1679. *December* 2. CLELAND *against* BAILLIE of Lamington.

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The assignee of a curator cannot force payment from the quondam pupil, till the curator settle his accounts.

BAILLIE of Littlegill being debtor to Mr William Sommerville, Mr William arrests in the hands of Lamington all sums due by Lamington to Littlegill, and obtained decreet for making forthcoming, which being assigned to several hands, and at last coming to James Cleland, and he having charged Lamington, who suspended upon this reason, that the debt being due originally to Littlegill, who was Lamington's curator, as appears by the act of curatory produced, if Littlegill had been insisting for the debt, Lamington had this defence, that he was his curator, and could not pursue him *ante redditas rationes*. It was *answered*, That that was only a personal objection, and could not militate against an assignee for a cause onerous; for we have no hypothecation of goods of tutors or curators, for their pupils' means, as was by the Roman law. It is true, compensation is competent against the assignee upon a liquid debt of the cedent; but here there is nothing liquid. It was *replied*, That though minors have not a hypothec, yet they have this privilege to be free of all their curators' pursuits, till they make an account, which is not merely personal, otherways it would be of no effect, it being easy for tutors or curators to assign, so that it is not a compensation, but *jus retentionis*.

THE LORDS found the reasons of suspension relevant, that the assignee's author was his curator, providing that the suspender give in a present charge of the curator's omission or intromission; and ordained a count and reckoning to proceed thereupon, to the effect that what should be found due by the curator to the pupil should be allowed in this charge.

Fol. Dic. v. 2. *p.* 50. *Stair, v.* 2. *p.* 713.

*** Fountainhall reports this case.

1679. *July* 25.—IT came to be debated, whether or not a minor in our law (for in the Roman law there is no doubt but he had it) hath a tacit hypothec in the goods of his tutor or curator, ay and until he make faithful count and reckoning to him of his administration? or if a tutor or curator can legally or validly assign or dispone any debt owing to him by the minor, or his predecessor, or assigned to him by another creditor, and *ante rationes redditas*? "THE LORDS found, that the assignee behoved to account for his cedent's tutorial or curatorial accounts, ere he who was the pupil or minor was obliged to pay him." See Stair, 24th January 1662, Ramsay, No 2. p. 9977. By this, before one bargain with another either for land, or take an assignation, he must search for acts of tutory and curatory, if the party he deals with was engaged in any, and not yet discharged, since it is found *vitium reale*.

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1679. *December* 2.—The point then debated being this day reported, "The Lords found Lamington's defence relevant, being proponed thus, that the cedent, Baillie of Littlegill, was tutor or curator to Lamington; and find, that he is thereby liable to count for the pupil's means intromitted with by him, or which he ought and should, or might have intromitted with; and ordain Lamington instantly to condescend upon, and give in the particulars wherewith he can charge Littlegill upon the account foresaid." It was thought a hard interlocutor, that Littlegill's being curator, and not having yet counted with his minor for omissions and intromissions, the presumptinn *quod intus habet*, and that he may be owing his pupil, should be a *vitium reale*, and meet the assignee for onerous causes by a curator: So that the Lords find by this, that a minor hath a tacit hypothec in his tutor's or curator's estate, which hinders their assigning debts owing to them by the minor or his predecessors, otherways than *cum onere* of counting for the administration. However, the Lords ordained the count to go summarily on in this same process, and ordained Newton auditor.

1680. *January* 27.—In the action betwixt James Cleland and Baillie of Lamington, (2d December 1679,) which the Lords turned into a curator count, Newton being auditor to the count and reckoning, he found Baillie of Littlegill, being one of Lamington's curators, was not liable for omission in not pursuing upon bonds due to Lamington's father, or goodsire, unless Lamington would qualify and instruct that Baillie of Littlegill, his curator, knew of these bonds, either by an inventory of the minor's estate, (for tutors and curators were not bound with us *conficere inventarium*, till the act of Parliament 1672,) or that the bonds, or other instructions of these debts, omitted to be sought in by the curators, were lying in his charter-chest the time of the curatory; or, 3*tio*, That there were rests owing by tenants for years immediately preceding the curatory, and these tenants continued thereafter during the curatory on the ground; or, 4*to*, That otherways he knew thereof; else hewas not an angel to divine there were such rights, or to seek them out *per omnes regni angulos*. *Vide* 24th June 1680, where the contrary was found in this case, upon report (*infra*). Some *alleged*, It was more reasonable that the tutor and curator should be burdened to prove that they searched the charter-chest, and did not find them in it, which, though a negative, yet is *negativa pregnans*; and it is to be presumed against the curators, that the writs were lying in the charter-chest, or (if he had been under tutory) that they were in the tutor's hands, or lying in processes, or writers chambers, or the like. It is true, since the said act of Parliament 1672, this will not defend any more a tutor or a curator. 2*do*, Newton sustained it relevant to assoilzie the curator from negligence, that it is offered to be proved, that the debtors either died insolvent, leaving no representatives, or the time of the curatory were commonly holden and reputed to be

bankrupt. See Durie, 6th February 1623, Watson, *voce* TUTOR and PUPIL. Or, *3tio*, That he did sufficient diligence against them, *viz.* by horning and denunciation, for affecting their personal estate, or by apprising, to carry the right of their lands; or, *4to*, That they are yet responsal, (*de hoc dubito*, for then the curator must once make it up to the minor, and afterwards seek relief and payment of that debtor;) or, *5to*, That the minor uplifted it himself, since his majority; or, *6to*, That there was an intromitting curator established, and he hath counted to the minor for the same debts, and either had got them allowed, or got a general discharge, which must also accresce to Littlegill, the concurator, seeing *omnes tutores et curatores tenentur in solidum*; so the discharging one after counting liberates all. In this same cause, my Lord Newton found Lamington could not crave that Littlegill, his curator, should count to him for the bygone rests in the tenants' hands, preceding Lamington's goodsire's decease in 1667, unless Lamington produced a title to these rests, either as executor or universal legatar, or a creditor to his grandfather, or that the executry was exhausted by payment of lawful moveable debts; and he found that the naked right and *jus* of being nearest of blood was not sufficient; and found he ought to prove the act of curatory electing Littlegill, and his acceptation of the office, and the true rent of the lands, and that they belong to him and his goodsire, by production of their sasines; as also, that he was minor all the years for which he craves the curator to count to him. Some of the former interlocutors stand in the Clerk's minutes thus: "The Lord Newton, for instructing Littlegill the curator's knowledge, that there were such debts, sustains the being in the charter-chest as a sufficient presumption and proof thereof; and that by witnesses who saw it taken out of the charter-chest after the curator's acceptance. As for Lamington's distresses, as cautioner for Raploch, who was alleged to be principal, and for relief, whereof the said Littlegill, curator, neglected to pursue Raploch, he found the distress alone not a sufficient ground whereupon the curator might have affected the estate of the principal party, unless actual payment had been made to the creditor; except only that he might have served an inhibition; and, therefore, he assoilzied the curator from the article of the distresses, unless Lamington will condescend, that, since the distress, and during the curatory, Raploch hath done voluntary deeds, by which Lamington is prejudged of his relief; which might have been remeided, if an inhibition had been served by the curator against Raploch: And also, *primo loco*, ordains Lamington to prove, that the distresses consisted with the curator's knowledge, in manner above written. Then he sustained this answer made for the curator, that the rents Lamington craved him to account for were either profitably debursed, or employed in Lamington's own affairs, as for his aliment, his debts, annualrents, law-suits, &c. or were uplifted by himself, and expended out and applied to his own necessary uses, or were counted for to him; and wherein the tenants were deficient, that the curators had done diligence for recovery of the same: And the LORDS assigned Lamington a day

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No 8. to prove the rental, and his age, for clearing of the time of the endurance of the curatory; and the pursuer, James Cleland, to prove the way and manner of the payment, and the employment; and the expending, applying, and employing of the rents to Lamington's use; and to produce the instructions thereof, and the diligences done against the tenants: *Item*, Found it also relevant to assoilzie the curator from omissions, for not pursuing for Lamington's grandmother's intromission, that the curotor offered to prove, that Lamington was her executor or intromitter with her goods; and if it was in majority, then it should extinguish the whole article; but if Lamington intromitted in his minority, then he found it relevant to extinguish *in quantum* he uplifted and profitably applied. As to the articles of the curator's omission, that he did not diligence against the relict, to cause them uphold the house of Painston, he ordained witnesses, before answer, to be adduced and examined by both parties, anent the condition of the house at the time of the Lady's entry, and the condition wherein it was at the time of her decease, that the two may be compared together."—A curator is obliged to cause the relict uphold the house, conform to act of Parliament.

To speak a little on this occasion of tutors and curators:—It is relevant to assoilzie a tutor or curator that the minor uplifted the rent himself, but it will be required to make it fully relevant that it be further proved, that either he violently uplifted it by force, or that he profitably employed it; for what if he did mispend it at cards and dice, then the curators should have hindered him from intromitting. Yet P. Montanus thinks it is to be presumed the minor spent it rationally; but it is unquestionably relevant for a curator to say, I have expended your rents on your aliment, on the paying of your debts and redeeming of your wadsetts, and on your law suits.

A tutor or curator ought to be very cautious and sparing in buying either the lands, rights, moveables, or other goods of the minor; for *nemo in rem suam auctor fieri debet.*

A tutor or curator is not in law obliged to lay out the annualrents of his minor's money upon annualrent, but the rents of lands he must lend out after a year, and the annualrents of these monies bear not annualrent till after the expiration of the tutory or curatory, and if then they do not pay them in, they bear annualrent. See 25th July 1678, Rose of Garlstone, *voce* Tutor and Pupil; 18th July 1629, Nasmith, (See Note p. 6522). But this seems very hard for the minor, if his whole estate consist in money and be opulent, that the tutor should have the benefit of their annualrents, (I suppose they may be 4000 or 5000 merks *per annum*,) and shall convert them to his own use, whereas it is in law *officium gratuitum.*

The Lords have commonly found, that a tutor or curator should not, upon his own expense, manage the affairs of his pupil, *nam officium nemini debet esse damnosum*; and to some tutors they allow L. 4 Scots *per diem*, and to some L. 3, and to others 30 pence, according to the quantity of the estate of the mi-

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nor. It oft-times proves no wisdom nor prudence to nominate many tutors to pupils, for each puts off to another, and they neglect, as all things in common are; and one who is faithful will go more commodiously about the management of it than many can do; whereof we want not examples to convince us of the truth of it. *Vide* § 1. *Instit. De Satisdat. Tutor.*

Tutors, curators, factors, and other administrators, as also creditors, apprisers, wadsetters, and the like, ought not to give down any of the rent they find; but if the tenants refuse to stay at that rent, then they are to fix placarts on the church doors, or intimations in the church, or tickets on burgage-houses, and endeavour to get a tenant at the old rent; and if, after all this diligence, they cannot get it set at the old rent, then they may set it as they can best agree, (first offering it to the debtor upon caution,) though it be for less, rather than suffer the ground to stand waste; or raise a process before the Lords to name commissioners to try the rents. See TUTOR and PUPIL.

1680. *June* 24.—IN the action James Cleland against Lamington, which resolved into a curator-accompt, (27th Jan. 1680.) Newton having reported two points debated there, they found, contrary to Newton's own opinion, "That the minor is not obliged to prove that the writs were in the charter-chest the time of the curatory, but that the same is to be presumed, unless the curator offered to prove that the chatter-chest was searched, and these bonds and other instructions not found therein; and allow that to be proved by witnesses who made inventory of the writs, or searched the charter-chest, or were present at the searching of it; and allow James Cleland by a diligence to cite the rest of the curators. And as to the other point about the executry, the LORDS, before answer, ordain Lamington to condescend, if during the time of the curatory he was distressed for any debts whereof he might have had relief of the executry, if his curators had confirmed him."

Fountainhall, v. 1. *p.* 53. 67. 77. & 104.

1680. *January* 7.

JAMES M'BRYDE *against* My LORD MELVILL and his SON DAVID.

No 9.

IN this case a practique was cited, 9th November 1672, Peirson against Crighton, No 80. p. 2672. where the LORDS refused compensation to a chamberlain upon a bond of the constituents, to which he had taken an assignation *ante redditas rationes, vide legem* 8. *C. De Compensationibus.*——THE LORDS refused to sustain this declarator till his cedent should make up his chamberlain accounts.

Fol. Dic. v. 2. *p.* 51. *Fountainhall, MS.*

*** Stair's report of this case is No 15. p. 2561. *voce* COMPENSATION.