No. 310.

son against Duff and others, No. 305. p. 16375. A father may often find it convenient to vest the tutors of his children with the additional character of executors or trustees. And this mark of confidence, so far from diminishing, ought rather to increase their obligation to a faithful discharge of their duty. Accordingly, in a case not collected, 10th March, 1790, Hawkins against Hamiltons, it was found, that a person who had been nominated by a father, both tutor and executor to his child, by neglecting to make an inventory, subjected himself to the penalties of the act 1672.—(See APPENDIX.) The contrary doctrine would indeed operate as a virtual repeal of the acts 1672 and 1696.

Besides, it is the opinion of Mr. Erskine, B. 1. Tit. 7. § 27. in which he is supported by several other writers on the subject, and the decisions quoted by him, that even at common law, tutors are liable *singuli in solidum.*

The Lord Ordinary reported the cause on informations.

One of the Judges seemed inclined to find the defender liable only for his own intromissions, on the presumption of his having managed the estate merely in the character of trustee. He thought, that in a case where no fraud was alleged, a severe interpretation of the statutes might be dangerous, by deterring many from accepting of gratuitous offices of this nature.

The Court, however, were of opinion, that there was great negligence in the conduct of the defender, and that the point was already in a great measure settled by the decision, Hawkins against Hamilton. They also thought it would be attended with bad consequences, to relax in any degee the salutary regulations of the statutes 1672 and 1696. They therefore

Repelled the defences.

Lord Reporter, *Dreghorn.* Act. *Cullen.* Alt. *Dean of Faculty.* Clerk, *Sinclair.*

R. D. *Fac. Coll. No.* 18. *p.* 37.

1793. *March* 7. JOHN HOME, Writer to the Signet, Petitioner.

No. 311.

The application of a *curator bonis*, for the sanction of the Court to ordinary acts of administration, is incompetent.

Borrowing money found to be an extraordinary act of management.

The late Sir Alexander Stirling executed a strict entail of the barony of Renton, and at the same time conveyed it to trustees for payment of an annuity to the widow and heir of the granter, and for a variety of other purposes; in particular, it was declared, that the trust should continue till the debts upon the estate were paid.

The trustees having declined accepting of the trust, John Home, writer to the signet, was appointed by the Court *curator bonis* upon the estate.

Some time after his nomination, he applied to the Court, 1*st*, For their authority to certain ordinary acts of administration, such as granting leases in terms of missives of the former proprietors, erecting buildings, and making improvements, &c. 2*dly*, He stated, that the rental of the lands was inadequate to the yearly charges against them, arising from the payment of the annuities, interest of debt,

and the expense of management. He therefore craved to be allowed to borrow such sums of money upon the credit of the estate as should be necessary, in order to provide for the deficiency. No. 311.

The Court considered both branches of the petition as falling within the ordinary powers of a *curator bonis*, and were of opinion, that it was not their province to superintend every common step taken respecting an estate under judicial management. They therefore refused the petition as incompetent.

Mr. Home presented a petition, reclaiming against this interlocutor, in so far as the Court had thereby refused to interpose their authority to his contracting debt. He stated, that Sir Alexander Stirling, by his deed of trust, had allowed his trustees to borrow money only to pay off the principal sums of the debts upon the estate, in case they should be demanded before they could be paid out of the rents and price of woods, and had not provided for other exigencies, such as the present, which might equally demand the borrowing of money to a certain limited extent, in order to carry on the management. That this act of administration was therefore of an extraordinary nature, though in the circumstances of the case absolutely necessary; and consequently the warrant for it must flow from the Court, both for the sake of getting the money more readily, and in order to render it an effectual burden on the lands.

The Court in so far altered their former interlocutor, and granted this prayer of the petition.

For the Petitioner, *Rolland, Cha. Hope.* Clerk, *Home.*

R. D. *Fac. Coll. No.* 46. *p.* 96.

*** On 19th January, 1803, a *curator bonis* applied for a warrant to borrow money. The petition was refused. See Henderson, Petitioner, No. 23. p. 14982. *voce* SUMMARY APPLICATION.

1794. *February* 22. GRAHAM *against* DUFF.

No. 312.
When a father is in embarrassed circumstances, and not resident in Scotland, persons indebted to his children cannot safely make payment to him as their administrator-in-law, without

Mr. Abernethy of Mayen granted a bond, obliging himself to pay to Mrs. Graham, his sister, an annuity of £.25, exclusive of her husband's *jus mariti*, and £.500 to her children, at the first legal term after her death.

Mr. Duff having purchased the estate of Mayen, under burden of this bond, he was, upon Mrs. Graham's death, charged by her husband to pay to him, as administrator-in-law for his children, the £.500 above mentioned.

Mr. Graham did not reside in Scotland, and was much embarrassed in his circumstances.

Mr. Duff, in a suspension, contended, that he therefore was not *in tuto* to pay the money to Mr. Graham, without obtaining security that it should be properly applied.