(M. 16,365.)

CAPTAIN DAVID PARKHILL of Craiglockhart, Eldest Son and Heir of JOHN PARKHILL of Craiglockhart, - - } *Appellant;*

ROBERT CHALMERS of Lambert, for himself, and as representing the deceased ALEXANDER CHALMERS, sometime Accomptant of Excise, - - - } *Respondent.*

House of Lords, 12*th February*, 1773.

TUTORY—INVENTORY—DISCHARGE.—1. Held, in consequence of a tutor neglecting to give up in his inventory, a lease of dues current at the deceased's death, that he was liable in payment of interest of these, from the dates at which they were respectively paid, and this, notwithstanding a discharge being granted for £889, as the sum effeiring to the minor's interest therein, in full satisfaction of all claims on that account, the minor having been kept ignorant of the claim and the state of the account. 2. Held, for the same reasons, that the curator was not entitled to charge any commission for his trouble. 3. Held that the curator, who had himself been a partner along with the deceased in the said lease current at the death, was not bound, on expiry of the same, to take a renewal also in the pupil's name; but entitled to procure that renewal in his own individual name—the pupil having then attained full age, and the curatory expired.

The appellant's and respondent's fathers, John Parkhill and Alexander Chalmers, were in partnership together, viz. in a lease from Lord Erskine of the coal of Alloa;—a lease from the Magistrates and Town Council of Edinburgh of the shore dues of Leith;—and a lease of the duties of the lights of the Isle of May. May 1750.

The present question arose out of the latter lease, which had been renewed to the parties, for the third time, at Whitsunday 1749, for eleven years, at the same rent as formerly, of £150 per annum. During the currency of this lease, and a year after the commencement thereof, John Parkhill died, leaving a settlement, appointing his partner, Alexander Chalmers, along with others, *tutors* and *curators* for his only surviving children, the appellant and his brother, who were then both infants.

The *tutors* and *curators* thus appointed, accepted of the office; and Alexander Chalmers, having been so nearly con-

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nected with the deceased in business, was appointed, or allowed by the other tutors, to take the sole management of their affairs. In this capacity, he uplifted the whole profits arising from the lease of the May Light house duties, his own share thereof, as well as the share belonging to the appellant, until the termination of the lease at Whitsunday 1760. In the course of this management, he neither accounted to his co-tutors nor to the appellant, for the sum of profits effeiring to his share therein, which, in the meantime, had accumulated to upwards of £1000. Nor did he include it in the *tutorial inventories* given up by him. It was also alleged that he kept the whole interest in this lease a secret from his co-tutors, his object being, that when the lease expired, he might secure a renewal for himself. In the year 1759, before the expiry of the copartnery lease, accordingly, he obtained a lease of the Isle of May dues for himself, to commence at Whitsunday 1760, when the copartnery lease expired. In the course of this year Alexander Chalmers died.

Sometime thereafter, his son Robert Chalmers, the respondent, called on the appellant, and stated, that from his father's books he found that at the time of his death he was owing him £889. 11s., as the proceeds of the Isle of May Light dues. This, the appellant alleged, was the first time he had heard of the claim. He was then of age, and was paid the amount; and he granted a receipt, without seeing any curatorial accounts. But sometime afterwards, the parties met in Edinburgh, when a settlement of the tutorial accounts was expected, and when the appellant was induced to grant a discharge, on the respondent's representation that the curators might object to the nature of the receipt formerly taken. This discharge acknowledged full payment and satisfaction of his father's share of the joint lease in question, referring to a particular account, which did not comprehend the Isle of May duties. There was superadded a general discharge, discharging all their intromissions with his estate and effects. He was immediately thereafter called away on foreign service; and it was not for seven years that, on his return to Scotland, he procured possession of his father's books, and saw for the first time that his father had an interest in the lease, and that a greater sum was due him than was paid. Accordingly, in these circumstances, the present action of reduction, declarator, count and reckoning, was raised, 1st, To reduce the two discharges above referred to, and to have the defender to render and pay a fair account of his intromissions with the Isle of May dues, for the lease

current previous to 1760. And, 2d, To have it declared, that the appellant was entitled to an equal share and interest in the *renewed* lease, taken by Alexander Chalmers in his own name, after the copartnery lease expired in 1760; and to have an accounting for the profits of the same. Defence,—The two discharges utterly foreclose the present action. This plea was afterwards abandoned; and the points discussed were, 1st, An article of 12 per cent, for which Alexander Chalmers had taken credit in his account of the dues in his own books, as commission or agency; 2d, The interest of the sums in his hands; and, 3d, His claim for a joint share and interest in the *renewed* lease and profits thereof.

Of this date, the Lord Ordinary pronounced this interlocutor: June 29, 1769.

" Finds that the not mentioning the tacks of the " duties of the Isle of May Lights, of the shore dues of " Leith, and of the duty of the great coal of Alloa, (in all " which the pursuer's father, John Parkhill, was a partner,) " in the tutorial inventories, although not appearing to have " proceeded from any bad intention against the pursuer, or " his brother, the pupils, as the deceased John Parkhill's " being concerned in these tacks was notour, and as Alex- " ander Chalmers, the defender's father, who was himself a " partner in these tacks, kept a most accurate account of the " profits on these tacks, distinguishing in his books the share " which fell to Mr. Parkhill's representatives, which could only " be with a view to account fairly for the same, but which he " was prevented from by death, yet whatever was the cause " of the neglect, which probably Mr. Chalmers, had he been " alive, might have explained, the pursuer is entitled to the " legal consequences of this neglect; and particularly, as there- " by the pursuer remained ignorant of the claim, so cannot be " allowed to suffer for not demanding regular payment of " the said profits, as from time to time they came into Mr. " Chalmers' hands, therefore Alexander Chalmers was, and " now the defender, as representing him, is bound to pay " interest for the said profits, from and after the first term " after they came into his hands, until the said profits were " paid up; and that from the term preceding John Park- " hill's death, the pursuer has right to these profits, so far " as not cleared with John Parkhill himself, notwithstanding " of the discharge by the pursuer's brother of part of " these profits, as supposed executry, when yet they be- " longed to the pursuer, the heir, reserving to the said de- " fender, Robert Chalmers, action for recourse against the

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" pursuer's brother. But finds, that notwithstanding these " tacks were current at John Parkhill's death, neither the " defenders, the tutors as a body, nor Alexander Chalmers, " one of their number who had been partner with John " Parkhill in them, were bound, upon the expiry of the old " tacks, to procure new tacks in like copartnery with this " pursuer, then very young, and thereafter a military man; " the pursuer's interest in these tacks having ceased upon " their expiry. And further, finds the defender Mr. Chalmers, " not entitled to charge any sum for commission to himself " or his father, on account of the trouble they were put to " in levying the pursuer's share of the profits, the same " being forfeited on account of neglecting inventories, as " the law directs."

This interlocutor was acquiesced in by the respondent, so far as related to the 12½ per cent. stated for his father's trouble, whereby the appellant recovered £900. But the appellant preferred a representation against that part of the interlocutor, which found him not entitled to a communication of the profits of the lease acquired in Alexander Chalmers' own name, of the Isle of May dues, after the expiry of the copartnery lease, which was current at his father's death.

The case was then taken to the Court, on report by the Lord Ordinary (Auchinleck) upon proof and memorials on this point. Upon advising which, this interlocutor was pro-

Dec. 17, 1771. nounced, " Find the defender not bound to communicate to " the pursuer any share of the benefit arising on the lease " of the May Light duties let to Alexander Chalmers, the " defender's father, by Mr. Scott of Scotstarvet, in Novem- " ber 1759, to commence at Whitsunday 1760; and remit to " the Lord Ordinary to proceed accordingly."

The appellant thereafter insisted for expenses, on the ground that he had been successful in a great part of the

Jan. 24, 1772. cause, whereupon the Lord Ordinary, in respect that the defender was not, " in any part of the proceedings, either " litigious or tergiversing, and that he has prevailed in a " very great point of the cause, and paid up the sums which " were found due directly, found no expenses due." And,

Feb. 5, 1772. upon reclaiming petition, the Court adhered.

Against these three interlocutors the present appeal was brought.

Pleaded for the Appellant.—The office of a guardian is a most sacred and important trust, and it has been the wisdom

and policy of the law, to tie up the hands of tutors and curators in regard to the estates of infants committed to their care, in such a way that no possible temptation of advantage to themselves should exist. In this case, the guardian has, availing himself of the office he held, substituted himself in place of his pupil, and has acquired a valuable interest to himself, which by law ought to have been acquired for his ward. His office indispensably required him to abstain from doing any positive injury to his pupil's rights, but enjoined him to manage them precisely in the same manner as a prudent man would do his own affairs. He was bound, therefore, whenever an opportunity occurred, to do every thing to promote his pupil's interest. Whatever, therefore, is done or transacted, which naturally arises out of the pupil's affairs, and in the course of their administration, is presumed in law to be done for the advantage of the pupil. This was the rule laid down in the Roman law, and is consonant with those principles which regulate the law of Scotland : Stair, b. i. tit. 6, § 17, establishes the rule that " Tutors " or their factors, are presumed to do that for the behoof of " their pupil, which they ought to do; and though it be " done *proprio nomine*, it accrues to the pupil. This is pre- " sumed *præsumptione juris et de jure*, so that the narrative " hearing another cause is not respected." Bankton, b. i. tit. 7, § 59, " Whatever rights the tutor or his factor acquires, " relative to the pupil, the law presumes it to be done " for the pupil's behoof, and therefore, they accrue to the " pupil, upon the same terms they were acquired." And this doctrine is supported by various decisions. The new lease of the Isle of May dues, having been obtained by Alexander Chalmers alone, as acting tutor for the appellant, must fall within the rule of law so laid down; as it was clear, from the whole circumstances of concealment, that the advantage thus unduly obtained by him has been to the prejudice of the appellant, and therefore he ought to have redress thereagainst. Nor is it any answer to this, to say, that at the time Alexander Chalmers obtained the renewal of this lease, the appellant was past majority, of full age, and, consequently, the office of curatory at an end, because, although this was the fact, yet the obligation and responsibilities still attached, for these continue beyond the legal time, and subsist until the tutors have strictly accounted, and are exonered.

In regard to expenses, no party complaining has a better

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right, in the whole circumstances of the case, especially when the appellant's success, and the fraudulent concealment of large claims, are taken into view.

Pleaded for the Respondent.—The respondent does not dispute the principle of law referred to, in regard to the acquisitions of curators; but denies its application to the present case. The new lease, in which the appellant claims an interest, was not entered into until several years after the appellant was of age, and no longer a minor. He had therefore no interest, as that interest was at an end with the expiry of the former lease, current at his father's death. After this event, and after he had attained majority, the respondent had no authority to act for the appellant, nor was he bound in law to act for him in regard to the lease in question. The whole transaction, in so far as the respondent's father was concerned, was fair, and to be expected in the circumstances. The appellant was a man devoted to the military life. He was actually on foreign service. And the respondent's father could not form the remotest idea that he could possibly have a wish to join in commercial affairs. Nor is it likely that he would have got his father to join him in such a project, far less likely that the landlord would let these duties to a young officer in the army. Nor has there been any concealment proved, such as to shew a fraudulent intention on the part of the respondent's father. The omission of all the joint leases or adventures, from the tutorial inventory, was not evidence of such fraudulent intention; as this was deemed proper by the whole curators, because, at that time, it was not certain whether these would be attended with profit or loss. For the same reason, or by an error of the clerk, notice is not taken of these in the Sederunt book. These omissions were part of a plan, upon which the tutors exercised their judgment for the best. Besides, all claim is now cut off by the discharges, as well as long acquiescence; and it is no objection to this, to say, that a general discharge, subjoined to a list of particulars discharged, will not be construed to extend to matters of a quite different nature, which are not presumed to have been under the view of parties; because this rule holds differently in regard to particulars of the very same kind with those that are discharged, and more especially where the discharge is of the acts and deeds of a tutor.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and

that the interlocutors therein complained of be, and the same are hereby affirmed. 1773.

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For Appellant, *E. Thurlow, Tho. Lockhart.*
For Respondent, *Ja. Montgomery; Al. Wedderburn, Ilay Campbell.*

(M. 7106.)

ROBERT M'NAIR, Merchant in Glasgow, *Appellant.*
JAMES COULTER and Others, Merchants in Glasgow, Insurers of the Ship Jean and her Cargo, - - - - } *Respondents.*

House of Lords, 15*th February* 1773.

VALUED OR OPEN POLICY—PROOF—BILL OF LADING—INTEREST.—Insurance for £1000, on ship and cargo, lost on her voyage from Virginia to Barbadoes. The son of the insured was master. The policy proceeded on false information of the value sent by the son to the insured, but without the latter's knowledge. The Court of Session held, that the bill of lading was not good evidence of the value and quantities of goods. The question was, Whether he was entitled to recover the sum named in the policy, or the real value of the ship and cargo only. Held, reversing the judgment of the Court of Session, that he was entitled to recover the sum of £1000 named in the policy; also to recover interest thereon.

This question arose out of a policy of insurance effected on the ship Jean and her cargo, for the voyage from Virginia to the Barbadoes, in which the respondents were the insurers, the appellant the party having the insured interest.

The particulars of the case are fully detailed in a report of the case, which went to the House of Lords (Vide *ante*, p. 224.) The case was then remitted back to the Court of Session to dispose of the other points in the cause.

By interlocutors of 8th February and 21st June 1765, the Court found that the insurers were not bound to pay the sums at which the ship and cargo were insured, but only the real value, as the same might be ascertained, and finding the value of the ship to be £450. When the case came back from the House of Lords further discussion took place, on the point, whether it was an open or a valued policy?

Of this date, the Court pronounced this interlocutor: Feb. 13, 1772.

"Find that the charger (appellant) is not entitled to recover from the suspenders (respondents) the £1000 Sterling specified in the policy, but only a sum equal to the damage he sustained by the loss of the ship Jean and her