

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-

tuity, to be paid by the party whose proof it is. It is observed in the same case, that the Court had decided, that arbiters were not *de jure* entitled to any recompense.

No 41.

*Fol. Dit. v. 4. Kilkerran. D. Falconner.*

\* \* \* This case is No. 1. p. 5729. *voce* HONORARY.

1761. November 17.

JOHN, &c. MACEVERS *against* HUGH ROSS of Kilravock, Esq; Advocate, Sheriff-depute of the Sheriffdom of Ross.

IN the year 1754, Mr Rose, by his commission, constituted Roderick Macever to be his substitute in the Island of Lewis, which makes a part of the shire of Ross. No mention was made of any salary in this commission. Macever acted above two years and half as Sheriff-substitute, and then died.

No 42.  
Salary due to a Sheriff-substitute, tho' not stipulated.

The pursuers, as executors to him, brought an action against Mr Rose for a salary, at the rate of L. 25 a-year, for the time their father had acted as Sheriff-substitute.

*Pleaded* for the defender: No salary stipulated; *ergo* none due.

*Answered* for the pursuers, That there is no evidence that their father accepted of the office without a salary: That the office was exceedingly troublesome; and the presumption was, that no man would accept of a troublesome office without some recompense.

*Observed* from the Bench: That it was *contra bonos mores* to employ a substitute without a salary, and might be attended with very bad consequences.

THE LORDS found the salary due.

*Act. Munro.*

*Alt. Scrymgeour.*

*Reporter Lord Woodhall.*

*Fol. Dic. v. 4. p. 218. Fac. Col. No 6. p. 145.*

1766. January 16.

JOHN BULLMAN, Attorney, *against* ALEXANDER EARL OF GALLOWAY.

JOHN BULLMAN, as administrator of the late James Aitkenson, attorney in Morpeth, brought an action against the Earl of Galloway and his son Lord Garlies, setting forth, That Lord Garlies having, in spring 1760, offered himself as a candidate to represent the borough of Morpeth in Parliament, he and his father had employed the late Mr Aitkenson, attorney there, to manage the election, as was vouched by many letters from them to him, which he accordingly did, with great zeal and ability, and the wished success; and, therefore, concluding for

No 43.  
Attorney acting as a political agent, not entitled to a recompense for his trouble, without a previous bargain.