

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 that tutor 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

of her daughter to the tutor. And although that cannot be observed in the precise terms of the will, since her second marriage, yet the next to that ought to be followed, *scil.* the allowing the infant to be educated with the pursuer's father. No. 265.

2dly, As the tutor is next in succession to the child, the law presumes that he will not take sufficient care of preserving her life; and as his father is in the line of succession next to him, so some suspicion lies likewise against him; therefore, neither of them ought to be considered as fit persons for that purpose. And, from the decisions referred to, it appears, that even when a mother offered to aliment her child *gratis*, no regard was paid to it; so that the tutor's making such an offer cannot have any influence; especially considering, that whoever does it must be a loser, as the fund of aliment is so small.

The Lords ordained the child to be delivered up to the tutor, and found no aliment due for the future.

C. Home, No. 33. p. 63.

1736. February 19. SCOT against STRACHAN.

No. 266.

An agreement to give a gratuity to a person for undertaking the office of tutor, because the nearest relations declined the office, found not to bind the pupil.

C. Home.

* * * This case is No. 40. p. 13433. *voce* RECOMPENSE.

1739. February 6. HUNTER and his TUTOR, Petitioners.

No. 267.

The procedure in a sale at the instance of a pupil and his tutor being found defective, in respect the heir-apparent of the pupil had not been called, a new process of sale was raised, wherein the next apparent heir, who was the pupil's younger brother, and to whom the same person was also tutor, was called, and who, as tutor to the next apparent heir now called, consented that the proof which had been led in the first process of sale should be repeated in this. It was found by a majority, "That the tutor could not wave the nullity, though the application for having said former proof sustained was made also with the concurrence of the creditors."

Tutor not allowed to wave a nullity, tho' all parties having interest consented.

Kilkerran, No. 1. p. 583.