

1792. February 17.

GEORGE GORDON FALCONER, and His FACTOR *loco tutoris*, against KATHARINE THOMSON.

No. 309.

Factor *loco tutoris* may enter into a submission.

Katharine Thomson had acted for many years as housekeeper for the deceased Mr. Falconer of Phesdo. She also uplifted his rents as his factor, and superintended the cultivation of a farm belonging to him.

After Mr. Falconer's death, the nearest relation of his heir refusing to be tutor, a factor *loco tutoris* was named, between whom and Mrs. Thomson a settlement of accounts took place. But some of the articles being doubtful, amounting in value to about £.300, a reference was made to two men, with a power to name an oversman. And the arbiters having differed, the oversman gave an award, finding a certain sum due to Mrs. Thomson.

Another person having been afterwards named factor *loco tutoris*, he brought an action for setting aside the reference and award, as unauthorised by the situation of the parties. The pursuers

Pleaded: A reference to arbiters is not an act of administration, but the exercise of a right of property, which is only competent to the owner, or those to whom the owner has specially entrusted it.

The nomination of a judicial factor is a *remedium extraordinarium*, to be applied for preventing wrong, which would be otherwise unavoidable, and not for performing acts which may be done or omitted without essential loss; and least of all, such as may be attended with irreparable injury.

A tutor being appointed to supply the defect of will in the person, as well as to manage the affairs of the pupil, has very extensive powers; but even he cannot enter into a reference respecting a real estate; and a curator has no such power. A factor *loco tutoris*, who is only named to prevent dilapidation, until the tutor-at-law can conveniently undertake the office, neither has nor ought to have such authority. As he cannot directly make any settlement, which may not be controlled by the pupil, he cannot indirectly do so, by the nomination of an arbiter.

In practice, a factor *loco tutoris* has not been allowed to submit to arbiters; although, where the award was favourable to the pupil, it has been found, that the other party was barred from objecting to it; 15th June, 1758, Brown, No. 289. p. 16359; 8th July, 1778, Creditors of Macdowal, No. 11. p. 4058.

Answered: A tutor, both by the Scots and civil law, may enter into a reference, at least respecting moveable effects. It is essentially necessary for the interest of the pupil, that his guardian should have such a power. It often happens, that the matter in dispute cannot be ascertained in a judicial way without much loss. Such is a settlement of accounts. If, by allowing a decree to become final, the tutor might irrevocably bind his ward, why may he not, in the form of a submission, do the same thing?

A factor *loco tutoris* is now named, altogether to supply the nomination of a tutor by the father, or the assistance of the nearest relation on the father's side, who

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.

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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-

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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.