The Lords found, That the defender must count as tutor to the minor for the reserved two chalders of victual uplifted and discharged by James Forsyth *tutorio nomine*; but, for the defender's further security, ordained the pursuer to establish a title in her person as executrix to the grandfather, that thereby she may discharge the defender, upon payment. No. 248.

Forbes, p. 294.

1709. *June* 11. BRUCE *against* FORSYTH.

No. 249.

No allowance given to a tutor for incidental personal charges in the pupil's affairs not particularly instructed, in respect inventories were not given up, in terms of the act of Parliament 1672; although the tutor had done the equivalent, by signing an inventory of the pupil's whole estate, writs, and evidents, in presence of the nearest relatives on the father's and mother's side, and giving up the said inventory to be kept by them as a charge against him.

Found, That the pupil must give the tutor allowance for cess, teinds, and feu-duty, upon procuring declarations from the collectors of the cess, and the chamberlains of the titulars and superior, that such cess, teind, and feu-duties were paid, and finding caution to relieve the minor thereof, although the particular receipts were not produced.

Forbes.

*** This case is No. 49. p. 3512. *voce* DILIGENCE.

1710. *February* 8.

WILLIAM RANKINE, *alias* LITTLE of Libertoun, *against* LEWIS JOHNSTON and HENDERSON.

No. 250.
How far tutors and curators ought to be liable for omissions.

William Rankine, pursues Lewis Johnston and Henderson, as his tutors-testamentary, to count and reckon for their administration; and he charging them for not doing diligence against his debtors and tenants, they alleged, by the nomination they are made only liable to count for their actual intromissions, and not for diligence and omissions, and so that quality and restriction must be the only rule of counting. Answered, That clause is against the very essence and nature of a tutory, as it stood established by law preceding the act of Parliament 1696, where parents are allowed to dispense with that exactness, to encourage tutors to accept; but prior to that law there was no such allowance. The law deferred so much to the choice of parents, as to relax those nominated by them from the oath *de fideli* or finding caution, but never allowed them that they should not be answerable for such diligence, as a prudent man uses in his own affairs; and if any

No. 250. had declared they should not be bound *rationes reddere*, law reprobated such conditions. And Spottiswood has a very remarkable decision, Tit. TUTORS AND CURATORS, * That a man having named his wife tutrix-testamentary to their children, with a provision that it should not expire though she married again, that this being contrary to the common law, and the weil and benefit of pupils, it ought not to take place; for *provisio hominis non semper tollit provisionem legis*, as in the case of usury and sundry others. And the freeing tutors of omissions, before the act 1696, was contrary to law, and can never be sustained. Replied, None is so fit and competent a judge as the father, who relied on the integrity and probity of the friends he named, and who would never have acepted the office had he not declared them free of omissions; and to find that was an unlawful clause, is to make the will a snare to entrap innocent men, who acted *bona fide* on the faith of that limited nomination; and there was neither law nor custom repudiating such clauses before the act of Parliament, and no doubt there were sundry tutors nominated in the same manner long before, to engage honest men to embrace the office, who, by reason of the former strictness, declined the office, and so left poor minors exposed to the care of broken and insolvent men. The Lords, by plurality, found the tutors not bound to count for omissions, but only for actual intromission in terms of the father's nomination, though it was before the law was made, giving parents that permission and latitude; but the Lords found them liable for omissions as curators; for in that capacity they had no dispensation, but were named and chosen by the minor.

Fountainhall, v. 2. p. 565.

*** Forbes reports this case:

William Rankine having succeeded to the estate of Libbertoun, and some houses and shops in Edinburgh, as heir of tailzie to William Little of Libbertoun, his uncle by the mother, burdened with clauses irritant and resolutive *de non alienando, nec contrahendo debitum;* the deceased Walter Rankine of Orchardhead, William's father, did, by his testament in December 1690, name Lewis Johnston and Alexander Henderson to be tutors to him, with the express condition, that they should not be liable for omissions, but only for their actual intromissions; who accepted and acted as tutors, and, after expiring of William's pupillarity, were chosen by him to be also his curators, with the same quality, That they should only be liable for actual intromissions.

This William Rankine (*alias* Little) after his majority, pursued Lewis Johnston, and James Henderson, as representing Alexander Henderson, the other tutor and curator, to count for the rents of his estate in his minority.

* The words of Spottiswood follow.—" A woman being left tutrix-testamentary by her husband to her own children, with provision that her tutory should not expire though she married again, the Lords found, That, notwithstanding thereof, the common law should take place, which was made for the weil and preservation of pupils and their gear; *et sic provisio hominis non sustulit provisionem legis.* 1585. *Spottiswood, p.* 346.

No. 250.

Alleged for the defenders: The pursuer's claim could only be sustained against them for actual intromissions, conform to the quality in the father's nomination, and the act of curatory.

Replied for the pursuer: Tutors, by the very nature of their office, are liable both for omissions and commissions, and as a wife left by her husband tutor to his children would fall from the office by her marrying again, though she was named with this provision, That her tutory should continue, notwithstanding of her taking a second husband, Spottiswood, Pratt. p. 346, (See Note, p. 16328); so a father could not, before the act 8 Parliament 1696, name tutors to his children, with the quality of not being answerable for omissions. And even that statute doth only allow such a qualified nomination by a father *in liege poustie*, when supposed to be free of indirect influence, for the administration of any estate descending from himself to his children; for one may adject what quality he pleaseth to his own gift; whereas not only doth the pursuer's estate flow from his uncle, but his father's nomination of tutors was in testament, which could not oblige the father's heir to repair any damage arising thereby to the pupil; and it were hard to think, That parents had a greater power before that law, than since. 2*do*, The defenders could not be elected curators with such a quality by the minor, who might have been imposed upon to do it to his enorm lesion.

Duplied for the defenders: Though our law has not extended the power of fathers so high, as it is by the Roman law and in other nations; it reposes the greatest trust and confidence in tutors named by them, who are exempted from making faith *defideli*, and from finding caution *rem pupilli salvam fore*: Now, by parity of reason, a father is empowered to name tutors with a quality, that they should not be liable for omissions, which is of no greater import to the pupil, than dispensing with the making faith, and finding caution. It doth not alter the case, that the pursuer's estate was not derived from his father, seeing the father had the only power of naming tutors to his son, and *tutor datur personæ, non rei*; the management of the pupil's estate being only a consequence of the office of tutor. Again, as the act 1696 limits the father's power of naming tutors to deeds *in liege poustie*, and the estate flowing from him, it extends it beyond what former law and custom allowed, by authorizing fathers to name curators to their children with such a quality, and further, that they shall not be liable *in solidum* for others, but only for their respective intromissions. This statute doth not innovate our old law or custom, whereby fathers could name tutors by testament, with condition that they should be countable only for actual intromissions; which had its rise from the civil law, that allows a father to name tutors to his children either purely and simply, or to a day, or *sub conditione*. And it is a pupil's interest, That he and his estate fall under the care and administration of persons whose fidelity and diligence is known to his father; especially considering, That when a tutor's condition alters, either as to his honesty or fortune, there is a sufficient legal remedy, to remove him as suspected, or oblige him to find caution. The practick observed by Spottiswood is not to the purpose; for the father's naming his wife to continue tutrix to his child-

No. 250.

ren in the event of her falling under the curatory and government of another husband, was shocking both to law and sense.

The Lords were much divided in their opinions about this point. And those who pleaded against the paternal faculty of naming tutors with a privilege of not being subject to answer for omissions, yielded, That a father might by granting a bond oblige his son and heir not to quarrel the tutor named, upon the account of omissions; and so do that *per ambages*, he could not directly do. However, it was found by the plurality, That the defenders *qua* tutors were liable only in the terms of the pursuer's father's nomination, for their actual intromissions, and not for omissions; but in regard they were also curators, not by nomination of the father, but by the minor's election, they were liable *qua* curators for omissions, as well as intromissions.

Forbes, p. 391.

1711. *January* 5. GEORGE PYPER, Merchant in Montrose, Supplicant.

No. 251.
A curator *ad litem* authorized to give in for a minor a renunciation to be heir to his father.

George Pyper, a minor, about eleven years of age, being pursued, as heir to his father, at the instance of James Innes, merchant in Aberdeen, for payment of £.296 Scots, and a day taken for the defender to renounce to be heir, the Lords, upon a petition offered for the minor, authorized William Smith, merchant in Montrose, the petitioner's uncle, to be curator *ad litem*, to sign and give in for him a renunciation to be heir to his father.

Forbes, p. 473.

1711. *January* 13.

JAMES FORRESTER, Son to the deceased William Forrester, Writer to the Signet, and His TUTOR, *against* ROBERT FORRESTER, late Bailie in Edinburgh.

No. 252.
What kind of voucher of payment will defend the debtor against the subsequent suit of the minor?

In the action at the instance of James Forrester and his tutor against Robert Forrester, for payment of £.73 owing by him *per* ticket to the deceased William Forrester, James' father, the pursuer offered to prove, by the defender's oath, that the ticket was in William Forrester's hands at his death, which the defender unwarrantably got up and retired. The defender having deponed, that he paid the money to one of the pursuer's tutors in presence of and with consent of the rest, who thereupon delivered up his ticket, the pursuer alleged, That it were dangerous to sustain a debtor's oath, that he retired his bond from his creditor's tutors, upon payment made to them, as a sufficient exoneration of the debtor, law having fixed a rule, that the debtors of minors shall pay to their tutors only upon getting a discharge, which is necessary, not only to exonerate the debtor, but also to constitute a charge against the tutors for what they uplift.

Answered for the defender: That he having retired his ticket, is free by the brocard, *instrumentum penes debitorem repertum præsumitur solutum*, although it were