ARCH. DUFF, Sheriff Clerk of Elgin, *Appellant;*

JANET HENDERSON, only lawful Child of the deceased John Henderson, Writer in Elgin, and JAMES YOUNG, Manufacturer in Elgin, her Husband, - - *Respondents.*

House of Lords, 7th Feb. 1793.

TUTORS AND CURATORS—LIABILITY—INVENTORY.—Circumstances in which tutors and curators appointed by the father's will (with exemption from liability *singuli in solidum*, and for omissions,) were held liable conjunctly and severally, they not having made up inventories. Also held liable in damages for removing the infant ward from the lease of the farm and mill of Ortown, and decrees of removing reduced. £200 costs awarded in the House of Lords on affirming the judgment of the Court of Session.

This was an action raised against the tutors and curators appointed by the respondent's father, at the instance of the respondent, setting forth that her father had left sufficient and ample means, both in heritable and moveable property, and had appointed tutors and curators to the respondent, of whom the appellant was one, and the acting tutor for the whole: That after her father's death these tutors and curators had taken the management of her affairs, and intromitted with her means and effects, without giving up either tutorial or curatorial inventories, as required by law. That they at least would not make furthcoming the inventory of the moveable estate of the deceased, specially referred to in his will; and that the appellant, as factor and manager for the Hon. Arthur Duff of Ortown, had improperly removed the respondent and her subtenants, from the Mill and Mains of Ortown, leased by her grandfather from Mr. Duff, in virtue of decree of removing obtained before the sheriff.

It was farther stated, that Archibald Duff had allowed this removing to be accomplished to favour the Hon. Arthur Duff, while he well knew that the said Arthur Duff was owing the deceased the sum of £300, by bill, to payment of which, she had sole right; and that if the arrears of rent due by the subtenants had been duly collected by him, as tutor and curator, and agent in her affairs, there would have been

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no occasion for removing her for nonpayment of rent: Therefore the summons concluded that the tutors and curators ought to be decerned and ordained to produce the said inventory referred to in deceased's will, and to make payment to the respondents of the amount thereof; and in case the said inventory should not be produced, they ought, conjunctly and severally, to make payment to her of the sum of £700, or whatever other sum the said respondent should instruct the said John Henderson died possessed of.

All the tutors and curators allowed decree to go out in absence against them except the appellant.

In defence, it was stated, That the libel concluded against the whole tutors conjunctly and severally, while by the will of the deceased, it was declared that each should be liable for his own acts and receipts only. The Lord
July 17, 1787. Ordinary pronounced this interlecutor on this point: "In "regard the defenders, Archibald Duff and James Hender- "son, do admit their having accepted and acted, and that "they have not made up inventories in terms of law, finds "that they are liable, conjunctly and severally, to account
Nov. 13 & 17, 1787. "in terms of the libel." On two several representations a-
Jan. 31, and July 8, 1788. gainst this interlocutor the Lord Ordinary refused. And, on reclaiming petition to the whole judges, it was unanimously refused.

The above summons having contained conclusions of reduction to reduce the decrees of removing which had eject-
Dec. 16, 1789. ed her from the Mains and Mill of Ortown, the Court further pronounced this interlocutor: "Sustain the reasons of "reduction of both decrees of removing against the pur- "suer, and find the defender, Archibald Duff, liable in da- "mages and expenses to the pursuer for his improper con- "duct, and remit to the Lord Ordinary to proceed accord- "ingly."

On reclaiming petition, this interlocutor was adhered, in
June 1, 1790. so far as regards reducing the decrees of reduction. "But, "before answer as to the other points in the cause, allow "the petitioner, Archibald Duff, a proof of the articles 5th "and 9th and intervening articles of his condescendence, "and to the respondents a conjunct probation, reserving to "both parties all objections competent against the wit- "nesses to be adduced by either of them, as accords."

The purport of these articles was to the effect, that it was the unanimous opinion of the whole tutors and curators, after the death of John Henderson, that the lease of the

Mill and Mains of Ortown could not be of any use to an infant, and they therefore resolved to raise a removing. This, however, was not proved. After the proof was concluded, the Court pronounced this interlocutor: "Adhere "to their interlocutor 16th Dec. 1789, finding the said Ar- "chibald Duff liable to the pursuers in damages and ex- "penses; and refuse the desire of the reclaiming petition "as to that point; modify the damages to £5. 16s. 8d. ster- "ling yearly as to the Mill of Ortown, and to £2. 5s. like "money, as to the Mains; and find the defender liable to "the pursuers in both these sums during the years remain- "ing unexpired of the lease when the decreet of removing "was obtained." On reclaiming petition against this interlocutor the Court adhered.

Feb. 17, 1792.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—As the appellant, and the other tutors and curators, were appointed by the father of the respondent, with a declaration that they should not be liable for omissions, nor *singuli in solidum*, but each for his own intromissions and commissions only, they could not be held liable, because the statute 1696 makes it lawful for a father to appoint guardians to his children with such exemptions; and declares that guardians so appointed shall not be liable for omissions, nor the one for the others. The provision in the statute, that nothing in the act contained shall liberate from or dispense with the making up of inventories, does not declare that guardians omitting to make up inventories shall be subject to the penalties annexed to such omission by the act 1672; at any rate, it is none of the penalties inflicted by that statute, that guardians shall be liable *singuli in solidum;* the appellant, therefore, can at most, be subjected only for his own omissions and commissions, but not for the omissions and commissions of the other guardians. 2. As to the damages awarded against him for the removing, the respondent has brought no evidence of the allegations upon which this claim is founded. Besides, it was clearly for the interest of the respondent to get quit of the farm and mill, and she has sustained no damage by these decreets of removing.

Pleaded for the Respondents.—1. The interlocutors finding the appellant and the other tutors liable jointly and severally, for whatever charge might be fixed upon them in the present suit, are clearly founded on the law of Scotland,

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which it is unnecessary to state at length on this head; but reference may be made to Mr. Erskine's Institute, B. i. tit. 7, § 27. The exception there mentioned to the general rule, "That tutors are liable *singuli in solidum*, of those who are named by the father, as allowed by the act 1696, c. 8, with a special proviso that each tutor shall be liable only for himself, and not for others, under which the appellant attempts to shelter himself, cannot aid him, because that act contains an express declaration, "That nothing therein con-"tained shall liberate from or dispense with the making of "inventories," as required by the act 1672, c. 2. And that act again declares, That no tutor shall have authority to exercise the office till an inventory is made. As the appellant and his co-tutors neglected to make up inventories, they are in the same situation as if they had not been named by the father, and had illegally intromitted; and consequently each of them must be answerable for the acts and deeds, receipts, and omissions of the whole. 2. As to the damages arising from the conduct of the appellant in conspiring to oust his infant ward of the farm and mill of Ortown, these are justly due, because it was the duty of these guardians to preserve the lease of these for her interest and behoof. And it was illegal in them to eject her therefrom in the circumstances and manner they did, seeing that many years of the lease had then to run. But if the guardians really thought that it was not for the interest of the ward to keep the lease, the proper course was to have tried to dispose of it; and it is in evidence that they might then have got a premium for it. The truth is, that the appellant being factor for the landlord, he had availed himself of his situation of tutor, to detect and discover a flaw in the lease, and thereby to take advantage of it in the manner that was done.

After hearing counsel,

Lord Chancellor Thurlow,—After a few remarks animadverting on the appellant's conduct,—said:

"Instead of acting the part of a parent to this family the appellant had taken the advantage of the knowledge of their circumstances which his situation enabled him to acquire, to distress and impoverish them. Without entering into the validity of the objections which had been made to the deed of lease in question, and the connection which subsisted between the different parties in the cause, it was clear the relation in which he then stood towards them ought to have prevented the appellant from taking any advantage of them.

The Court of Session, instead of having done too much for the respondents, had awarded them little more than a fifth of what was their due. As a punishment on the appellant for the part he had acted, he would move that the appeal be dismissed with £200 costs."

It was therefore ordered and adjudged that the interlocutor complained of be affirmed, with £200 costs.

For Appellant, *W. Grant, W. Tait.*
For Respondents, *Sir J. Scott, J. Anstruther.*

SIR ALEX. RAMSAY IRVINE, & ROBERT KINNEAR, *Appellants;*
ALEX. VALENTINE, - - - *Respondent.*

House of Lords, 4th March 1793.

LEASE—ASSIGNEES—SUSPENSION—COMPETENCY.—A Lease was taken to the tenant, his heirs and assignees, such assignees to be approved of by the landlord. On assigning the lease:—Held that the landlord was not entitled to impose new and more ample conditions in his own favour in giving such consent or approval. A decree of reduction having been extracted, and suspension brought of that decree; Held that suspension of a decree *in foro* of the Court of Session was incompetent.

The respondent obtained leases of the farms of Easter and Wester Pitgarvie, the latter of which originally belonged to him. The leases were for a term of 19 years, and thereafter for the life of the person then in possession. They were both taken to Alexander Valentine, his heirs and assignees (such assignees being always agreeable to, and approved of by the said Alexander Ramsay Irvine, his heirs and successors, by a writing under his or their hands to that effect). And certain conditions as to cropping and enclosing and fencing were laid on the tenant, and also binding him "to take the advice and direction of the said Alexander "Ramsay Irvine and his foresaids, as to the fences to be "put upon said possession. And for the said Alexander "Valentine and his foresaids, their encouragement in carry-"ing on the said ditches, Sir Alexander Ramsay obliges