

1779. December 1. SMITH *against* MARSHALL.

No. 302.

A tutor dative having sold his pupil's lands by warrant of the Lords, and intermitted with the price, his cautioner in the act of tutory was found liable for the price to the pupil, the caution being, *rem pupilli salvam fore*.—See APPENDIX.

*Fol. Dic. v. 4. p. 390. T. MS.*

1784. March 10. JOHN BELL *against* JOHN HENDERSON.

No. 303.

The appointment of a factor *loco tutoris* falls by the service of the tutor of law.

John Henderson was appointed factor *loco tutoris* to the infant grandchildren of John Bell, and continued in the office for several years. Afterwards, John Bell expedite a service as tutor of law to his grandchildren; of which John Henderson brought a suspension. The reasons were, the delay of the agnate in claiming the tutory, his great age, his residence in England, and having entered into a second marriage.

The Lords repelled the reasons of suspension.

Lord Ordinary, *Hailes*. Act. *G. Wallace*. Alt. *Honyman*. Clerk, *Menzies*.

C.

*Fac. Coll. No. 153. p. 238.*

1785. November 23. DUNCAN JOHNSTON *against* MARGARET CLARK.

No. 304.

A guardian named by a father to his natural child, entitled to demand the custody of the child, from a person to whom the father had committed it.

Andrew Clark, residing in the island of Jamaica, put under the care of Margaret Clark, his sister, who lived in this country, a natural son of his, while an infant. By his testament, he "nominated Duncan Johnston guardian to the person and estate of his said reputed son." Some years after the arrival of the child, the father being then dead, Johnston brought an action against Margaret Clark, concluding for delivery to him of the person of the boy; in defence against which, she

Pleaded: The law does not recognise any man as the father of a bastard, nor confer on him, as such, that *patria potestas*, or fatherly guardianship, from which alone can spring the power of naming tutors to his child. He is viewed in no other light than any stranger, who, though he may appoint persons to manage an estate bestowed by him on a pupil, will not acquire the authority over his person. The pursuer, then, is not a legal tutor, and cannot sue in this action. The defender, it is true, received the child from her brother; but the question is not as to re-delivery to him. It is demanded to be made to the pursuer, and in a character which is not authorised or known in law.

Answered: It is not necessary here to maintain the pursuer's legal appointment as tutor. If Andrew Clark, who committed to the defender the custody of his

son, had himself the right of redemanding that custody, and if he has conferred that power on the pursuer, in clear and direct terms, by appointing him "guardian to the person of the child," the present claim must of course be sustained.

No. 304.

The pursuer's argument was adopted by the Court; and it was farther observed, That if a person bestows an estate on a child who has not a lawful father, he may appoint a guardian to that child, to the effect of directing his education, as well as of taking charge of his estate.

The Lord Ordinary decerned in terms of the libel; and

The Court adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Hailes.* Act. *Nairne.* Alt. *H. Erskine,* Clerk, *Colquhoun.*

S.

*Fac. Coll. No. 239, p. 368.*

1788. July 10.

JANET HENDERSON *against* ARCHIBALD DUFF and JAMES HENDERSON.

Duff, Henderson, and several other persons, were, by the father of Janet Henderson, nominated her tutors, it being declared, that they were to be answerable for actual intromissions only, and each for himself alone. No inventory, however, of the father's effects was made up by those tutors. On that ground, Janet Henderson raised an action against Duff and Henderson, as having become liable *singuli in solidum*.

No. 305.

Tutors having neglected to make up an inventory, liable *singuli in solidum*.

Pleaded for the defenders: By the statute of 1696, Cap. 8. fathers are empowered to name tutors and curators to their children, under the conditions, that they shall not be liable for omissions, or *singuli in solidum*; which they would have been at common law, independently of the act of Parliament 1672, C. 2. Under these conditions, the defenders were nominated. The first-mentioned statute, it is true, while it introduces an exemption from those common-law obligations, provides, "that nothing in it shall liberate from or dispense with the making up of inventories;" a thing enjoined by the other enactment. But this proviso cannot have the effect of subjecting the defenders, farther than to the peculiar penalties of the statute of 1672; such as, being denied reimbursement of expense laid out in the minor's affairs, or being removed as suspect; that of 1696 having excluded from the case the rules of the common law. Nay, though, in the terms of the statute 1672, they were to be held liable for omissions, it would not follow, that they should likewise be subjected *singuli in solidum*.

Answered: If there had been no mention of inventories in the statute of 1696, the obligation on tutors with regard to them would still have continued under the prior one of 1672, that enactment not being repealed; and surely a special *salvo* of this obligation cannot have an opposite effect. On the contrary, it plainly indicates, that without complying with that requisite of the former enactment, no