

estate, for a debt due to his pupil, was sufficient diligence to exoner the tutor when there were moveables which he could have affected ; and if for that neglect he ought to take that right to himself, and make it up to his minor. THE LORDS found he was not bound to have discussed these moveables, but that his adjudging was sufficient ; for, besides the loss in apprising moveables, it crumbles and breaks a principal sum,

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1693. February 16.—THE LORDS advised that point delayed on the 15th current, between Carleton and Colston, and found, that a tutor not making inventory lost only his personal expenses, but not those that were profitable ; for they thought he could not be in a worse case than a *prædo*, who got allowance of necessary expenses ; but the President and others answered, the act of Parliament had made the difference, and imposed this certification *in modum pœne* on such fraudulent tutors ; and if this should be interpreted to be no more than the loss of their personal expenses in attending and going about the pupil's affairs, it would be no check at all, but would frustrate the said useful act ; so a charge should never be constitute against a tutor, except what he pleased to make himself. THE LORDS, though they assoilzied Colston in this special case, because of the circumstances that he had not malversed in his office, yet they were proposing to make an act of sederunt for the future, that tutors neglecting to form inventories should lose all their expenses whatsoever. See TUTOR AND PUPIL.

Fol. Dic. v. 1. p. 242. Fountainball, v. 1. p. 560. 561.

1696. January 16.

IRVINE against SPENCE.

No 46.

A TUTOR's cautioners being pursued for the tutor's intromissions in not doing diligence against some of the pupil's debtors ; and an answer being made that that he was stopped by the surcease of justice in November 1688, and died shortly thereafter ; besides, that many of the debtors were insolvent, so that it was casting away money to pursue them ;—the LORDS thought it too strict to require diligence of the tutor, in this circumstantiate case, and therefore allowed the cautioners to prove, that the debtors were then habite and repute insolvent.

Fol. Dic. v. 1. p. 241. Fountainball.

* * * See this case, No 37. p. 501.

1699. July 7.

M'MURDOCH against FINDLAY.

No 47.

WHITELAW reported Elizabeth Macmurdoch against Robert Findlay, tenant in Coats, her late tutor. He and Mr George Campbell having been conjunct

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tutors, and Mr George being debtor to his pupil in 2000 merks by bond, Robert is now pursued to make up that sum for not doing diligence against the said Mr George before he broke. *Alleged*, Though the law be strict against tutors, yet it cannot tie them to impossibilities, or to more diligence than they use in their own affairs ; and here, all looked on Mr George Campbell as a most opulent solvent person, till he broke by surprise, like a thunder-bolt, in 1689, and the Signet and Judicatories not being then open till November, it must excuse him, this not being so much as *levis culpa*, especially considering he, Mr George, was a co-tutor and trusted by the defunct with the papers, which upon the matter was a dividing of the administration of the tutory betwixt them. *See* Stair's Instit. Obligations of Tutors, Num. 23. where curators chosen with this quality, to be free of omissions, were approven ; and, Smith *contra* Creditors of Invergelly, *voce* EXPENSES, an article of victual was allowed, being sold to one then reputed solvent, though bankrupt at the time of the computing. *Answered*, Where a co-tutor is debtor to his pupil (which was expressly forbid by the Roman law,) there is the greater obligation on the other tutors to look that he pay the sum, and though they are not debtors nor cautioners for what he owes the pupil, yet they are liable for his mal-administration, and for diligence against him as well as other debtors ; and here Mr George's condition was very suspicious before the Revolution or shutting up of the Signet ; and Findlay the co-tutor was certainly *in mora* in not registering the bond, and charging and denouncing thereon, which diligence would have exonerated him. There being several circumstances either aggravating or extenuating urged on either side, the LORDS resolved to hear it in their own presence, how far Findlay was bound *in solidum* for Mr George his co-tutor's obligation to pay.

The cause being heard in presence, 15th November 1699, the LORDS found the co-tutor not liable in this case for the other tutor's debt, but only for his administration ; and found no negligence on his part, and therefore assoilzied Findlay.

Fol. Dic. v. 1. p. 241. Fountainhall, v. 2. p. 58.

. Dalrymple reports the same case :

MURDOCH and her curator having pursued Findlay, her tutor, to compt and reckon, he craves allowance of 2000 merks, due by Mr George Campbell, who was a co-tutor ; because he broke suddenly, being a man of unquestioned credit, as to his fortune, the very time that he broke, and all diligence being done thereafter.

It was *answered* ; Co-tutors and curators have always been reckoned as mutual cautioners for each other ; and Mr George being bound to have paid in his money, especially knowing his own circumstances, Findlay the co-tutor is liable for him. *2do*, The co-tutor neglected diligence, which recovered other men's money ; and condescends upon a protested bill, which is the greatest evidence

of the decay of a merchant's credit, and likewise on a horning, and on an inhibition.

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It was *replied* ; That tutors are all liable *in solidum* for diligence in their administration ; and consequently are mutual cautioners for the administration of their co-tutors ; but they are not cautioners for each others debts ; and therefore, if money be lodged in the hands of a co-tutor, of a sufficient visible fortune and credit, whatever happen to such a debtor, the remanent tutors are no more liable for him, than for any other debtor, especially where the money was lent by the pupil's father, who did nominate Mr George Campbell a tutor, *sine quo non* ; and the defender was diligent to receive yearly annualrent, and could not be obliged to uplift the principal. *2do*, As to the diligence, they were all quickly paid without noise, and the defender neither knew of them, nor was obliged to know, there being no course of diligence, and the debtor's credit continuing always good, in so much as most provident and exact men of the kingdom lent him money before he broke.

' THE LORDS found, That co-tutors are not mutually liable for one another's debts, but only for administration of their office ; and sustained the defence, that the co-tutor was held solvent, till he broke of a sudden, and that other men, known to be cautious and provident, lent him money shortly before he broke.'

Dalrymple, No 19. p. 22.

1702. February 11.

ELPHINSTON against MILNE.

ELPHINSTON of Airth against Sir Robert Milne, late of Barnton, his tutor, for omitting to do diligence against the estate of Grange, for the sum of 22,000 merks, and so craved he might be liable for that omission. *Alleged*, The debt being an heritable bond granted by the Lady Airth, and Hamilton of Grange, her husband, bearing infeftment forth of the lands of Airth for security of that sum, it is not only a dubious question, but appears clearly to have been Airth's own proper debt, and so the tutor was neither *in dolo* nor *culpa*, in not pursuing Grange for the same ; and it would be an insuperable burden if tutors were obliged to cast out their pupil's money in pursuing debts not belonging to them. *Answered*, If dubiousness of rights were a sufficient excuse to liberate tutors from diligence, it would open a door to let them all escape, and he ought to have taken advice of lawyers, and raised a process and tried the validity thereof. But, *2do*, It appears to have been Grange's debt, because towards the payment of it he set afterwards a tack of his own coal. THE LORDS thought the proper method here was first to determine whose debt this originally was, whether Airth's or Grange's ; but, though Grange was cited to compear *incidenter* in this process, yet he and his creditors being absent, the Lords forbore to decide that point, and went to the other, whether in this circumstantiate case the

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The dubiety of a pupil's right, found to be no ground of defence upon which a tutor could seek to be exonerated for not having done diligence.