

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.

No 42.

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