

1736. February 19.

ARCHIBALD SCOT of Rossie *against* MARGARET STRACHAN of BALGAVIES and her CURATORS.

THE said Margaret Strachan's father died when she was an infant, leaving his affairs involved in several law-suits; and her nearest relations, judging that it would require a great deal of skill and application to manage them, pitched upon Sir Alexander Wedderburn of Blackness as a proper person to be her tutor-dative; who accordingly undertook the office, upon obtaining an obligation from Patrick Scot of Rossie, grandfather, by the mother, to the said Margaret Strachan, and Alexander Strachan her father's brother; in which Rossie obliged himself, that, if she survived the age of twelve years, she and her curators should pay or allow him, at compting, the sum of L. 100 Sterling. But, in case she died before attaining to that age, then Alexander Strachan obliged himself that her heirs should pay it.

Sir Alexander continued to act for the young Lady, until she was past pupilarity, when she chose curators, who having called him to account, he stated as an article of discharge an L. 100 for pains, conform to the above agreement.

The curators were very sensible he had a great deal of trouble in the administration of his pupil's affairs, wherein he had not only acquitted himself honestly, but likewise his skill and good management had proved very beneficial to her: however, as they did not think they were empowered to give him any gratification, they allowed him to retain the money, and took a bond, whereby he became bound to repay it to them in the event he did not recover it from Rossie's heirs. Upon which Sir Alexander brought an action against Archibald Scot of Rossie, as representing his father, founded upon the above obligation; who, in order to indemnify himself, brought a process against the said Margaret Strachan and her curators, concluding that they ought to be decerned to fulfil the contract entered into by his father for her benefit and advantage.

It was *pleaded* for Margaret Strachan, That the office of tutor is gratuitous; therefore the allowing a salary to Sir Alexander would be giving him a donation, which the law does not empower curators to make; more especially as it presumes the office was undertaken from a principle of humanity and affection, rather than any hope or reward: and, it is believed, no instance can be given where a tutor ever obtained a salary for his pains, excepting where it hath been appointed by the testator. Neither can this be thought a hardship upon tutors, although the infant has affairs to manage that require extraordinary trouble, as they name factors and appoint them reasonable salaries; but the constituting a tutor with a salary is a thing that has been hitherto unknown, and does not appear now so necessary, since the act of sederunt, regulating the conduct of factors named by the Lords for managing pupils' estates.

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An agreement to give a gratuity for undertaking the office of tutor, because the nearest friends declined meddling, found not to bind the pupil.

No 40.

*Replied* for Rossie, That, as this concert among the relations to give a gratification to Sir Alexander, was entered into solely for the defender's behoof, it would be very hard, if the payment thereof should be thrown upon him; as his father could not possibly have any other thing in view, at that time, but her advantage. It was acknowledged, that tutory is a gratuitous office, and commonly undertaken either from relation or motives of friendship; in which cases no demand can be made upon account of pains and labour; but the present case was very different, where the nearest relations, foreseeing that the infant's affairs would require greater skill and address than usual, and, in consideration thereof, those who might claim that office in law forbear to meddle, but, from affection to the infant, pitch upon another, and agree to give him a moderate allowance at the end of the tutory; such an agreement, as it was *in rem versum* of the infant, ought to be sustained. Nor does there seem any thing contrary to this in law; for a salary or *solatium* was given to tutors in some instances; as appears from L. 33. § ult. D. De administ. tut.; and in other countries this is commonly practised. See Paponius, lib. 15. tit. 5. art. 12. Gratus de expensis, cap. 20. num. 14.; and Jac. Gothofrede, in his treatise De sellario, cap. 5. § 16. Besides, the pursuer's father, when he entered into this contract, may properly be considered as acting the part of a *negotiorum gester* for the young lady; upon which ground the pursuer is well intitled to an action, in order to compel her to fulfil the contract undertaken upon her account, and which has proved so advantageous; nor can any evil consequences follow for giving a reasonable gratification, where it is plainly for behoof of the ward to do it.

*Triplied* for the defenders; The laws of other kingdoms can have no influence in this question; as every country has its own maxims, and follows those rules experience has shewn to be attended with the fewest inconveniences. In Scotland, the rule of the common law has constantly been followed, viz. That tutory is a gratuitous office; which has not been productive of any bad consequences; but should it be changed, it is not easy to foresee what effects such alteration might produce. It is true, that the office was attended with extraordinary trouble, in the view of which the contract was entered into with Sir Alexander; and likewise that the defender has reaped a far greater advantage thereby than the sum now pursued for; but still these are not sufficient reasons for breaking in upon the established rules of law.

THE LORDS assoilzied the defenders.

*C. Home, No. 22. p. 45.*

No 41.

1746. November 16. NAPIER against LORD ELPHINSTON.

It was found, That the commissioners appointed to take proofs, were not entitled to a recompense for their trouble; on this ground, that it might be *malis exempli* to allow commissioners, who dictate the depositions of the witnesses, to take money from one of the parties. But the clerk was found entitled to a gra-