

It was ALLEGED for the defender, That he being neither nominated a tutor nor factor for the bairns, he was not bound to act for them ; nor could be liable in law for omissions, which is the only ground of law whereupon tutors, curators, or factors were liable for not doing diligence ; whereas he, being a creditor to the mother, was *in bona fide* to take a translation for a just and onerous cause ; and was only obliged to pursue for recovery of so much as would pay his own debt ; and, never having been required to make a retrocession, was not liable for the superplus.

The Lords, having seriously considered this case, as being singular, the defender neither being tutor nor factor ; and, on the other part, that, by his own translation to the assignation, he was nominated a consenter for the use of the bairns, as well as the mother ; so that, without his consent, nothing could be done, which did imply a clear trust ; and that he having intromitted with the whole bonds, did thereby satisfy his own debt ; and did never offer to the children, nor their uncle, who was joined with him, to make a retrocession, or to concur against the debtors ;—therefore they did decern the defender liable : albeit he was neither tutor nor factor ; but that the trust being known to himself, and he being master of the whole bonds, was liable for their damage, in suffering the debtors to become irresponsible ; the case of minors being most favourable, who cannot deal for themselves, and their defunct father having relied upon the defender, his care and diligence.

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1677. February 8. The LORD STRANRAER *against* SIR ROBERT GORDON of EUBO.

THE Lord Stranraer having pursued Sir Robert Gordon of Eubo, as one of the three commissioners for managing his estate, for making full count thereof, according to the rental,—it was ALLEGED, That the commission was never delivered to him, nor was he required to meet with the other two ; and all that he ever did being but as a friend, to assist the chamberlains, and sometimes to uplift money for my Lord's use, which he had so employed, he could not be farther liable but for his actual intromission.

It was REPLIED, That, by the defender's own missive letters, he declared that he was acquainted with the commission, and that he was willing to serve my Lord ; and, having formerly intromitted before the commission, and managed the whole estate, he ought to be liable, not only for his intromission, but for diligence against the tenants ; especially the commission being registrated.

The Lords, having considered the commission, that it did not bear any salary or allowance for pains ; and it not being proven that he did accept thereof, being required, with other two who were joint with him ; they did assoilyie from doing diligence, and found him only liable for actual intromission.

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1677. February 9. JOHN CALLENDER *against* DAVID COLYIER.

In a suspension, raised at John Callender's instance, who was charged at the