

SECT. III.

Citation in actione directa Tutelæ.

1629. July 29.

SLEWMAN against WARDLAW.

A MINOR pursuing the factor to her tutor for tutor-counts, which factor by contract betwixt the tutor and the factor, was obliged to do all to the minor, which the tutor himself was obliged in of law; it was found, that the said factor and his heirs, who were here convened (the factor himself being dead) were subject to give count, reckoning, and payment to the said minor, and that the tutor's self needed not to be convened in this process; but the action was sustained against the factor, and which action was sustained against him, not only for his intromission, but also for his omission, and for payment of such particulars as the said factor might have intromitted with. *Item*, The said action was sustained for all the years duties of the lands wherein the minor was infeft, and which pertained to her umquhile father, which preceded her sasine, since the decease of her father; and for the which years, albeit the minor's infeftment preceded not the same, the factor was found ought to be comptable, seeing the sasine should be drawn back to the time of the father's decease, there being no other claiming the non-entry thereof, and no other pretending right thereto.

Act. *Belsbes.*

Alt. —.

Clerk, *Gibson.**Fol. Dic. v. 1. p. 133. Durie, p. 467.*

1668. December 2.

MR ALEXANDER SEATON against GEORGE SEATON of Menzies.

MR ALEXANDER SEATON, heir and executor to James Seaton his brother, pursues George Seaton as heir to his father James Seaton, for making his father's tutor accounts, as being tutor to the pursuer's brother; and for instructing that he was tutor, produced several writs subscribed by him, as tutor testamentar. The defender *alleged, imo*, That the condescendence was not relevant to instruct the defender's father tutor, unless the testament whereby he was nominate were produced; otherwise his acknowledgement can only make him but pro-tutor; and so not liable for all omissions, and no sooner liable than after the date of these writs; *adly*, Albeit the defender's father had been tutor, yet by the writs produced, it is evident that he was but one of more tutors; and therefore no process against him, till they be all called. The pursuer *answered*, That the acknowledgement to have been tutor was sufficient against him, who subscribed the same: and that there was no necessity to call all the rest, seeing the

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No 17.

A tutor's factor being, by contract with the constituent, obliged to do all for the pupil that the tutor himself was bound to by law; it was found that the tutor needed not be convened in a process of count and reckoning at the pupil's instance.

No 18.

In an action against a tutor's heirs, the Court would not sustain process, till the co-tutors were called; for the heirs could not know the administration, or how to account.

No 18. whole tutors were liable *in solidum*, and as ordinarily, parties bound conjunctly and severally, may be convened conjunctly or severally, so may tutors, who as others may except upon the performance of other tutors as well as their own; neither is the case of tutors alike with cautioners, who are not liable *in solidum*; for tutors, as they are liable conjunctly and severally for the whole office, so are they convenable conjunctly and severally for the same.

THE LORDS repelled the first allegiance, and found the writs produced instructed the defender's father tutor, and not only pro-tutor; for if the testament had been produced, shewing other tutors, so that the acknowledger could not have been *tutor testamentar*, it would have made him but pro-tutor, but that not being, it instructed him tutor. As to the other point, in respect the tutor was dead, and his heir only but convened, who could not know the administration, the LORDS would not sustain process, till they were also called.

Fol. Dic. v. I. p. 133. Stair, v. I. p. 567.

1684. *March.* LORD NAPIER *against* SIR WILLIAM NICOLSON.

No 19.
Found that a minor ought call his whole tutors or curators, either at the beginning or *cum processu*.

FOUND that a minor ought to call his whole tutors or curators, either at the beginning or *cum processu*, to the effect the defences of every one may be communicated to the benefit of all; though every one may be decerned *in solidum*, as was formerly found in the Lord Pitmedden's case; albeit the contrary was lately decided in Lockhart's case against Mr John Ellies, No 13. p. 2183: where the tutor called was only allowed to intimate to the rest of the tutors who were not called. This was adhered to as to the Representatives of dead tutors; December 2. 1684.: and the like was decided January 1685, Dalgarno *contra* Henderson. See TUTOR and PUPIL.

Fol. Dic. v. I. p. 133. Harcarse, (TUTORS and CURATORS.) No 981. p. 277.

1705. *June 23.* HELEN and MARGAET MURRAYs, Children to the deceased Patrick Murray Merchant in Edinburgh, *against* JAMES MURRAY of Deuchar.

No 20.
Action of count and reckoning was sustained against the accepting tutors nominated, without calling the rest who did not accept nor act.

JAMES MURRAY of Deuchar, and Mr William Monipenny advocate, having been the only accepting tutors nominate to Helen and Margaret Murrays;— THE LORDS sustained action of count and reckoning at their instance, against the said James Murray, and the Representatives of Mr William Monipenny, without necessity to call the rest of the tutors named, who never accepted nor acted.

Fol. Dic. v. I. p. 133. Forbes, p. 10.