

1779. December 1. SMITH *against* MARSHALL.

No. 302.

A tutor dative having sold his pupil's lands by warrant of the Lords, and intermitted with the price, his cautioner in the act of tutory was found liable for the price to the pupil, the caution being, *rem pupilli salvam fore*.—See APPENDIX.

*Fol. Dic. v. 4. p. 390. T. MS.*

1784. March 10. JOHN BELL *against* JOHN HENDERSON.

No. 303.

The appointment of a factor *loco tutoris* falls by the service of the tutor of law.

John Henderson was appointed factor *loco tutoris* to the infant grandchildren of John Bell, and continued in the office for several years. Afterwards, John Bell expedite a service as tutor of law to his grandchildren; of which John Henderson brought a suspension. The reasons were, the delay of the agnate in claiming the tutory, his great age, his residence in England, and having entered into a second marriage.

The Lords repelled the reasons of suspension.

Lord Ordinary, *Hailes*. Act. *G. Wallace*. Alt. *Honyman*. Clerk, *Menzies*.

C.

*Fac. Coll. No. 153. p. 238.*

1785. November 23. DUNCAN JOHNSTON *against* MARGARET CLARK.

No. 304.

A guardian named by a father to his natural child, entitled to demand the custody of the child, from a person to whom the father had committed it.

Andrew Clark, residing in the island of Jamaica, put under the care of Margaret Clark, his sister, who lived in this country, a natural son of his, while an infant. By his testament, he "nominated Duncan Johnston guardian to the person and estate of his said reputed son." Some years after the arrival of the child, the father being then dead, Johnston brought an action against Margaret Clark, concluding for delivery to him of the person of the boy; in defence against which, she

Pleaded: The law does not recognise any man as the father of a bastard, nor confer on him, as such, that *patria potestas*, or fatherly guardianship, from which alone can spring the power of naming tutors to his child. He is viewed in no other light than any stranger, who, though he may appoint persons to manage an estate bestowed by him on a pupil, will not acquire the authority over his person. The pursuer, then, is not a legal tutor, and cannot sue in this action. The defender, it is true, received the child from her brother; but the question is not as to re-delivery to him. It is demanded to be made to the pursuer, and in a character which is not authorised or known in law.

Answered: It is not necessary here to maintain the pursuer's legal appointment as tutor. If Andrew Clark, who committed to the defender the custody of his