger, That his acting under the name of Governor to the Viscount abroad, could not infer an obligation to be countable for the spending of his money; for it is known that a Governor *non est nomen juris*, but is a mere title of respect which noblemen put upon persons that travels with them, as friend or servant, whose counsel they use, and which majors, as well as minors do, and which hath no power, and so can import no obligation: So that unless it could be made appear, that there was a contract or agreement betwixt Mr. John and the Viscount, to count for all money, there can be no obligation; for, it is undeniable that the Viscount might have dismissed Mr. Cockburn any day he pleased, and he had power to controul the Viscount in nothing, but was a servant only subject to the Viscount; and unless he had been commanded to receive, give out, and account for his money, it had been presumption in him to have attempted it. It is true that Governors entrusted by parents and tutors, who thereby had power to over-rule and controul their pupil, and according to their trust, are accountable for the reasonableness of their expenses; but in this case the Viscount was married, was seventeen years of age, and by application to the Lords, had obtained a modification of 10,000 pounds yearly for his expenses, during his minority, which he might dispose of, and discharge without consent of his curators; and therefore as to that modification, he was as free as if he had been major. Nor can it be pretended, that there was a continuation of the charger's trust as Pedagogue, the case being wholly altered, and the charger's power of over-ruling the Viscount ceased; nor is he in the case of a Protutor, because tutory is a known office, and likewise curatory, whereby those who behave as such, are liable as such; but a Governor is not at all so, and the charger's Pedagogue was discharged, and discontinued; neither is there any pretence for this clamour, seeing it will appear that the Viscount for his own spending, did not exceed the modification of the Lords; and that the charger at his return had the approbation of the council, and all my Lord's friends, and

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No. 190. had his pension from my Lord when he was major *sciens et prudens*, bearing expressly, for his good service in my Lord's affairs, during my Lord's travels, which takes off all pretence of malversation. And for the other sums they were truly lent to, and given out for my Lord, and were no gratifications, and the charger spent that part of his life with my Lord, which might have fitted him for any other employment at home, which is now lost.

The Lords found, that seeing the accounts were transacted with Mr. John as Governor, he ought to give some account of the manner, and reason of the expenses, reserving to the Lords the manner of charge and discharge, and the effect, how far the charger should be liable beyond his intromission.

Stair, v. 2. p. 585.

1678. *February* 25. ROSE of Garlestone.

No. 191.

A tutor or curator is not in law obliged to lay out the annual-rent of the minor's money upon annualrent, but the rents of lands he must lend out after a year.—See APPENDIX.

Fountainhall.

*** This case is mentioned in No. 8. p. 9986. *voce* PAYMENT.

1678. *July* 26.

PEARSON of Kippenrosse *against* BELSHES of Tofts.

No. 192. An action against him as tutor to count. He craves £.100 as the yearly aliment. Answered, The annual of their money unliferented was but 100 merks. The Lords found, except in very singular cases they would not suffer the aliment to exceed the annual-rent.

Fountainhall MS.

1678. *January* 18. GRAY *against* The LADY BALLEGERNO.

No. 193.
A Testament naming tutors found valid, the defunct not being able to subscribe, having given warrant to Ministers to subscribe, tho' he died before they fully subscribed.

Umquhile Ballegerno having no sons, provides his estate to his eldest daughter, with the burden of £.20,000 to his other daughters in case he had two or more, and £.12,000 in case of one, payable at the first term after his death; he did also name his wife and some other persons tutors to his bairns. He had two daughters, Mary and Margaret, who survived the first term after his death. This provision was with a power to the father to divide the portions off the £.20,000 and in case he divided not, to two friends after his death, which two friends did divide to Mary the elder 20,000 merks, and to the successors of Margaret, who is dead, 10,000; whereupon there is a pursuit at the instance of Mary against