

No. 242. ought not to be stopped therein. The Lords found they had been in use to sequestrate minors as well as the Council, and that my Lord Bargany could not claim her custody, being her nearest heir; and that minors have been oft imposed on in their elections, and that it merited the Parliament's consideration, that minors should not have that unbounded liberty to their own prejudice; therefore, they prorogated the diet of her election till November next, and ordained her to be delivered up to James Hamilton of Pencaitland, one of the Clerks of Session, to stay in his house till the 11th of November next, and all her friends indifferently to have access to her, and that she chuse betwixt the 1st and 10th of the said month.

Fountainhall, v. 2. p. 154.

1704. November 7.

WILLIAM DRUMMOND *against* COLONEL MENZIES'S HEIR.

No. 243.
May a pupil
be sued for a
debt?

William Drummond, writer in Edinburgh, pursued Colonel Menzies's heir for payment of 500 merks, contained in his predecessor's bond, on this passive title, That he had accepted a disposition with the burden of debts, and so *præceptione hæreditatis* was liable. Answered, I am only a pupil of seven or eight years old, and so can neither accept, repudiate, nor possess, law presuming that age to have no will or deliberate knowledge in such things, and therefore cannot be universally liable, unless he prove the minor to be *locupletior factus* by it. Replied, It is confessed, by a late act of Parliament, pupils are exeemed from personal execution by caption, till their age of fourteen; but to exeem their estates till then, is contrary to the analogy of all law; for if he be lesed by his tutors accepting a right, he can be reponed against their deed; but it were absurd to postpone creditors' diligence on that pretence, for if it be *hæreditas damnosa*, they may renounce and repudiate; and if they do not, they must be liable. The Lords considered, that pupils had two remedies; one by the *actia tutelæ* against their tutors; and the other by restitution against deeds done to their lesion; and that they could not burden the pursuer to prove the pupil was *lucratus*, but the tutors ought to repudiate, if they would free the pupil of this pursuit; and seing they did not, they repelled the defence, and found the minor liable for the debt.

Fountainhall, v. 2. p. 238.

1705. February 16. BALFOURS *against* FORRESTERS.

No. 244.
What is sufficient cause
to remove
tutors as suspect?

William Forrester, writer to the signet, having a considerable estate in money, near 100,000 merks, he, by his testament in 1705, names Mr. James Forrester, advocate, his brother, and others of his own friends, to be tutors to his children, but with the privileges of the 8th act of Parliament 1696; and these tutors having accepted, and managed by the space of two years and an half, there is a process

for removing them as suspected, raised at the instance of Rachel Balfour, the children's mother, and Balfours of Forret and Randerston, her brethren, on this ground, That they, in that short time, had uplifted considerably of their pupils' means, and had neither re-employed it, nor given any rational account what had become of it; though, by the testament, the father had expressly enjoined them to gather in his money, and ware it out upon land. Alleged, They were not obliged to answer in this summary way, especially being tutors-testamentary entrusted by the defunct, and nearest of blood, failing of the children, and so not to be presumed to squander their means, and who have followed the prescriptions of law anent tutors in all point, and made fair judicial inventories of their pupils' whole estate, in terms of the 2d act 1672; and the defunct had that confidence in their faithfulness and integrity, that, conform to the power given by the fore-said act of Parliament 1696, he has liberated them of omissions, and only made them countable for their actual intromissions, and has declared them not liable *in solidum*, but *pro rata* only each for themselves; and they gave in a condescence, that what principal sums they had uplifted were either re-employed, or else disbursed in necessary uses, as paying what remained for building the monument in the Grayfriars church-yard, which the father had erected for his burial-place, or for the mother's jointure, children's aliment, merchant-accounts, &c. Answered, If the malversations were not very gross and palpable, they had never quarrelled them; and it was not on omissions they were convened, but rather for too much diligence in uplifting in so short a time above £.1000 Sterling of the pupils' money, whereof they gave no just or true account; for as to these disbursements, no judicatory in the world can allow tutors to uplift and sink principal sums to pay these incident emergencies, and the wife's jointure and aliment, &c. for these should be paid out of the current annual-rents, where the *sors* and stock is so great; this were to eat up their principal sums in a short time, and is not *ex fide tutelam gerere*, but it is an unaccountable malversation; and if this were not sufficient to remove tutors as suspected, it is impossible for any thing to do it; yea, the Lords, on the 2d of July, 1680, Sir Alexander Gibson *contra* Lord Dunkeld, and Thomson, No. 198. p. 16299. found the very omission of making inventories enough to remove them; but here are positive acts of mal-administration. The Lords were of opinion, that the tutors had not answered the trust reposed in them; but if they would find sufficient caution for by-gones, and in time coming, they did not think fit to remove them, being tutors testamentary, in whom the defunct reposed trust, and of such the Roman law required no caution; yet where they begin to fail in their condition, as either *vergentes ad inopiam* or *grassantes in re pupillari*, they may be put under caution. Vinnius, Ad Tit. Institut. De suspect. tut. thinks neither the solvency of the tator nor his offering caution, sufficient, where he has already given proofs of his malversation. However, the Lords allowed these tutors a day betwixt and which they may offer sufficient caution; and if not, then the Lords removed them from the office as suspected.

Fountainhall, v. 2. p. 269.