

testament was ineffectual, for that the nomination of Anna Napier to be executrix and universal legatary, without specially legating the bond, carried no more than would have fallen under the right of an executor ; but so it is, that a substitution excludes the executor.

Kilkerran, No. 2. p. 345.

1739. July 19. and December 4.

FOWLER against CAMPBELL

It is not every management of the affairs of a pupil that will infer a pro-tutory, but only such as is *qua* tutor, that is, where one acts under the character of tutor when he is not so ; for the act of sederunt, June 24, 1665, did no more than adopt the civil law into ours.

Formerly, when one had acted as tutor, and was pursued to account as such, it was a good answer, that he was not tutor, as in Notman's case, which gave occasion to the act of sederunt, and that there were tutors nominate, whereof he was none. To remedy this, the act of sederunt was made, declaring, That whoever should in time coming intromit with the means and estate of any minor, and should act in his affairs as pro-tutor, having no tutory established in his person, should be liable in the same manner as tutors and curators.

Upon this general reasoning, the Lords were at one, but differed upon the application of it to this particular case. Some were of opinion, that to infer a pro-tutory, it was necessary that the person should assume in express terms the character of tutor, *ut tutorem se fingeret* : Others thought, that not only the acting under the express character of tutor, but the acting under any equivalent character, would infer pro-tutory, otherwise the act of sederunt would have little or no effect.

And so the Court found in this case, and subjected the defender, a widow, who was held to have assumed a character equivalent to that of tutor, by not only uplifting and discharging the principal sums of bonds, whereto she had no pretence of a common interest, but in her discharges designing herself manager of her husband's affairs, and discharging for her, her heirs, and the heirs and representatives of her husband.

Kilkerran, No. 2. p. 583.

* * * This case is reported by C. Home :

William Macwhirich, merchant in Inverness, died without making any will, leaving considerable effects, and several children under pupillarity : Upon his death, as none of the relations on the father's side were willing to meddle in the children's affairs, Elizabeth Fowler his relict, having an interest in the goods herself, applied to the magistrates of that town to have the same inventoried and ap-

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Pro-tutors and pro-curators how far liable.—Act of Sed. 1665.

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pretiated, as also that the papers might be sealed till a title was made up, so that her husband's family might not suffer by delay. In consequence whereof, inventories were made out, (which do not appear to have been signed by any person,) and the goods were likewise appretiated. And thus, she was decerned executrix, *qua* relict to her husband : However, a difference falling out (as was alleged) betwixt her and the commissary, anent the extent of the subjects to be confirmed, was the cause that no confirmation was expedite; notwithstanding whereof, the relict and her second husband intromitted with the defunct's effects. On which account, Elspeth Macwhirich, one of William's children, brought a process against her mother and her second husband, to account for their intromissions; which being assigned to Alexander Campbell, he insisted the defenders should be liable to account as tutors or protutors to Elspeth.

Pleaded for the defenders : That none of them were ever tutors to the pursuer, and so are not obliged to account as such, neither were they pro-tutors. To make one fall under that character, it is necessary that the person has immersed himself in the management of the pupil's affairs, without any other call than for the interest of the minor; and, even in the administration, he had used the name of tutor, which he had no title to do : But in this case that cannot be alleged, seeing, before the relict intromitted, she applied to the magistrates, set forth the state of her husband's affairs, and craved the goods might be inventoried, &c. which was accordingly done : Thereafter she was decerned executrix *qua* relict, which showed her *animus* not to act as tutrix or pro-tutrix, and would have expedite a confirmation, if it had not been for the difference betwixt her and the commissary. Besides, she had a considerable interest in all the moveable subjects, *jure relictæ*; so that her meddling cannot be esteemed acting as pro-tutrix for her children, but for her own interest; and, though her administration might make her liable as a *socia* acting *in re communi*, yet it could never bring her under the character of a pro-tutrix, especially if it be considered, that, in the course of her or her husband's management, they, nor either of them, ever took the name of tutors to the children : When they lifted money that had belonged to the defunct, it was on discharges with warrantice; when they paid debt, they took assignation or discharges to themselves. See June 10, 1665, Swinton against Notman, No. 148. p. 16273. Neither does the act of sederunt 1665 make all intromitters liable to count as protutors, but only when their intromission is as such, which implies an acting under the character of tutor.

It was answered for the pursuer : That, in order to determine the question, Whether the defenders were liable as pro-tutors, it was necessary to look into the nature of the management : For this purpose it was observed, That, from the application to the magistrate, it was plain the relict undertook the pupil's affairs, under covert of their authority, as none of the father's side would meddle; and that this formality showed she had an eye to the office of tutory, which requires inventories; but, because there was no nomination of tutory in her favours, nor gift from the Exchequer, nor judicial inventories made up consequential thereto, where-

by the relict might have been habilely stated in the office of tutory, therefore the law characterizes such management a pro-tutory, that a person may not profit by neglecting the legal requisites, and may not be in a better situation than those who follow what the law prescribes, and that minors may not be ruined by means of such officious intromitters. The consequence of this application further shows, that the relict was following out the management in the same terms, under colour of a tutory, or as empowered to take it upon her: Did not the defenders enter upon the whole effects of the minors, dispose of the goods on hand without distinction, uplift the debts due to the defunct, and pay those due by him? Does it not likewise appear, from some of the receipts and discharges produced, granted by the defenders to the debtors, that they discharged the debts and accounts due to the defunct, as if they had been owing to the relict, designing herself therein manager of her deceased husband's affairs? Further, it appears from two discharges, that William Mackie raised principal sums due to the defunct by bond, in which neither of the defenders had any manner of interest; so that he could not be acting in that respect, but on account of the infant children. It is a jest, therefore, to suppose, that one who acts thus in a minor's affairs shall term himself pro-tutor in the writing granted by him, otherwise not be liable in that quality. Such epithet could not create any authority to act, but, on the contrary, discover he had none, and so embarrass his management. Besides, it is plain, from the act of sederunt 1765, that it is the intromission with the minor's estate, and acting in his affairs, that subjects the party to the character of pro-tutor; and, if it were otherwise, miserable would be the state of minors; for, to be sure, the worse that the intent of the intromitters was, the more careful would they be to avoid taking on the character, whereby they might be brought to an account favourable for the minor. In the next place, supposing the relict had confirmed the whole executory, and managed it in common, it cannot be admitted, that therefore the defenders would not have been liable as pro-tutors, as well as upon the character of executors, seeing the making up titles to a subject belonging to a minor cannot free the intromitters from the legal effect of being liable as pro-tutors. Nor can the joint interest which the relict had in the executory alter the case. If indeed the defenders had only concerned themselves with the subject, whereof she had a proportion *pro indiviso*, and that fell under the communion of goods betwixt husband and wife, and had confirmed those, so as to lie open to a fair charge at the suit of the children for their shares, there might be some colour for not subjecting them as pro-tutors for the remaining effects: The necessity of the thing might excuse them, and the children would have undergone no hardship in bringing them to an easy account.

The Lords found the defenders are liable to account to the pursuer's cedent as tutors or pro-tutors for her.

C. Home. No. 127. p. 211.