1731. *February.* PITCAIRN *against* CURATORS.

No. 262.

Found, in terms of the act 8th Parliament 1696, That a father having named curators to his son, he he could not, in prejudice of the father's nomination, elect curators to himself.—See APPENDIX.

Fol. Dic. v. 2. p. 478.

1732. *February* 17. COCHRAN *against* COCHRAN.

No. 263.

In a son's contract of marriage, the father disponed to him several acres of ground. After the son's decease, the children's tutor, finding that one of these acres did not belong to the disponer himself, but to the disponer's wife, grandmother to the pupils, solicited a gratuitous disposition of the same from her. It was found, That the right acquired by the tutor to the acre of land in question accresced to the pupil, it being pleaded, That there ought no difference to be made in this case betwixt onerous and gratuitous acquisition; 1*mo*, Because every step taken by a tutor touching his pupil's estate must be presumed done with a view to the interest of his pupil; 2*do*, Because, were this distinction admitted, the pupil would have no security, the tutor having it generally in his power to frame the narrative of a deed conceived in his own favours.—See APPENDIX.

Fol. Dic. v. 2. p. 492.

1735. *January* 31. GRAHAM *against* EARL of MARCH.

No. 264.

A tutor having disponed an heritable bond, wherein his pupil was infeft, to a purchaser of the estate, upon payment, in a reduction of the said disposition against the purchaser, the tutor having died insolvent, it was pretty obvious, That the disposition to the purchaser, who had an interest to disencumber the estate, was the same with a renunciation: But then it was questioned, Whether a tutor can at all renounce an heritable bond, or the debtor be in safety to pay, without having the decree of a Judge for his warrant, or at least seeing to the application of the money? It was pleaded for the pursuer, as fixed law, That a tutor cannot assign his pupil's bonds, whether heritable or moveable, nor sell his land, unless *causa cognita* upon a decree of a Judge; and such restraints would be to exceeding little purpose, if the tutor were at liberty to uplift and squander the whole debts belonging to his pupil; and to fortify this, the authority of the civil law was quoted; § 2. Institut. Quib. alien. lic. vel non, L. 25. & 27. C. Administr. Tut.; and Sir George M'Kenzie, Tit. TUTORS AND CURATORS, § 18. Answered, The inter-

No. 264. vention of a Judge is only required in our law, to enquire whether the alienation be necessary, and to fix the price; neither of which can obtain in this case, where the tutor must receive payment of the pupil's debts, when offered. There the Judge's province is at an end; neither he nor the purchaser is bound to see to the application of the money; that part is left entirely to the tutor. In the same way, a debtor may safely pay to the tutor; nor does our practice require, that he see to the application of the money. The only case where this is requisite is where the tutor borrows money; which being a more extraordinary step of management than even alienating the pupil's effects, and being absolutely a voluntary deed in the lender, our law imposes upon him the necessity of seeing the money applied. Possibly it would be a good regulation that this should obtain in every case, in conformity to the Roman law; but our practice has not gone so far. The Lords found, That thet utor might lawfully assign the pupil's bonds in favour of the purchaser of the land affected with the heritable bond, and who had thereby right to redeem it.—See APPENDIX.

Fol. Dic. v. 2. *p.* 489.

1736. *July* 30.

MARGARET M'ILVAIN and her HUSBAND *against* JOHN M'QUHIRTER.

No. 265.
A tutor-testamentary preferred to a mother, as to the custody of her own child, to which she was entitled by her husband's will, in respect of her second marriage, though the tutor was next in succession.

Peter M'Quhirter, tenant in Craigfad, by his last will, appointed the said John, his brother, to be sole tutor to Janet M'Quhirter, his only daughter; and therein provided, "That his spouse should educate and entertain the child in every thing, according to her quality and station, till she be of the age of twelve; for which he ordained his brother to pay to the child's mother the yearly interest of her free stock."

After Peter's death, Margaret M'Ilvain, his relict, married a second husband; whereupon the tutor required her to deliver up the child to him, under protestation, That she should have no title to any further sum in name of aliment. However, she refused to comply; and thereafter insisted in a process against the tutor for payment of the aliment, which was about £.26 Scots yearly, that being the yearly interest of the free stock.

For the tutor it was pleaded: That as the mother had married a second husband, neither she nor her father, to whose house she had sent her daughter, were proper persons to have the custody of the child's education; in support of which the following cases were quoted; 22d February, 1631, Finny, No. 116. p. 16255.; February, 1632, Gordon, No. 121. p. 16259.; February, 1675, Fullarton, No. 184. p. 16291. And, rather than allow her to be taken out of the hands of her father's friends, he or his father offered to aliment her *gratis*.

Answered for the mother: The governing rule in this case ought to be the father's intention, who, by the testament, has preferred her as to the custody