ought not to be restored; the LORDS found that this did not exclude him from the benefit of restitution upon minority and lesion; but they ordained the charger to depone, that the articles of the account for the balance of which the bond was granted, were at the common rates, and not exorbitant.

No 164.

*Fol. Dic. v. 1. p. 585. Fountainhall.*

*** This case is No 98. p. 5881. *voce* HUSBAND and WIFE.

---

1708. *December* 1.

The EARL of ABERDEEN, and other CREDITORS of GORDON of Rothemay, *against* GORDON *alias* BARCLAY of Towie, his Son, and his Curators.

No 165.
A minor, after being served heir, and intromitting with rents, finding the estate overburdened with debt, raised reduction of the service upon minority and lesion, and offered to account for the rents applied to his own use, but not for those embezzled by his curators, who were insolvent. The Lords refused to restore the minor against his service, except he counted to the creditors for the rents intromitted with by his tutors and curators, whether applied to his utility or not.

TOWIE having succeeded to two estates, viz. Rothemay by his father, and the estate of Towie by his mother, and being in his pupillarity, served heir, by his tutors, to his father, in the lands of Rothemay; and his curators now finding that estate overburdened with debt, he, with their concourse, raises a reduction of his service on minority and lesion, whereby he would turn the whole debts upon Rothemay, and keep his mother's estate of Towie free, though it is alleged that part of the debt was contracted by his father to disburthen his wife's lands of Towie; and it were but reasonable that every estate bear its own debt. *Alleged* for the Creditors of Rothemay, they could not hinder him to seek restitution against this service and retour, as the Roman law repones minors *contra aditionem hæreditatis*; but that reposition must be understood *in terminis juris*, that he account for the rents of Rothemay, his father's proper estate, intromitted with by his tutors and curators these twelve years bygone, and restore the same to the creditors, which will exceed one hundred thousand merks, that the restitution may be mutual and equal on all sides, the law being clear, that *minorum restitutio* must be such *ut unusquisque jus suum recipiat, l.* 24, § 4. *D. De minor. Answered* for the minor, He is content to hold count for the bygone rents of his father's estate of Rothemay, and his tutor's intromisson therewith, in so far as the same came to his use, or were profitably employed, either as *locupletior factus* or *in rem ejus versum*, and to extend it farther, were to make his benefit of restitution wholly elusory and unprofitable; for what you give me with the one hand, you take it away by the other, if you make me accountable for the whole rent uplifted by my tutors; and it may be squandered and misemployed, either with paying their own debt, or luxurious misspending of the same, as happened in this case. Rothemay named Grant of Crichie and others to be tutors testamentar to his son; and so being his father's choice, were not obliged to find caution; and, after many year's intromission, having broke without making any account, there is no reason why this *damnum fatale* should fall on the minor, who could not help it, but rather on the

No 165. creditors who had a legal remedy of doing diligence for affecting the estate, by adjudging and arresting, and yet made no use of it, but suffered the tutors-intromitters *vergere ad inopiam;* and as this is congruous to reason, so it is clearly founded in the Roman law, where it is expressly determined, that a minor restored against his entry to an inheritance *debet præstare si quid ex hæreditate in rem ejus pervenit,* and no more; and the learned Sande, *lib.* 1. *tit.* 15. *decis.* 2., shews it was twice so found, both in 1607 and 1633; and Duarenus *ad tit. Cod. Si minor ab hæredit. abstineat.* And the creditors are not wholly destitute of a remedy, for they may pursue the tutors who intromitted, and evict the same from them. *Replied,* That though minors have a double action, one against the party with whom their tutors contracted, and the other against the tutors themselves, yet this can never be detorted to the prejudice of their predecessors' creditors; for to turn them over to pursue the minor's tutors, now broke, were to make them cautioners for their debtor's tutor's fidelity, contrary to all reason; neither can any fault be charged on the creditors, for if they had done diligence, they would have ruined the minor much more by heaping vast expenses on him, *vide l.* 5. *D. De condict. indeb.* THE LORDS found the case very strait, the favour of minors on the one part, and of creditors on the other; but by plurality, they refused to restore the minor against his service, except he counted to the creditors for the rents of his estate of Rothemay intromitted with by his tutors and curators, whether applied to his utility or not, with deduction of cess, dead, poor, and waste, and such other necessary defalcations. See 30th November 1665, Boyd against Telfer, *voce* TUTOR and PUPIL; and 2d July 1667, Lord Blantyre, No 76. p. 2215.

*Fol. Dic. v.* 1. *p.* 584. *Fountainhall, v.* 2. *p.* 468.

*** Forbes reports this case.

THE tutor of Patrick Barclay of Towie having taken to the pupil a right to his father Rothemay's estate, with the burden of debts, and served him heir to his father; Patrick Barclay, with consent of his curators, raised reduction of the said disposition and service *ex capite minorennitatis et læsionis,* pretending, that his father's debts exceeded the value of the estate.

*Alleged* for the Creditors of Rothemay, The pursuer cannot seek to be restored *in integrum,* until he first count for and restore the rents of Rothemay intromitted, or that ought to have been intromitted with by his tutors and curators, during the years of his possession.

*Answered* for Towie, He could only be liable to hold count for his tutor's intromissions, in so far as he was *locupletior factus,* or profited thereby. For as law allows not minors to reap profit with another's loss, so they are not to suffer prejudice by the deeds of their tutors, which can only bind them *in quantum* profitable *et in rem versum*; as is clear, 1*mo*, From the civil law, *L.* 7. § 5. *in fine, L.* 22. *L,* 27. § 1. *in fine, D. De Minor. L. un Cod. De Reput. quæ fiunt*

*in Jud. in Integ.* And the opinion of lawyers, *Stravius ad Tit. D.* § 65. *Sande Decis. p.* 31, and *Aditio Hæreditatis* is reckoned among those deeds against which restitution is most easily granted, *L.* 6. *D. De Minor*, as being a matter of whole sale, and *res periculosissima.* 2*do*, This is agreeable to our law and practice, whereby a tutor's intromission cannot subject the pupil to a passive title, but only make him liable *quatenus in rem versum*, November 30. 1665, Boyd, *voce* TUTOR and PUPIL. A minor hath his election to pursue restitution against the party without discussing his curators, though they were sufficiently solvent, July 2. 1667, Lord Blantyre *contra* Walkinshaw, No 76. p. 2215, much more if they were insolvent. 3*tio*, It were indeed a great hardship for pupils to answer for the mismanagement of their tutors, as if they were cautioners for them; whereby they might be ruined by the deeds of others they were not capable to prevent, being considered in law as having neither will nor judgment, or capacity to discern what may be acted in their affairs; and if the rents of Rothemay have perished, the creditors have themselves to blame for not affecting them by legal diligence in due time.

No 165.

*Replied* for the Creditors of Rothemay, Law hath indeed provided for the security and indemnity of minors, that they be not prejudiced by the weakness of their judgment or unripeness of years, in their contracts with third parties who voluntarily chused to deal with minors; and even in that case restitution ought to be made with as little prejudice to the other party contracter as can be, *L.* 23. § 4. *D. De Minor.* But where a person necessarily without his own choice falls to have business with a minor, as where a minor succeeds to the party's debtor, if he the minor seek to be restored against the succession, he must restore what his doers have withdrawn from the heritage, which the creditors were hindered by his service to possess; for they seeing an heir fairly entered, could not in justice heap up expenses upon the estate by affecting the rents. And here the pursuer cannot pretend loss by his own mismanagement, he having always been under the conduct of tutors and curators, against whom he may recover what they have mismanaged, *actione tutelæ et curatelæ.* 2*do*, As to the decision 1665, betwixt Boyd and Telfer, there is a visible difference betwixt subjecting a pupil to an universal passive title by his tutor's intromission which is penal, and the obliging him to restore his predecessor's estate as it was the time of his entry, if he claim restitution *in integrum*, which is *rei persecutoria*, and agreeable to the rule, *restitutio ita facienda ut unusquisque jus suum recipiat.* And in the case of the decision betwixt the Lord Blantyre and Walkinshaw, a person had voluntarily bargained with, and lent money to a minor; whereas here the defenders fell innocently against their will into business with a minor; besides that, even in that decision, several of the Lords were inclined not to sustain process, till the curators were first discussed. 3*tio*, There is less hardship to leave the pursuer to seek relief off his tutors and curators, than to expose creditors to the endless hardships of a tedious count and reckoning with them.

No 165.

THE LORDS found, That the pursuer cannot be restored upon the head of minority and lesion, unless he restore the whole rents of the estate intromitted, or that might have been intromitted with by his tutors and curators.

*Forbes*, *p.* 284.

---

1711. *January* 17.
THOMAS DUNDAS, Merchant, and one of the Bailies of Edinburgh, *against* JOHN ALLAN, Writer there.

No 166.
A bill accepted by a minor without consent of his father, his administrator-in-law, for merchant goods sold to another, found reducible upon minority and lesion, altho' the sum was small, and the acceptor was a writer doing business for others, and paid part of it during his minority.

BAILIE DUNDAS having obtained a decreet before the Bailies of Edinburgh, against John Allan, for L. 34 : 12s., as the remains of L. 47 : 5 : 6 Scots, contained in a bill accepted by him, payable to the Bailie, John Allan suspended and raised reduction upon minority and lesion, in so far as the bill was accepted by him when minor, without consent of his father, his administrator of law, as a cautionary security for the price of goods furnished not to himself, but to the Lady Cousland.

*Answered* for the charger, The reason of suspension and reduction ought to be repelled; Because, 1*mo*, The subject of this debate is so very small, that no such lesion could thence arise, as deserves the extraordinary remedy of restitution *ex capite minorennitatis*, which must be enorm, February 14. 1677, the Duchess of Buccleugh *contra* Earl of Tweeddale, No 8. p. 2369. For *prætor non curat de minimis*, and such an extraordinary cure is not to be applied to every trifling case. 2*do*, The suspender was a writer versant in business, and so presumed more capable to deceive, than to be deceived. 3*tio*, The suspender entered in payment after he was forisfamiliated by being married, and living separately from his father; which, by the civil law, was such an homologation as obliged one to pay debt contracted by him while *in familia paterna*, notwithstanding of *Senatus-consultum Macedonianum*, *L.* 7. § 13. *et ult. D. Ad Senatus-consultum Maced.*

*Duplied* for the suspender, 1*mo*, The smallness of the debt cannot influence the decision, seeing quality, and not the quantity, of the debt is to be considered; and what may seem a small matter to one, may be considerable to another. 2*do*, Whatever might be pretended, had the suspenders engagement been in the business of his employment as a writer, yet his undertaking a cautionry for the price of merchandise sold to another, was palpable lesion. And so anxious have the Lords been to secure minors from prejudice by rash cautionry, that a bond signed by a minor as cautioner, and his father as principal, was found null *quoad* the minor, though he was therein designed student of law, and afterwards proved an eminent lawyer, December 7. 1666, Mackenzie *contra* Fairholm, No 72. p. 8959.; *July* 25. 1667, *p.* 8960. Nor, 3*tio*, Can the suspender's paying part of the sum charged for be any homologation to fix him, since the partial payment was made during his minority; and he is