

to pay for his personal charges, but only to pay proportionally what should be laid out upon the process to advocates, writers, and agents, did find, That they were only liable in so far, and ordained count and reckoning accordingly ; seeing it was notour, and made appear, that he had many other particular business of his own, which made him come to Edinburgh, and stay constantly there, many sessions. And, as to that point, that they should be liable after revocation of the mandate, whereupon there was great debate upon the nature of *actio mandati et natura societatis* ; whereupon many lawyers were cited, *hinc inde*, for proving that a society, being once entered into amongst parties, none of them could resilie, *res* not being *integra*, as was in this case ; there being an act admitting probation for both parties, before answer ; which was equivalent to an act of litiscontestation, which was *contractus judicialis* ; and whereupon sentence behoved to follow, after advising of the depositions, which was done before any alleged revocation.

The Lords did consider this case as not being properly of the nature of a society, or mandate, as to any thing wherein they had not a common interest, such as was the mills, wherein they had a joint interest, and wherein they were all concerned, as to the exorbitance of the multure imposed upon them ; but, as to their distinct lands and tenements, whereto every one had a special right of property, and so were only joined in a common complaint against oppression ; for which there being no decret of relief taken before the Lords of Council, as those commissionate by their letters ; but upon their own private address, having obtained remedies from the Magistrates ; they found them not liable, unless it were proven, *scripto*, or by their oaths, that they had made a fraudulent separation, by agreeing with the Magistrates to desert Collodine, that he might be at the sole charges, and, notwithstanding, they should get the whole benefit that he should obtain by law : but, as to the common interest of the mills, they found them liable proportionally for their charges, they having received benefit by the decret, notwithstanding they had resiled.

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1675. December 21. ROBERT KENNEDY, Writer, *against* ALEXANDER SCOTT, Goldsmith, and *against* WILLIAM WALLACE and his CURATORS.

THERE being a bill of advocation presented by the said William and his curators, of a cause depending before the Bailie-court of Edinburgh, for taking away the person of the said William Wallace from Alexander Scott, goldsmith, to whom he was bound apprentice by an indenture ;—upon that ground, That the said William's father had made an assignation of his estate, wherein he not only named the said Robert Kennedy, and Oliver Mestertoun, overseers, but, *per expressum*, ordained them to have sole management of the said children's estate, during their minority ; and thereupon concluded, that the said David could have no curators who could authorise him to do any deed which might burden his estate, nor dispose upon his person, by making any indenture to serve a master, without advice of the said trustees and overseers : and they having made a prior indenture to Alexander Reid, goldsmith, he ought to be removed from his present master, and enter to that service.

It was ANSWERED for the pupil and curators, That, by our law, all minors past tutory may choose curators; and they, having found caution, have good interest, not only to look to the minor's estate, and how the same is managed by the overseer, but also to dispose upon his person where he may be best educated: neither ought the disposition made by the father to be regarded to seclude the curators, that being written by the said Kennedy himself when the father was upon death-bed, and being done of design for his own advantage; seeing, failyieing of children, and heirs of their body, the estate was to return to Kennedy himself: and, albeit it be ordinary, and is allowed, that persons may dispone and entail their estates to strangers, upon such provisions and conditions, that such as they nominate shall have the sole management, yet the same is never done by a father in order to the children's provisions; who, by the law, have right thereto, if the father dispose not otherwise thereof; and the disposition is most suspicious, and contrary to practice, for the reasons foresaid: but, whatsoever that provision of the disposition may import, yet it cannot hinder the minor to choose curators for disposal of his person, or seeing to the faithful management of the overseers.

It was REPLIED for the said Robert Kennedy, That, by our law, there is no distinction betwixt fathers affecting any right of provision made to their children, and where, having no children, they disposed the same to strangers: and, seeing it is clear and undoubted, that fathers may appoint tutors to their children, who can only have care both of their persons and estates; so, in case their children did pass pupillarity, they appointing trustees for managing their estate, there is no place for their choosing curators; because curators *tantum dantur rebus, non personis*: and so this pupil could not choose curators, and do contrary to what the trustees had done before.

The Lords did seriously consider this case; and found, That, albeit Kennedy was appointed trustee for managing the estate during his minority, yet that could only give him a right of management during that time; but that did not hinder the minor, after pupillarity, to choose curators, and, by their advice, to be educated for his advantage, which was not quarrelled in this case: and, albeit the curators could not take from the trustees the management of that estate, yet, in the case of mismanagement, or like to dilapidate the fortune, the pupil had good action, upon that account, to pursue the trustees for security of the estate, or removing them from their trust.

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1676. January 7. ALEXANDER LAWRIE *against* The TENANTS of LOGAN and APPARENT HEIR of HALBERT IRVINE.

ALEXANDER Lawrie, being served heir of conquest to his brother, John Lawrie of Maxwelltoun, who was infeft in the lands of Logan upon a wadset of 5000 merks, with a back-tack bearing a clause irritant;—whereupon, having obtained a decret of declarator of expiration of the back-tack, and reversion for not payment of the back-tack duties, did pursue the heir of Halbert Irvine, granter of the wadset, for payment of the maills and duties.

It was ALLEGED, That the decret of declarator being suspended, albeit there