

Pleaded : In many instances, it must be very much for a pupil's advantage, that an encroachment should be made upon his provision, for the sake of fitting him out, and enabling him to engage in some profession, as a means of support in future life. Formerly the law may have been more strict upon this point; but it is so laid down by Ersk. B. 1. Tit. 7. § 24. No. 318.

Notwithstanding the clause in the settlement, that the interest was intended for the maintenance of the children; and that the provisions of those who died before majority or marriage, were to accresce to the others; the majority of the Court differed from the Lord Ordinary, and thought, that whatever the tutor expended *utiliter* upon the pupil, he became a creditor to that extent upon the provision bequeathed to him, and would be entitled to retain it accordingly.

“ The Lords, &c. In respect there is no evidence of any useful advances beyond the interest of the provisions, adhere to the Lord Ordinary's interlocutor.” And a reclaiming petition, containing a condescence of what were alleged to be useful advances, was remitted, 15th June, 1802, to the Lord Ordinary, to inquire into the truth of the facts.

Lord Ordinary, *Craig.* For Blair, *Maconochie.* Agent, *J. Brunton*, Solicitor.
 Alt. *Smyth.* Agent, *Jo. Smyth, W. S.* Clerk, *Pringle.*

F.

Fac. Coll. No. 41. p. 84.

1804. February 29.

VERE against DALE.

Daniel Vere succeeded to the estate of Stonebyres, when an infant, his affairs being under the management of tutors nominated by his father. The free rent of the estate at this time was about £.246. It is situated on the banks of the Clyde, opposite the cotton-works erected by David Dale, merchant in Glasgow, in the vicinity of Lanark.

In 1787, an agreement was entered into between Mr. Dale and Mr. Vere's tutors for a perpetual feu of eighty acres, for payment of £.160 of price, and 12s. 6d. feu-duty yearly for every Scotch acre. An application was made to the Court of Session, in the name of the tutors, to interpose their authority to this transaction. All who were interested in the succession were called as defenders.

A proof was taken, exhibiting the then rent of the lands. This appeared to be about £.16 16s. and the feu-duty to be paid by Mr. Dale was £.50 4s. 8d. At that time, the Court found and declared, “ That the feuing of the said lands, in terms of agreement, entered into with the said David Dale, is for the utility and advantage of the said pupil; and authorised, and hereby authorise, the pursuers, to feu to the said David Dale, his heirs or assignees whomsoever, the said linn-fields and mill-lands of Stonebyres, lying, bounded and described in manner foresaid, to be holden of the said pupil, and his heirs and successors in the lands and barony of Stonebyres, for payment of the feu-duties, and other prestations, and under the

No. 319.

The Court cannot authorise the sale of a pupil's heritable estate, except upon urgent necessity.

No. 319. conditions specified and contained in the agreement above mentioned, entered into betwixt the pursuers and the said David Dale; and decerned and declared, and hereby decern and declare, the feu-rights so to be granted by the pursuers, in name of the said pupil, with all that shall lawfully follow thereon, to be as valid and effectual as if granted by a person of lawful age, and with full management of his estate; and declared, and hereby declare the same unchallengeable by the said pupil, on the head of minority or lesion, or any other ground arising from the state of minority, in which he now is, conform to the law and daily practice of Scotland, used and observed in the like cases in all points."

At this time Mr. Vere was only six years of age.

When he came of age, being dissatisfied with the conduct of his tutors in this transaction, he brought an action of reduction against Mr. Dale, upon several grounds, but chiefly as being *ultra vires* of the tutors, and therefore *ultra vires* of the Court to authorise it.

The Lord Ordinary, (7th December 1802), "In respect the reduction at the pursuer's instance substantially resolves into a challenge of the powers of the Court, in regard to sales or feus of the heritable property of minors, and of the manner in which their powers were exercised in this case, matters more proper for the consideration of the whole Court than of a single Judge, the Lord Ordinary makes *avisandum* with the case to the Court; and appoints the parties to prepare informations," &c.

The pursuer

Pleaded: From the incapacity of infants to manage their own affairs, a provision is made by the law of every civilized country for the appointment of tutors to manage for them. But from the very nature of this appointment, the power must be merely that of management, which, in general excludes any right of alienation. Moveables, indeed, being of a perishable or temporary nature, it may be their duty to dispose of them. But with regard to heritable property, their powers are greatly restricted. No part of such estate can be disposed of, but from absolute necessity; and even then, they are not to be the judges, but must act under the control and by the advice of the Supreme Court. Such is the doctrine both of the civil and Scotch law; Lib. 27. Tit. 9. Lex. 7. D.; Lib. 4. Tit. 37. § 22. C.; Stair, B. 1. Tit. 6. §. 18.; Bankt. B. 1. Tit. 7. § 29.; Ersk. B. 1. Tit. 7. § 17. The measure of a sale, therefore, is only to be resorted to in cases of necessity, nor are any views of probable advantage sufficient to authorise it, as was found in the late case of Mr. Colt's tutor, No. 317. p. 16387.

Answered: When the feu was granted, it was considered by the tutors as of most essential advantage to the pursuer; and in the same light it appeared to the Court, who were in possession of every possible information necessary for forming a judgment on the subject. Their judgment accordingly was, that the transaction was most beneficial for the pupil. The interposition of their authority at that time, is surely of itself a sufficient proof that the Court did not exceed their powers. In this they acted in conformity with former precedents; Plumer against his

Tutors, 8th March, 1757, No. 288. p. 16358, Hallows, petitioner, 1st March No. 319, 1794, No. 22. p. 14981.

As this measure was at the best only an object of apparent advantage, but not of urgent necessity to the pupil's affairs; "The Lords (29th February 1804) sustain the reasons of reduction of the decret libelled, and reduce, decern, and declare accordingly; remit to the Lord Ordinary to hear the counsel for the parties on the defender's claim for meliorations, and proceed and determine therein as to his Lordship shall seem just."

Lord Ordinary, *Hermand.* Act. *Dickson.* Agent, *Arch. Gibson, W. S.* Alt. *Campbell.*

Agent, *Jo. Campbell, W. S.* Clerk, *Menzies.*

F.

Fac. Coll. No. 150. p. 333.

Husband Curator to his Wife, being Minor; See HUSBAND AND WIFE.

Diligence prestable by Tutor and Curator; See DILIGENCE.

Liable for Annual-Rent; See ANNUAL-RENT.

Quorum; See SOLIDUM ET PRO RATA.

Minor may not be a Tutor; See MINOR.

Minor acting without consent of Curators; See MINOR.

Minor's Privileges; See MINOR.

Tutors and Curators must account by the Fiars; See FIARS.

Recompence, if due to a Tutor; See RECOMPENCE.

Tutors or Curators, or their Assignees, cannot pursue *ante redditas rationes*;

See PAYMENT.

See APPENDIX.