

1673. *December 16.*MARGARET SCRYMGEOUR and Others, *against* ALEXANDER WEDDERBURN of Easter Purie.

In the action of count and reckoning at the said Margaret's instance against Easter Purie, her tutor, they having insisted upon an article craving the tutor to be decerned in the sum of £.1400, or thereby contained in an account and subscribed by the deceased Earl of Dundee, bearing that in case he should be found liable, that he should pay the same to Major Scrymgeour the pursuer's father, for which the tutor had done no diligence; it was alleged that he could not pursue upon that subscribed account, because the particulars thereof were of several sums of money alleged delivered to the Earl's father at York, or given to physicians and surgeons, and for expenses of bringing his corpse here out of York, where he died, for which he had no receipts, and so could not instruct the debt, neither could the same be referred to the Earl's son's oath, who was in Scotland all this time, and knew nothing thereof; and Major Scrymgeour himself, albeit he did survive the death of the Viscount of Dundee, by the space of six years, did never pursue the subscribed ticket. It was replied, that the subscription of that account did bear an acknowledgement of the verity thereof, and these words, "in case he should be found liable," now only adjected because he was heir to his father; but there were heir and executor confirmed, betwixt whom there might be a debate who should be liable, and albeit there were no receipts for verifying the debt, yet the tutor might have referred the same to the Earl's oath. The Lords did find, that the tutor was not liable to pursue on this subscribed account, unless they could instruct that the tutor had sufficient ground of probation for instructing the debt.

*Gosford MS. No. 648. p. 378.*

No. 179.  
Duty of a  
tutor in suing  
for debts.

1674. *January 16.*HAMILTON *against* LUNDIE.

William Hamilton of Wishaw having adjudged the lands of Fordel from the heirs of Sir John Brown, pursues a declarator against Andrew Lundie, that a prior apprising of the same lands was satisfied by intromission with the rents of the lands, either by the apprising, or by the said Andrew's intromission, as tutor to Fordel's heir, he being one of three tutors nominated, who are liable *in solidum*, not only for their intromission, but for what they might have intromitted with.

The Lords found that the intromission as tutor, or the omission, could not be determined till the pupil and con-tutors were called; but in regard there was an act of count and reckoning in this process, wherein some progress had been made, they allowed the pursuer to continue this process by a citation against the con-tutors and pupil, that the tutor's accounts might be concluded, and what

No. 180.  
Effect of a  
tutor's intro-  
mission in a  
case of ap-  
prising.

No. 180. this tutor was found liable for, might then come in consideration, to be imputed in the sums contained in the apprising.

*Stair, v. 2. p. 254.*

1674. July 29.

WALLACE *against* KENNEDY.

No. 181.

In the act of curatory it is requisite, that two of the nearest of kin, both on father's and mother's side, be called.

William Wallace, with concurrence of his curators, pursues Robert Kennedy his tutor, for count and reckoning of his means, who alleged no process; *1mo*, Because by the late act of Parliament, curators cannot pursue till they make inventory; *2do*, Because the act of curatory is null, seeing Queen Mary's act of Parliament requires "the calling of two of the nearest of kin on both sides." It was answered, That the curators knew nothing what were the pupil's means, and could make no inventory till the tutor produced the minor's writs, but offered to make the inventory before any extract; and as to the act of curatory, it could not summarily be taken away without reduction, and the late act of Parliament requires only the calling of the nearest of kin on both sides, and if the minor was pursuing alone, the Lords might authorise these curators as curators *ad lites*.

The Lords found, that two of either side ought to be called in acts of curatory, and that the late act did not determine that one of the nearest of kin on either side should be sufficient, and so did not derogate from the first act, and did only relate to the inventory; but the Lords did authorise these curators to proceed in the account, they always making inventory before extract, and renewing a formal act of curatory.

*Stair, v. 2. p. 281.*

1675. January 9.

M'INTOSH *against* FRASER.

No. 182.

A discharge granted by a curator is not sufficient without the minor's subscription.

*Stair. Dirleton.*

This case is No. 418. p. 11239. *voce* PRESCRIPTION.

1675. February.

SCRIMZEOUR *against* WEDDERBURN.

No. 183.

A tutor testamentary delaying for some time to accept, was not found liable for any thing that perished before his acceptance.

*Stair. Dirleton. Gasford.*

\* \* This case is No. 25. p. 6357. *voce* IMPLIED CONDITION.