1696. *June* 17. JAMES GRAHAM, Petitioner.

No. 236.

James Graham, a minor, gives in a petition, shewing, he was decerned to grant a disposition in terms of his father's obligation, and, wanting curators, he craved the Lords would authorize his writer to consent with him as his curator. The Lords refused this bill, they only granting curators *ad lites* for managing minors' processes, but not to authorize them in other business; and a minor wanting curators may do the same that one having curators can do, seeing, in both cases, he will be restored, if lesed.

Fountainhall, v. 1. *p.* 721.

1696. *December* 17.

The RELICT and CHILDREN of JOHN CLARK, Writer, *against* The BAXTERS of the CANONGATE.

No. 237.

The Baxters of the Canongate were owing the defunct 2000 merks by bond, and being pursued to pay, they object, That, by the father's testament and nomination, he had indeed named his wife sole tutrix to her children, during her viduity, but withal had obliged her to act with the special advice and concourse of Adam Chrystie and William Wilson; and *ita est*, they refused to consent to the discharge; 2*do*, She had not made up inventories, conform to the act of Parliament 1672. Answered to the *first*, She could not force these persons to accept the trust, but they were content so far to countenance the payment as to sign witnesses to the discharge. To the *second*, She was content to make inventories *ante omnia*. The Lords found the tutory did not fall by their refusal, and all that she was obliged to do was to require them, in which case she could validly discharge alone.

Fountainhall, v. 1. *p.* 744.

1697. *November* 10.

MUIR of Monkwood *against* CRAWFORD of Newark, His Tutor.

No. 238.

Tutors are liable only from the date of acceptance of the office.

In the count and reckoning, the pursuer charges him with a considerable sum, as the price of some horses, nolt, and sheep, and other stocking his father left on the lands at the time of his decease. Newark, the defender, alleged, The article was not relevant to make him liable to count for the goods, or price, *esto* they were extant at the time of the pupil's father's decease, unless he likewise proves their existence the time of his entry, which was not till a year or two after his father's decease; or else that they were sold to responsal persons, and the price still in

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. No. 238.

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