

## No 41.

A tutor not doing diligence for bonds left in the defunct's charter chest, which were granted to the goodsire, and never confirmed by the pupil's father, is liable, but the pupils are first obliged to do diligence, that it may be known if the debtors were *so laende*.

1670. February 17. DR BALFOUR and SPOUSE *against* WOOD.

IN the action of count and reckoning at the Doctor's instance, and Anna Napier his spouse, against the Heirs of Mr James Wood, her tutor, there was an article of the charge bearing debts due upon several bonds to the said Anna's goodsire, whereupon no diligence was done by the tutors. It was *alleged* for the defender, that these bonds were never confirmed, neither in the defender's father's testament, nor in the goodsire's testament, which was confirmed by their father; and the defender's father, being but one of the tutors to the pursuer, and not giver up of the inventory of the debts, nor knowing any thing of these bonds, he was not obliged to eik the same to the testament, nor pursue therefor. It was *replied*, that they offered to prove that the said bonds were in the charter chest, which was in the possession of the tutors, so that they might have known thereof, and omitting to do diligence are liable in law. THE LORDS did find it relevant that these bonds were in the charter chest during the factory, and that the same was in the tutor's possession, but in respect that the said bonds were never confirmed, neither in the father's nor goodsire's testaments, they ordained the pursuer first to insist against the debtors in these bonds, that it might be known if they were yet sufficient or not; and in case of insufficiency, they would then consider how far the tutors ought to be liable.

*Fol. Dic. v. 1. p. 240. Gosford, MS. No 254. p. 105.*

1671. November 18. CHARLES CASS *against* JAMES ELLIES.

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A curator continuing to intromit after the expiry of the curatory is only liable for his actual intrusions, not for any diligence or omission.

UMQUHILE Richard Cass having umquhile Patrick Ellies and several other curators, Charles Cass his heir now pursues James Ellies, as heir to Patrick Ellies, for count and payment of his whole rents and estate. In the count and reckoning this point was reported by the auditor; and it was *alleged* for James Ellies, that he could not be liable as representing his father as curator, because, albeit his father was nominated by the minor, and that the act of curatory bears, that he was elected by the judge; yet it does not bear that he compeared, made faith, and found caution, and therefore he was not sufficiently authorised as curator, and could never have pursued action upon that title. It was *replied*, albeit the curators not making faith, and finding caution, might have been a ground that the minor or other curators might have excluded him from acting, yet he having acted and subscribed several bonds produced as curator, by which the minor gave provisions to his sisters, and which bore expressly, with consent of his curators under-subscribing; and the writ bears, 'Patrick Ellies consents,' so that the defunct having acknowledged himself curator, and acted *eo nomine*, the defender his heir can never controvert it, even though he neglected to make faith, and find caution: For he may be found curator *passive*, as an heir served

will be heir passive, but not active, unless he were retoured. It was *answered*, that all that is pretended can only make the defender's father pro-curator ; for a vitious or erroneous declaration is not sufficient, where the truth of the thing doth manifestly appear to the contrary ; the act of curatory makes it appear, that there were several curators compearing, making faith, and finding caution, which Patrick Ellies did not, and so was no curator ; and it is above question, that it is not the nomination of the minor that makes the curator, but the authority of the judge proceeding upon a citation of the nearest of kin, and a formal process and sentence thereupon, which cannot proceed, unless the curator accept, make faith, and find caution ; so that curators being once established, nothing that the pupil, or any other pretending to be curator can do, can make a curator, but at most he can only be pro-curator ; and though pro-curators be ordinarily liable in the same way as curators, yet it is only where there is no curators ; for if there be curators authorised, as there can be no vitious intromission where executors are confirmed ; so there can be no pro-curators where there are curators authorised ; and the defunct's subscription, as consenting to the provisions made by the minor to the sisters, bearing expressly to be revockable at his pleasure, during his life, it was in effect *donatio mortis causa* ; and neither a testament nor legacy require to be authorised by curators ; nor is an act proper for them. It was *answered*, that albeit it be true, that curators are constitute by authority of the judge, and upon process ; yet it is as true, that the sentence of the judge is given upon the calling of the nearest of kin, and the minor's nomination, if there be no just opposition ; and doth not depend upon the curator's compearance, acceptance, making faith, and finding caution ; for it is without question, a curator may be authorised though he were absent, but that does not oblige him to accept unless he please, and at any time thereafter he may compear judicially, make faith, and find caution ; or if without these, he act, he is truly curator, albeit he has failed in his duty, in making faith, and finding caution, and upon that ground may be repelled *ab agendo*, by the minor, or other curators, but not by other parties, who had not that interest ; so that the defender's father having directly authorised the minor as curator, he became thereby curator as the rest, at the least from the time of that acceptance. *2do*, He is alike liable though he were but pro-curator ; for pro-tutor and pro-curator being but vitious passive titles, may subsist *in odium* of the actor, even where there are tutors or curators ; neither is there any consequence from executors, and vitious intromittors ; because vitious intromission being the most odious and extensive passive title, it is by custom restricted where there are executors confirmed : But pro-tutors or pro-curators, neither were, nor ought to be restricted so, who are not thereby liable to all the minor's debts, but only for diligence in that office, which they unwarrantably assume.

THE LORDS found, that the defender's father being nominated and appointed by the act of curatory, and thereafter subscribing with the minor, consenting

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as curator, was liable as curator *passive*, though he had neither made faith, nor found caution; and that he might be liable as pro-curator, albeit there were curators authorised, and that not only for his intromissions, but his omissions, from the time he began to act as curator, or procurator. The pursuer further *alleged*, that the defender having been his curator, continued to intromit with the mails and duties of his lands, some years after his majority, and was liable for these years *in solidum*, having continued to act in the same way, as when he was curator, and therefore being liable to the same duty; and now after twenty years time, cannot put the pursuer to prove his several intromissions; for as tacksmen, after the expiring of their tacks, are liable for the full duty, although it were more than the value of the lands; and a factor, after expiring of his factory, continuing to meddle; and a tutor after expiring of his tutory; are liable for these whole years in which they meddle; so, for the same reason, a curator continuing to meddle after the curatory is ended, must be liable as before. It was *answered*, that a curator could not be liable further than his intromission, for years after his curatory; neither does the parallel hold with tacksmen or factors, for there *per tacitam relocationem*, or *reconventionem*, the tack or factory is prorogate, by consent of both parties, the one suffering, and the other acting; but it cannot hold in a curatory, which being a judicial act introduced by law, having a definite time in the law, the tacit consent of parties cannot prorogate the same, but the minor must impute it to himself, that did not hinder them; and in that it differs from tutors, who act for pupils, and therefore are obliged to obtain them authorised with curators; neither could the defender be liable as *negotiorum gestor*, for though such be liable for diligence in *negotio capto*, if it be one individual thing, yet not to continue the intromission with the rents of several lands, which have no such connection.

THE LORDS found that albeit the curator had intromitted before the expiring of the curatory, and had continued to intromit thereafter, that he was only liable for what he intromitted with thereafter, and not for any diligence or omission, unless he had been factor constituted by the minor, or remanent curators, in which case he might be liable for years thereafter, as factor, for diligence.

*Fol. Dic. v. 1. p. 242. Stair, v. 2. p. 3.*

\* \* \* Gosford reports the same case :

IN a count and reckoning pursued at Carse's instance, against James Elies, as representing his father, who was one of the curators of Richard Carse, to whom the pursuer was heir of tailzie and executor confirmed; there being produced to verify the said Elies's acceptance, three several bonds subscribed by the minor, with consent of his curators, whereof the said James Elies was one, as likewise an act of curatory, bearing him to have been named curator judically before

the Sheriff; it was *alleged*, That these deeds did not make him liable as curator, because he did never compear judicially and make faith and find caution, which are necessarily required to make a curator liable, as the act of curatory bears; and, without which, he cannot be authorised by the Judge. It was *replied*, That a curator, acting *qua* curator, by subscribing any deed and consenting to his pupil's deeds, infers an acceptation against him, it being in his power to act or not, notwithstanding his nomination in the act of curatory. THE LORDS, after much reasoning among themselves, finding it a case of universal concernment, did find, by a plurality of votes, that a curator being named, and consenting to several deeds, makes him *passive* liable to the pupil to count for the estate, as well as the rest of the curators who compeared judicially and accepted; albeit it will not furnish him an active title to pursue the rest who have accepted; neither would it be sufficient to authorise the minor to make a disposition, unless he had compeared, made faith, and found caution.

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There being an article wherewith Elies was charged, viz. for the rents of some years after the pupil was major; it was *alleged*, That immediately after the pupil was major, the office of curatory became extinct; and one that was curator, intromitting, can only be liable for his actual intromission, but not for omission as a curator. It was *replied*, That as undoubtedly a tutor, after the expiring of the years of pupilarity, if he continue to administrate, is liable, *tanquam tutor*, as likewise a factor, after expiring of his factory, if he continue to act; so there is *par ratio*, if a curator continue to administrate.

THE LORDS found the allegiance relevant, and that a curator, being *junctus officio*, is only liable for his intromission *tanquam quilibet*; and there was a great difference betwixt him and a tutor, or factor, who continues to intromit, because, after pupilarity, the minor is not *sui juris*, and capable to administrate his affairs; and the granter of a factory being still absent after the expiring thereof, the tutor and factor, in law and reason, ought to be liable for their administration, as when their office did continue. But a minor having attained to his full age, and so capable to administrate his own affairs, and to discharge his curators, and to uplift his own rents by himself or his order, he suffering any other to intromit, they can only be liable for their actual intromission, but not for omission, which is his own fault.

Gosford, MS. No 393. p. 197.

1684. February 27. DUFF and DALGARDNO against TAYLORS of EDINBURGH.

THE LORDS having heard HARCARE report the points taken to interlocutor in the debate Elizabeth Duff, and her husband, John Dalgardno, my Lord Forret's servant, against the incorporation of Taylors of Edinburgh, they ordain before answer the adjudication upon the estate of Salton to be produced; and find the

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