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

TUTOR AND PUPIL.

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.

[*Fac. Coll. IX.* 369; *Dict.* 16,374.]

BRAXFIELD. If the father of a natural child maintains him, he has a right to fix the place of the child's residence; and, if the father, so also a guardian named by the father. I hesitate in determining whether such a father may not have power to name something of the nature of a tutor.

JUSTICE-CLERK. It is admitted that the child was sent over from Jamaica to Margaret Clerk; the father certainly could have recalled the child: the naming Johnston guardian implies a like power in him.

GARDENSTON. The father of a natural child, providing for it, may name an administrator, if not a tutor to it.

PRESIDENT. I am clearly of opinion that a man cannot, in legal words, name a *tutor* to a natural child, but still he may name a *guardian*: for there is a natural, although not a civil relation between the father and the child.

On the 23d November 1785, "The Lords decerned, in the terms of the libel, the pursuer finding caution, for L.500 sterling, not to remove the child out of the jurisdiction of the Court;" adhering to the interlocutor of Lord Hailes.

Act. W. Nairne. *Alt.* H. Erskine.

N. B. On recollection, I had some doubt as to the propriety of demanding caution; and the President told me he had the same doubt. But the pursuer did not insist on the objection.

1786. *January* 24. ROBERT GORDON *against* ANDREW MELLIS.

PRISONER—ACT OF SEDERUNT 1671.

The temporary enlargement of a prisoner on a *meditatione fugæ* warrant, falls not under it.

[*Faculty Collection, IX.* 382; *Dictionary,* 11,756.]

ESKGROVE. The Act of Sederunt does not apply to this case, which respects an imprisonment on a warrant till caution should be found *judicio sisti,* and not

an imprisonment for a debt. As the prisoner was restored to prison, no possible loss could accrue to the creditor, and so the jailor is not liable: had the prisoner not been restored to prison, the case would have been different.

HAILES. My displeasure at the presumption of the jailor, in taking upon himself to allow the prisoner to be at large, made me overlook the just sense of the Act of Sederunt.

On the 24th January 1786, "The Lords assoilyied the jailor;" altering the interlocutor of Lord Hailes, but "found no expenses due."

Act. Ch. Hay. *Alt.* Allan M'Connochie.

1786. *March* 9. CHARLES SALTER, *Petitioner.*

SALE.

How far, by the measuring out of goods, without further delivery, the property is transmitted?

[*Faculty Collection, IV.* 391; *Dict.* 14,202.]

ESKGROVE. Had the malt been put *in publica custodia*, the case would have been clear; but, here, all that appears is an acknowledgment, by the seller, that he had measured out the malt. But, *quære*, How can the creditors be in a better situation than the debtor? The debtor must have delivered the malt, the price of which he had received.

BRAXFIELD. There is no difference between a factor in a sequestration and a creditor who poinds. It is strange that men will pay before delivery, when there are so many bankrupts appearing every day. If they do, they must suffer for their own negligence.

On the 9th March 1786, "The Lords refused an incidental petition, praying an order on the factor under the sequestration, for delivery of the sixty bolls of malt."

For petitioner, H. Erskine. *Alt.* John M'Laurin.
