

does not chuse, or is unable to act as tutor-at-law. Whatever powers, therefore, are usually and necessarily entrusted to the one, ought to be given to the other. Without this, the remedy would be incomplete. The decision in the case of Brown is in favour of this argument, for the reference must be binding on both parties, or on neither. In the other case, the question was as to the powers of the factor on a sequestrated estate, which were admitted to be quite different from those intrusted to a factor *loco tutoris*. The circumstances attending that case too were very peculiar.

The Court in general thought, that a factor *loco tutoris* might enter into a reference; although, it was observed, that if the question was not the proper subject of such an agreement, or if an improper person had been chosen arbiter, the pupil might be restored *ex capite læsionis*.

The Lords found, that a factor *loco tutoris* might enter into a reference, and therefore in this case assoilzied.

Reporter, Lord Dreghorn. Act. Dean of Faculty. Alt. M. Ross. Clerk, Menzies.

C.

Fac. Coll. No. 208. p. 437.

1793. January 25. MARION KILPATRICK against JOHN MACALPINE.

James Kilpatrick appointed John Macalpine, John Eadie, and others, to be tutors and curators to Marion Kilpatrick, his grand-daughter. By the same deed, he named them his executors and trustees over the whole subjects she enjoyed from him, and declared, "that they should not be liable *in solidum*, nor each for the other, but each only for his own actual intromissions." Macalpine and Eadie accepted of these offices, but they made up no inventories of Kilpatrick's estate. Macalpine intromitted with some part of his effects; but the chief management devolved on Eadie, who afterwards became bankrupt, deeply in debt to his pupil.

When Marion Kilpatrick came of age, she brought an action of count and reckoning against her tutors, concluding, that they should be found liable *singuli in solidum*, because they had neglected to make inventories of the subjects under their management. Appearance was only made for Macalpine, who, in defence

Pleaded: The defender acted not as tutor, but trustee for Marion Kilpatrick. Had another been appointed trustee, the defender could not, as tutor, have interfered with the management of her estate. In fact, she had no effects of which *qua* tutor he could make an inventory. Her sole right in the estate of her grandfather consisted in the faculty of forcing the trustees to denude in her favour. The acts 1672, C. 2. and 1696, C. 8. are therefore not applicable to the present case. And at common law, neither tutors, nor joint administrators of any sort, are liable further than for their own intromissions.

Answered: That tutors, even when appointed by the father, in terms of the act 1696, C. 8. are, if they neglect to make up inventories, liable *singuli in solidum*, was the unanimous judgment of the Court in the case, 10th July, 1788, Hender-

No. 309.

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A tutor named by a grandfather, who neglects to make up inventories, is liable *in solidum*, although appointed by the same deed trustee over the pupil's estate.

No. 310.

son against Duff and others, No. 305. p. 16375. A father may often find it convenient to vest the tutors of his children with the additional character of executors or trustees. And this mark of confidence, so far from diminishing, ought rather to increase their obligation to a faithful discharge of their duty. Accordingly, in a case not collected, 10th March, 1790, Hawkins against Hamiltons, it was found, that a person who had been nominated by a father, both tutor and executor to his child, by neglecting to make an inventory, subjected himself to the penalties of the act 1672.—(See APPENDIX.) The contrary doctrine would indeed operate as a virtual repeal of the acts 1672 and 1696.

Besides, it is the opinion of Mr. Erskine, B. 1. Tit. 7. § 27. in which he is supported by several other writers on the subject, and the decisions quoted by him, that even at common law, tutors are liable *singuli in solidum*.

The Lord Ordinary reported the cause on informations.

One of the Judges seemed inclined to find the defender liable only for his own intromissions, on the presumption of his having managed the estate merely in the character of trustee. He thought, that in a case where no fraud was alleged, a severe interpretation of the statutes might be dangerous, by deterring many from accepting of gratuitous offices of this nature.

The Court, however, were of opinion, that there was great negligence in the conduct of the defender, and that the point was already in a great measure settled by the decision, Hawkins against Hamilton. They also thought it would be attended with bad consequences, to relax in any degree the salutary regulations of the statutes 1672 and 1696. They therefore

Repelled the defences.

Lord Reporter, *Dreghorn*. Act. *Gullen*. Alt. *Dean of Faculty*. Clerk, *Sinclair*.

R. D.

Fac. Coll. No. 18. p. 37.

1793. March 7. JOHN HOME, Writer to the Signet, Petitioner.

No. 311.

The application of a *curator bonis*, for the sanction of the Court to ordinary acts of administration, is incompetent.

Borrowing money found to be an extraordinary act of management.

The late Sir Alexander Stirling executed a strict entail of the barony of Renton, and at the same time conveyed it to trustees for payment of an annuity to the widow and heir of the granter, and for a variety of other purposes; in particular, it was declared, that the trust should continue till the debts upon the estate were paid.

The trustees having declined accepting of the trust, John Home, writer to the signet, was appointed by the Court *curator bonis* upon the estate.

Some time after his nomination, he applied to the Court, 1st, For their authority to certain ordinary acts of administration, such as granting leases in terms of missives of the former proprietors, erecting buildings, and making improvements, &c. 2^{dly}, He stated, that the rental of the lands was inadequate to the yearly charges against them, arising from the payment of the annuities, interest of debt,