No. 274. intended by it, a fresh brieve must be taken out of the Chancery for the same purpose.

The Lords remitted to the Lord Ordinary to advocate the cause.

C. Home, No. 226. p. 368.

No. 275. A man in appointing tutors to his infant heir, may also name a factor for levying the rents.

1743. *February* 11. TUTORS of STRAITON *against* WILLIAM GRAY.

Alexander Johnston of Straiton died 10th of March, 1742, leaving a land-estate of 7,000 merks yearly rent to his eldest son, an infant, and moderate provisions to his two other children. Upon the 26th of February preceding, he executed a nomination of certain persons to be tutors and curators to his children, of whom William Gray writer was one, with the usual powers of appointing factors with a salary, for whom they should be answerable. The very day before his death, labouring under the disease of which he died, he granted a factory to the said William Gray for levying the rents of his estate, during the pupillarity and minority of his heir, with a yearly salary of £.15 Sterling; taking him bound to account to the tutors and curators.

The tutors judging themselves not bound by this nomination, named a factor of their own, and the matter came to be tried in a multiple-poinding raised by the tenants. And, in behalf of the factor named by the tutors, it was pleaded, That a man may indeed leave his estate to his heir in any terms he pleases; but if the absolute property be settled upon the heir, it belongs to him *qua* proprietor to have the management of his own estate. It is therefore a stretch beyond the common law, to support a man's nomination of tutors to his children. The *patria potestas* among the Romans introduced this power, which utility moved us to adopt; and now it is become as it were a branch of the common law, But then, as this power is established by practice, it is limited by the same authority; a mother has no such power, nor a grandfather; it was confined within the years of pupillarity, till it was enlarged by the statute 1696, impowering fathers to name curators to their children, provided the nomination be made *in liege poustie*. And from these premises it was inferred, that though custom originally, and now a statute, authorises a man to name tutors to his children, there is no custom nor authority impowering him to name a factor to his children. It was pleaded in the *second* place, That Straiton's nomination of a factor being on death-bed, whatever effect it may have during pupillarity, it can never be longer effectual; for if a man cannot name a curator to his heir upon death-bed, as little can he name a factor.

To the *first* it was answered, That the nomination of a tutor, far from being contrary to the common law, is, in reality, a duty imposed upon fathers by the law of nature. No person disputes it to be the duty of parents to take care of their children till they arrive at the years of discretion; and, if the father be prevented

by death from performing this duty, he ought to put another in his place. Nor is it against any principle of law, to put under guardianship a child who has neither power nor will to act for itself. And if such be the duty of fathers, the scarcity of good men to chuse for guardians must infer a power of qualifying such a nomination, so as to make up the want of personal merit by good regulations. Accordingly, nothing is more ordinary, nor more natural, in a nomination of tutors and curators, than to fix a *quorum*, a plan of management, and what omissions shall subject the guardians. In particular, nothing was more usual among the Romans than to distribute the management among the tutors, or to appoint one to be the sole manager. And it really implies no more power to appoint one of them to be the factor; which is the present case; or to appoint a factor who is none of the tutors. To the *secoud* objection it was answered, That this is not the time to determine the question, Whether the nomination of Gray to be factor must subsist during the minority of the heir? It is enough to say at present, That a factor named by the tutors to act during the heir's pupillarity, ought not to be preferred before a factor named by the predecessor.

No. 275.

"The Lords sustained the factory granted by the predecessor to subsist during pupillarity; and found no necessity at present to determine, Whether it must subsist after pupillarity, while the heir continued minor"

Rem. Dec. v. 2. fi. 60.

1744. *January* 27.

LORD DRUMORE, SIR JOHN BAIRD, and SIR JAMES DALRYMPLE, Petitioners.

No. 276.

If there be a remedy, where the minor refuses to concur with his curators?

Curators applied by summary petition, representing, That the minor refused, without reason, to concur with them in appointing a factor; and therefore craving that the Lords might authorise them to act in the management of the minor's affairs without her concurrence, or that they might give such other remedy as to their Lordships should seem just.

Upon advisng this petition, with the answers thereto, it was the general opinion, that there was no authority in the Court to compel a minor to act with his curators, more than to compel a major to act with his interdictors; that as the Court could not compel a minor to chuse curators, so it could not authorise them to act without the minor. And though the consequence of this should be to elude the act 1696, there was no help for that; nor was that act of Parliament ever so understood, that the father could force the minor to submit to his nomination, though at the same time it is true, that where the father has nominated, the minor cannot chuse others.

However, as the answer made to this petition was thought satisfying in point of fact, the petition was refused without giving judgment upon the general point of law.

Kilkerran, No. 7. *fi.* 586.