

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