

S E C T. III.

Can a foreigner be appointed a tutor here. Can a foreigner be received as a cautioner. Who understood to be a foreigner. Can a foreigner be sued in this country.

1627. December 17. DONALDSON against BROWN.

IN an action for exhibition of writs, pursued by a Fleming, born in the Low Countries, begotten upon the daughter of Captain Donaldson, Scotsman, by his father, who was a Fleming, and not a native of this realm, against William Brown, who was convened for production of certain bonds in his custody, made to the said Captain Donaldson, his goodsir by his mother; in the which pursuit, the pursuer being a pupil, was authorised, by a tutory-dative given to him by the King's Majesty; and it being controverted, if the King might give a tutory-dative to a stranger, native of another realm, seeing none could be served tutor lawfully to him in Scotland, the LORDS sustained this tutory-dative, not as a general gift of tutory, but *ad hunc effectum* to authorise the pupil, as an administration to assist him in the action libelled *in hoc particulari negotio*, even as if the goodsir upon the pursuer's mother's side had left a tutor to the pupil in his testament, for the governing of any particular estate left by him to the pupil, which would have been effectual *in hoc negotio*, if it had been done in testament; and not being done in testament, the Prince might grant an administration as effectual in favour of the pupil for recovering of that, which, by the law of this kingdom, might befall to him; wherein, if the King dispensed with his own interest, no other could quarrel the same; and by the said grant of the gift, the King had ceded his own interest to the tutor in favour of the pupil; but the LORDS found, That there ought to be produced an authentic declaration, and trial taken by the Magistrates or Judges within whose bounds the pupil dwelt, that he was the eldest son of these persons, and so that he was apparent heir to his said goodsir, whereby he might be known to be that person who had right to pursue as apparent heir to his said goodsir for the writs libelled, according to the laws of this realm, which is not used, nor necessary to be done in pursuits amongst Scotsmen.

Act. Lermouth.

Alt. Belshes.

Clerk, Gibson.

Fol. Dic. v. 1. p. 325. Durie, p. 322.

No 9.

A foreigner pursued an action in Scotland, under authority of a tutory dative appointed by the King. The Lords sustained the tutory-dative, to supply a curatory *ad lites*, so as to authorise the pupil in the action.

* * Spottiswood reports the same case :

THERE was an action of exhibition pursued by one Donald Skelton, grandchild and apparent heir *ex parte matris* to his grandfather Captain Andrew

No 9.

Donaldson, whereby he being authorised by William Donaldson his tutor-dative, convened William Brown, merchant in Edinburgh, for exhibition and delivery to him and his said tutor, of certain bonds and obligations made in favour of his said umquhile grandfather.—*Alleged*, That the tutory-dative was null, in respect that the King could not dispoise it, the pupil being a foreigner born in Germany, as his father was before him, and had never been in this country, and so the pupil was not sufficiently authorised.—*Replied*, That the King might give a gift of tutory, vacant in his hands, to any pupil having goods and gear within his dominions.—THE LORDS sustained the pursuit at the pupil's instance, thus authorised, because it was not so much a tutory-dative, as a power of administration of the pupil's goods within this kingdom, which the King might lawfully give to any, as well as the father could have done by his latter-will; and withall they ordained the tutor to find sufficient caution.—Next, *alleged* no process at the pursuer's instance as apparent heir, because *non constat* whether he was or not.—THE LORDS ordained, in respect that the pursuer was a foreigner, that it should be verified he was apparent heir *cum processu*.

July 11. 1628.—IN this action between Skelton, authorised by Donaldson his tutor-dative, and William Brown, the bonds being exhibited, *alleged* against the delivery, That the defender could not deliver them to the tutor-dative, because he offered to prove that there was one Sim named tutor-testamentar by Captain Donaldson to his grandchild Skelton. Notwithstanding of this allegiance, the LORDS ordained the writs to be given up to the pursuer, in respect he had found sufficient caution (Sir Robert Hepburn) by which William was put *in tuto* to deliver the bonds to the tutor-dative.

Spottiswood, (TUTORS and CURATORS.) p. 345.

1759. February 6. MARY COLLINS *against* LORD BOYD.

No 10.

A person residing without the jurisdiction of the Court, cannot be received as a judicial cautioner.

IN the question betwixt Mary Collins and her trustees against Lord Boyd, 2d July 1755, *voce* PAPIST, the Court ordered Lord Boyd to pay the whole sum to the pursuer, on her finding caution, that Janet Boyd, the nun, would never claim her share due by Lord Boyd.

Lord Boyd *objected* to the cautioner, That he did not live within the jurisdiction of the Court; and that as this was a judicial act or obligation, the cautionry being ordered by the Court, no cautioner could be received who was not amenable to it.

Answered, This is not a *cautio judicio sisti et judicatum solvi*. It is not properly a judicial act or obligation. It is a common cautionary obligation, that a person living in a convent shall not claim her share of the money due by Lord Boyd; and therefore any responsible person may be received as cautioner, whether amenable to this Court or not.