

remitted to the Lord Ordinary to proceed accordingly; and found Alexander Scoular liable in the expense of extracting the decret.” No. 289.

Act. R. Dundas.

Alt. Lockhart.

Clerk, Kirkpatrick.

Fac. Coll. No. 108. p. 193.

1758. January 10. CRAGIE, Petitioner.

A factor *loco tutoris* applied to the Court, for directions and authority in making certain purchases of land. The Lords remitted to the Ordinary to enquire into the facts set forth in the petition, and afterwards, upon report, authorised the factor to make these purchases.

No. 290.

Sel. Dec. Fac. Coll.

* * * This case is No. 179. p. 7455. *voce* JURISDICTION.

1758. August 2.

CHILDREN OF DUNCAN FISHER *against* Their Tutors and Curators.

Duncan Fisher executed a nomination of tutors and curators to his children in the following terms: “I do nominate and appoint James Fisher, my father, Margaret Macneil, my spouse, during the widowity of the said Margaret Macneil, *allearly*; and failing them by death, Donald Macneil of Collonsay, Angus and Alexander Macneils, James Campbell writer, James Campbell of Oib, James Campbell of Raschilly, any two of them being a quorum, curators and tutors to Angus, James, and Barbara Fishers, my children, &c. with full power to them, or their said quorum, to manage my said children their persons and estate,” &c.

No. 291.
Quorum of
tutors and
curators.

Duncan Fisher having died, and also James Fisher, who, with the wife, was named tutor in the first place, a question occurred, Whether, by the death of James, the first nomination was vacated, so as to make place for the second nomination? or, Whether, on the other hand, the wife was entitled, under the first nomination, to act alone?

“The Lords found, That the first nomination of tutors and curators has not failed by the death of James Fisher.”

Reporter, Colston.

Fac. Coll. No. 131. p. 243.

1759. February 16. SCOTS *against* ELIZABETH SCOT.

A gentleman, by a deed executed some time before his death, nominated and appointed his relict, her father, and her two brothers, and another gentleman, to

No. 292.
Whether the
mother or
the tutors of

No. 292.
 infant-pupils
 are entitled
 to direct their
 education and
 place of resi-
 dence ?

be tutors and curators to his children during their pupillarity and minority; any two of them to be a quorum.

The children surviving the father, viz. two sons and three daughters, were very young when he died, and remained with their mother in the country for some time. When the eldest boy was six years old, and the second five, the grandfather and one of his sons, two of the tutors, gave directions for taking away the two boys from the mother, and bringing them to Edinburgh, to be there boarded, and put to school for their education. The mother refused to comply with this measure, and insisted, That she was the proper custodier of her infant-children; especially as she was named one of the tutors to them: That as the children were too young, and their constitutions very weakly, Edinburgh was not a proper place for their education, and their health would be endangered by their close residence there; or, at any rate, that it would be more proper to put them to school at a town healthfully situated, in the near neighbourhood of her residence in the country, where they might be properly boarded with a master of every good character, and at the same time be under her inspection.

The mother having, for these reasons, refused to give up the children, the two tutors applied by petition to the court, for a warrant to obtain the custody of the boys. Answers were given in on the part of the mother, setting forth the above-mentioned reasons for opposing the desire of the petition; and also objecting, *1mo*, That it was not competent to any two of five tutors, four of whom had accepted, to insist in a summary application of this kind: That it was necessary that a proper action should be brought before the Court, in which the whole tutors should be called, and their opinions heard and considered; and that there was no reason in this case, why the ordinary rules of proceeding ought to be dispensed with. *2do*, If this application were competent at the petitioners' instance, still the mother is by law entitled to the custody of her children till they arrive at a greater age than either of them has attained to. Balfour observes several cases where this point was determined, in the Title, OF KEEPING MINORS' PERSONS, Cap. 24. p. 336 *. "The care and keeping of an heir, being minor, and of all other minors, pertains to the mother, after the decease of their father; and the mother, in this case, ought and should be preferred to the minor's goodsire, and to all the rest of his friends and kinsmen." This rule, established above two hundred years ago, has not been altered against the mother in any case where she continued unmarried; and far less ought it to be so, where she has been entrusted by her husband with the care of her children, as one of their tutors; and as the maternal care is dictated by nature, and is far preferable to all others on many accounts, she ought therefore to be preferred to the custody of these pupils in their present infant state.

Observed on the bench: None of the other tutors named are here joining with the mother; therefore the petitioners are a quorum, and entitled to make the application. It was anciently, indeed, our law, that the mother should have the custody of pupils; but that will not now take place universally. The rule admits

* See the cases alluded to, *supra* h. t.

of many exceptions. But the question here is not so much, Who shall have the custody of the children? as, who shall have the direction of the place of their education? of which the petitioners are more proper judges than the mother:

“The Lords found the petitioners entitled to the custody of the children.”

Act. J. Craigie.

Alt. Ferguson.

C. C.

Fac. Coll. No. 172. p. 305.

1765. June 19.

BUCHANAN against BUCHANAN.

A tutor who had advanced considerable sums for his pupil, and purchased claims affecting his estate, to prevent it from being torn to pieces by diligence of creditors, having, at the distance of above forty years, brought a process of constitution of his debts against the estate, and obtained decree, the heir pursued a reduction thereof, on the grounds, That a tutor acquiring debts due by a pupil *durante tutela* is presumed to have acquired them out of the funds of the pupil; and that here, the tutor having never given an account of his intromissions, the law presumes *quod intus habet*. The Lords, on its being proved, that at the time of the tutor's paying those debts the estate was then so much burdened and exhausted, that it was impossible it could have afforded the price advanced by the tutor for those debts, found, That this was sufficient to set aside the ordinary presumptions of law; but they found the tutor liable to account for his intromissions.

Fol. Dic. v. 4. p. 389.

* * This case is No. 342. p. 11676. *voce* PRESUMPTION.

1769. February 5.

GIB against GIB.

A tutor, who took up an heritable bond belonging to his pupil, upon a count of the irregular payment of the interest, and put the money into the hands of bankers, who were in good credit at the time; but suddenly stopped payment a few months after the transaction, and, after the expiry of the tutory, was pursued to make up the loss.

The pursuer referred to many authorities, for proving, that the exactest diligence was prestable by tutors; as, § 1. Inst. De. Oblig. quæ quasi ex contract. L. 21. C. Mandati, L. 37. § 1. D. De. Neg. gest. Voet. ad Tit. De Administr. tut. num. 6.

On the other hand, the defender contended, that the authorities did not apply, and that tutors were not liable for the unexpected failure of debtors who had been in good credit. In proof of this proposition, he referred to L. 50. De. Admin. et per. tut. et cur. L. III. D. De. Cond. et dem. Sande dec. Fris. Lib. 2. Tit. 9. D. 13. Bruce's Tutor's Guide, Part 3. Tit. 3. § 37.

No. 292.

No. 293.

No. 294.

Diligence prestable by tutors. Found not liable for the insolvency of bankers, in credit when money was lodged with them.