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. No. 292.

"The Lords found the petitioners entitled to the custody of the children."

Act. *J. Craigie.* Alt. *Ferguson.*

G. C. *Fac. Coll. No.* 172. *p.* 305.

1765. *June* 19. BUCHANAN *against* BUCHANAN.

No. 293.

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.

No. 294.
Diligence prestable by tutors. Found not liable for the insolvency of bankers, in credit when money was lodged with them.

A tutor, who took up an heritable bond belonging to his pupil, upon account 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 prestable 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. 294. " The Lords found, that, as the bankers were carrying on business, and in good credit when the defender put the pupil's money into their hands, in February 1766, on their bill, payable one day after date, that their failing afterwards, and stopping payment in November thereafter, does not make the defender liable to the pursuer for the said money."

Act. *Lockhart.* Alt. *Maclaurin.*

G. F. *Fac. Coll. No* 83. *p.* 332.

1770. *December* 21.

DAVID, ADAM, and JOHN DONALDSONS, Brothers of the deceased William Donaldson, Petitioners.

No. 295.
The Court refused to authorise tutors to act upon the failure of a *sine qua non*, but appointed a factor *loco tutoris*.

William Donaldson in 1769, leaving a daughter Mary, and a natural son Robert, both under puberty; by a settlement of his affairs, he appointed Sarah Russel his spouse and the petitioners to be tutors and curators to his said children; " declaring any two of them to be a quorum, my wife being always one." The tutors accepted, and continued to act for some time; but Sarah Russel having entered into a second marriage, became unqualified; and as she was named *sine qua non*, the remaining tutors were apprehensive of the consequences of their acting, unless authorised by the Court.

They accordingly applied by petition, stating the fact, and suggested it was part of the *nobile officium* of the Court to supply omissions in the deeds of private parties: That there was an obvious omission in the deed in question; for when it named the widow tutrix *sine qua non*, it ought to have provided for the nomination falling either by her subsequent marriage or death. In a case observed by Forbes and Fountainhall, similar to the present, relief had been given; 3d July 1711, Tutors of Niddry, supplicants, No. 149. p. 7431. It was farther observed, that though the nearest agnates might serve tutors of law to the daughter, no such measure could be followed as to the son, who had no agnate.

The Judges were clearly of opinion they had no power to grant this application; but, upon a second petition, they pronounced the following interlocutor:

" Having resumed consideration of this petition, and no objection being given in thereto, nominate and appoint the petitioner Adam Donaldson factor *loco tutoris* to Mary and Robert Donaldsons, with the usual powers, the said Robert Donaldson, before extract, finding caution in terms of the act of sederunt."

For the Petitioners, *G. Fergusion.*

Fac. Coll. No. 63. *p.* 290