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their hands when he entered to the administration, and which he might have recovered if he had done diligence. Answered for Monkwood, It was sufficient for him to prove their existence at the time of his father's death, which presumed them to be still in being at his entry, which was not above a year after; and if he say they either perished before he accepted, or were disposed of to bankrupts or insolvent persons, the pursuing of whom would have been unprofitable expense to the minor, this resolves into a defence, and he must prove it; and the pursuer is content to find it relevant in these terms. Replied, The office of tutory is not *necessitatis*, (as it was by the Roman law), but any may accept or repudiate as they please; and till acceptation none is liable either for intromission or omission; and therefore, to make him countable, he must either prove the goods were in being, or converted to money, the time of his entry and acceptation of the office; and it is not sufficient to prove their existence at his father's death. So the question arising among the Lords, Who should be burdened with the probation, whether the tutor, that before he entered on the office the goods were perished, or sold to persons against whom his diligence would have been ineffectual, or the minor, that the goods were either extant in *specie*, or their price as *surrogatum* in responsal hands? the Lords, after so long a time, thought it more reasonable to lay the *onus probandi* on the minor, seeing *regulariter* a tutor cannot be liable but from the time of his acceptance; so, if their existence at his entry were not proved, it were hard to make him countable for the same. The minor's procurators contended, If he had entered legally as tutor served, or by a gift, then he might plead to be countable only from the date; but here the tutory was only proved against him by acts of gestion *qua* pro-tutor, and he having officiously meddled, should not have the favour of a legal tutor; but the Lords found no difference as to this point. It is true, if a minor charges his tutor or curator, that either he meddled or ought to have meddled with goods, (especially if they be such *quæ usu pereunt* as cattle do), he must say they were extant at the time of his acceptance; but if the distance and space be but small between his father's death and the tutor's entry, the minor may plead what he instructs was extant when the tutory first devolved at his father's death, continued to be so at the tutor's entry; seeing, mutatio non præsumitur in tam brevi temporis intervallo nisi probetur. But this is inter casus in arbitrio boni et cauti judicis positos. Anent pro-tutors' diligence for omissions, as well as intromissions, see the act of Sederunt, June 10, 1665.

Fountainhall, v. 1. *p.* 791.

1698. *February* 9. TURNBULL *against* JOHN BISSET.

No. 239.
Duty of making up inventories.

Turnbull, uncle to the children of Andrew Bisset, skipper in the Queensferry, by the mother's side, pursues John Bisset, their uncle by the father, and their

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tutor of law, to see himself removed from the office, because of his malversation, in so far as he has been now two years tutor, and has never made up inventories of the pupils' estate, contrary to the 2d act of Parliament 1672. Alleged, Inventories are only to be made before he acted, and he was pursuing the relict for exhibition of the writs by which he could only do it; and she had caused her brother raise this process; and he is now making the inventories, and has never yet meddled. Answered, The act requires the making up of the inventories at the very entry on the office, and though he could not then make it complete, yet he might afterwards eik, as things came to his knowledge. The Lords removed the tutor as suspect, in having neglected the appointment of the act of Parliament; which they found themselves strictly and precisely obliged to follow, though it might be prejudicial *in eventu* to the pupils.—See 7th July, 1680, Gibson *contra* The Lord Dunkeld and Thomson, No. 198. p. 16299.

Fountainhall, v. 1. *p.* 822.

1700. *January* 24. Balfour *against* Mr. George Forbes.

No. 240.
Whether a tutor may transact?

Balfour of Broadmeadows, as eldest son to the Laird of Kaillie, pursues Mr. George Forbes, late Minister at Traquair, as his tutor, to count for his means, conform to a charge, one of the articles whereof was £.400 Scots due to his father by the Countess Dowager of Traquair. Alleged, I cannot be liable for the whole sum, because, having no writ constituting the debt under the Countess' hand, he was necessitated to transact it for 226 merks in money, and 20 hogs, in regard she had a claim against the said Balfour of Kaillie as possessor of one of her life-rent rooms. Answered, Tutors cannot transact at their own hands, without a legal necessity; and here there was none; for he was her chamberlain, and that was given him for his fee, as appears by a discharge of one of the years of his possession, and so she could never have founded a ground of compensation on that debt; and therefore the tutor was either *in mala fide*, or grossly negligent, to have componed and given down. Replied, A legal necessity for a tutor's transacting does not alway require a decree for his warrant, but may even arise from the clearness of the contrary party's right, when no relevant defence can be obtruded against it; and which was his case. The Lords would not in the general find, that tutors might not, in any case, transact their pupils' affairs; for, in some dubious and intricate cases, such transactions have been allowed as warrantable; but *in hac facti specie* they found no such necessity incumbent on this tutor, and therefore found he had transacted on his own hazard, and behoved to count for the whole.

Fountainhall, v. 2. *p.* 83.