

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.*

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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.*

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1677. July 27.

MR. HUGH M<sup>c</sup>ALEXANDER of Dalreoch, against MR. FERGUS M<sup>c</sup>ALEXANDER, Minister.

In an action pursued at Dalreoch’s instance and his curators against Mr. Fergus M<sup>c</sup>Alexander, 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<sup>c</sup>Alexander, 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

No. 189.  
then having  
served him-  
self tutor-in-  
law, it was  
found, that  
the gift being  
procured be-  
fore 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