

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

No. 305. benefit was to be derived from the latter. To suppose that any part of a statute was to have less effect, because it enforced the common law, is strange; and it is likewise a singular consequence of the defenders' argument, that while tutors are to be deemed liable for the smaller and less culpable omissions to which are annexed the peculiar penalties of the act 1672, they should be exempted from the penalties due to such as are grosser or more blameable, because these are likewise inflicted by the common law. Nor is there any distinction between tutors being liable for omissions or liable *singuli in solidum*. If there be misconduct in a co-tutor, it belongs to the rest to call him to account, and to have him removed as suspected. By the omission of that duty, they become each of them liable for such co-tutor.

The Lord Ordinary "found the defenders liable, conjunctly and severally, and *singuli in solidum*."

The defenders having reclaimed to the Court, the Lords, on advising their petition, with answers, adhered to the interlocutor of the Lord Ordinary.

A second reclaiming petition, presented by the defenders, and appointed to be answered, was likewise refused.

Lord Ordinary, *Swinton*. Act. *Wight, Abercromby*. Alt. *Dean of Faculty, Rolland*.
Clerk, *Gordon*.

S.

Fac. Coll. No. 32. p. 52.

* * This case was appealed. The House of Lords, 7th February, 1793, ORDERED,
That the appeal be dismissed, and the interlocutors complained of be affirmed,
with £.200 costs.

1789. June 26. GEORGE, &c. WILSONS, against JAMES WILSON.

No. 306.

A tutor obtaining, in his own name, a lease of lands formerly held by his pupils, accountable to them for the profits.

The father of the pursuers having died in the possession of a considerable farm, the defender undertook, in consequence of a faculty granted by the widow and other friends of the deceased, to manage their affairs. Afterwards the defender, as the nearest agnate, was appointed tutor, by the Barons of Exchequer, to the pursuers, who were in a state of infancy.

The defender then, apparently with the approbation of those connected with his pupils, entered into a bargain with the proprietor of the farm, whereby, after renouncing the subsisting lease, of which there were two years to run, he obtained a new one for fifteen years, in his own name, at an advanced rent of £.20. This sum, during the two years of the former lease, he became bound to pay to his pupils. When there were four years of this second lease to run, and while the children were still under his care, he obtained another lease for thirteen years, on his agreeing to pay an additional rent of £.30.

The defender having acquired, in this way, a fortune of several thousand pounds, an action was brought by George, &c. Wilsons, for obliging him to communicate to them the profits arising from those leases. The defender