1739. *June* 22.

JEAN CRAICH and STEWART Her husband *against* ANNA NAPIER, Relict of Craich.

No. 268.
Whether a minor can assign to his curator?

William Craich of Duchray became bound in his contract of marriage with Anna Napier his second wife, to provide to the bairns of the marriage £.500 Sterling; with a proviso, That if there should be only one daughter of the marriage, the same should be restricted to £.300 Sterling.

In the year 1727, the said William, upon the narrative of the contract of marriage, and that his daughter Katharine was the only child yet procreated of the marriage, assigned to the said Katharine Craich, and the heirs of her body, or her assignees, which failing, to Jean Craich his daughter by a former marriage, her heirs, executors or assignees, the sum of £.300 Sterling, due by the bonds therein mentioned, reserving his own liferent and power to alter: And by the same deed nominated Anna Napier as sole tutrix and curatrix to her daughter. William Craich died that same year 1727, while his said daughter Katharine was an infant; and her patrimony was managed by her mother, pursuant to the above nomination.

In the year 1736, while Katharine was about thirteen years of age, she assigned the foresaid sum of £.300 to Anna Napier her mother, her heirs or assignees; with this provision, That it should be lawful for her at any time, in her lifetime and on deathbed, to alter the disposition, and to uplift or assign the subjects conveyed: And in May 1737, she nominated her said mother her executrix and sole legatrix, and universal intromitter with her whole goods, gear, and moveables, &c.

Katharine died soon after this testament; and a question having arisen, touching the said £.300 Sterling, between Anna Napier, as having right by the assignation granted by Katharine, or by her testament as universal legatary, or both, and Jean Craich, as having right by the substitution in her father's conveyance to Katharine; in a multiple-poinding at the instance of the debtors in the bonds for the said £.300 Sterling, the Lords by a narrow plurality found, "That the assignation by William Craich to Katharine his daughter, the heirs of her body, or her assignees, of the sums provided to her by her mother's contract of marriage, which failing, to Jean Craich his daughter of a former marriage did not limit or prejudge the power of Katharine to dispose of the subject at her pleasure, even by a voluntary or gratuitous deed; and that she had actually disposed of the same to Anna Napier her mother, first, by her assignation reserving liberty to herself to alter in any time of her life, and also by her testament, whereby she had nominated the said Anna Napier her executrix and universal legatary; and therefore preferred the said Anna Napier:"

Notwithstanding what had been urged by the minority, that the assignation by Katharine to her mother was void; as notwithstanding the power to alter, it did not become a testament, but still remained a deed *inter vivos*, which her curatrix could not authorise *in rem suam*, and was therefore no better than an assignation to a third party would have been when granted without her consent; and that the

testament was ineffectual, for that the nomination of Anna Napier to be executrix and universal legatary, without specially legating the bond, carried no more than would have fallen under the right of an executor; but so it is, that a substitution excludes the executor. No. 268.

Kilkerran, No. 2. p. 345.

1739. *July* 19. *and December* 4.

FOWLER *against* CAMPBELL

No. 269.
Pro-tutors and pro-curators how far liable.—Act of Sed. 1665.

It is not every management of the affairs of a pupil that will infer a pro-tutory, but ony such as is *qua* tutor, that is, where one acts under the character of tutor when he is not so; for the act of sederunt, June 24, 1665, did no more than adopt the civil law into ours.

Formerly, when one had acted as tutor, and was pursued to account as such, it was a good answer, that he was not tutor, as in Notman's case, which gave occasion to the act of sederunt, and that there were tutors nominate, whereof he was none. To remedy this, the act of sederunt was made, declaring, That whoever should in time coming intromit with the means and estate of any minor, and should act in his affairs as pro-tutor, having no tutory established in his person, should be liable in the same manner as tutors and curators.

Upon this general reasoning, the Lords were at one, but differed upon the application of it to this particular case. Some were of opinion, that to infer a pro-tutory, is was necessary that the person should assume in express terms the character of tutor, *ut tutorem se fingeret:* Others thought, that not only the acting under the express character of tutor, but the acting under any equivalent character, would infer pro-tutory, otherwise the act of sederunt would have little or no effect.

And so the Court found in this case, and subjected the defender, a widow, who was held to have assumed a character equivalent to that of tutor, by not only uplifting and discharging the principal sums of bonds, whereto she had no pretence of a common interest, but in her discharges designing herself manager of her husband's affairs, and discharging for her, her heirs, and the heirs and representatives of her husband.

Kilkerran, No. 2. p. 583.

*** This case is reported by C. Home:

William Macwhirich, merchant in Inverness, died without making any will, leaving considerable effects, and several children under pupillarity: Upon his death, as none of the relations on the father's side were willing to meddle in the children's affairs, Elizabeth Fowler his relict, having an interest in the goods herself, applied to the magistrates of that town to have the same inventoried and ap-