

No. 239. tutor of law, to see himself removed from the office, because of his malversation, in so far as he has been now two years tutor, and has never made up inventories of the pupils' estate, contrary to the 2d act of Parliament 1672. Alleged, Inventories are only to be made before he acted, and he was pursuing the relict for exhibition of the writs by which he could only do it; and she had caused her brother raise this process; and he is now making the inventories, and has never yet meddled. Answered, The act requires the making up of the inventories at the very entry on the office, and though he could not then make it complete, yet he might afterwards eik, as things came to his knowledge. The Lords removed the tutor as suspect, in having neglected the appointment of the act of Parliament; which they found themselves strictly and precisely obliged to follow, though it might be prejudicial *in eventu* to the pupils.—See 7th July, 1680, Gibson *contra* The Lord Dunkeld and Thomson, No. 198. p. 16299.

Fountainhall, v. 1. p. 822.

1700. January 24. BALFOUR against MR. GEORGE FORBES.

No. 240.

Whether a
tutor may
transact?

Balfour of Broadmeadows, as eldest son to the Laird of Kaillie, pursues Mr. George Forbes, late Minister at Traquair, as his tutor, to count for his means, conform to a charge, one of the articles whereof was £400 Scots due to his father by the Countess Dowager of Traquair. Alleged, I cannot be liable for the whole sum, because, having no writ constituting the debt under the Countess' hand, he was necessitated to transact it for 226 merks in money, and 20 hogs, in regard she had a claim against the said Balfour of Kaillie as possessor of one of her life-rent rooms. Answered, Tutors cannot transact at their own hands, without a legal necessity; and here there was none; for he was her chamberlain, and that was given him for his fee, as appears by a discharge of one of the years of his possession, and so she could never have founded a ground of compensation on that debt; and therefore the tutor was either *in mala fide*, or grossly negligent, to have componed and given down. Replied, A legal necessity for a tutor's transacting does not alway require a decree for his warrant, but may even arise from the clearness of the contrary party's right, when no relevant defence can be obruded against it; and which was his case. The Lords would not in the general find, that tutors might not, in any case, transact their pupils' affairs; for, in some dubious and intricate cases, such transactions have been allowed as warrantable; but *in hac facti specie* they found no such necessity incumbent on this tutor, and therefore found he had transacted on his own hazard, and behoyed to count for the whole.

Fountainhall, v. 2. p. 83.