No 72. the son, without his consent, is null *ipso jure*; as if it had been granted by a minor having curators without their consent.

1666. *December* 7.—Sir George M'Kenzie having intented declarator and reduction of a bond subscribed by him as cautioner for his father, *ex eo capite*, that it was null *ipso jure*, in respect he was minor for the time, and his father was *loco curatoris* to him, and had not authorised him, at least could not be author to him *in rem suam*; it was *alleged*, That he had not intented reduction within the *quadriennium utile*; and as to the declarator of nullity, the reason was not relevant, in regard bonds granted by minors, having curators, without their consent, are null; they being interdicted *eo ipso* that they do chose curators, that they do nothing without them; but bonds granted, or other deeds done, by minors wanting curators, are not null in law; but the minors lesed by the same may crave to be reponed *debito tempore* by way of reduction. And that the father, though he be tutor in law for the children being pupils, he is not curator being *puberes* and of that age that they may choose their own curators.

THE LORDS, notwithstanding, found the reason relevant; and declared the bond null as to the pursuer; *quibusdam refragantibus, inter quos ego*; upon these grounds, that there is a great difference betwixt tutors and curators, pupils and *puberes*, the father having, by the law, power to name tutors, and consequently being tutor of law himself, and having that authority which may be derived, and given by him to others; whereas he has no power to name curators to his children, when they are of that age that they may choose themselves; and though he should name curators in a testament, his nomination could not bind his children; and, 2*do*, If children, being *puberes*, should choose any other persons to be their curators, they would exclude and be preferred in that office to the father; whereas *habenti curatorem curator non datur*; 3*tio*, If a child should have an estate *aliunde*, and the father (his son being *pubes*) should *cessare*, and be negligent in the administration of his estate, there could be no action against him for his omission, which might be competent against him and his heirs if he were curator.

For the Pursuer, *Wedderburn & Lockhart.* For Fairholm, the Defender, *Sinclair.* Clerk, *Gibson*

Dirleton, No 26. *p.* 11. *No* 31. *p.* 14. & *No* 55. *p.* 23.

No 73.
A bond of caution, granted by a minor, with consent of tutors, was sustained.

1672. *February* 20. CARSTAIRS *against* MONCREIFF.

MR DAVID MONCREIFF being debtor to James Brown in a sum of money, he did procure William Moncreiff his son as principal, and Sir John Moncreiff as cautioner, to grant a bond to the said James Brown for the said sum; and Sir

John being minor, the bond is granted with consent of Mr David as his curator; and being now assigned to Robert Carstairs, he charges Sir John, who suspends, upon this reason, that the bond is null, as being done by a minor having curators, without their consent; and as to the consent adhibited by Mr David Moncreiff, it is null, because no curator can authorise his minor *in rem suam* to the curator's own behoof; and it is offered to be proven that this curator was debtor in the same sum before, and caused his own son grant this bond, and his minor as cautioner in place thereof, whereby the curator himself was liberated of the prior bond. It was *answered*, That albeit a curator cannot authorise his minor to any deed done directly in favours of the curator, as if the minor should grant a bond to his curator, or should be cautioner for his curator; yet, where the curators behoof is but indirect and consequential, neither our custom, nor the Roman law, from whence it is drawn, prohibits or annuls such consents of curators, as is clear in the case of a tutor or curators authorising a pupil to enter heir to a person who was debtor to the tutor, that yet his consent was valid, *l.* 1. *quanquam D. De authoritate & consensu tutorum;* and if this were drawn in consequence to every remote advantage of curators, neither could creditors be secured, nor minors authorized. It was *replied*, That the behoof of the curator is not remote in this case, neither could the creditor pretend to be *in bona fide*, as not knowing the curator's interest or behoof, the curator being debtor to him in the same sum before; and this being a fraudulent unwarrantable act of the curator, unnecessarily to engage his minor as cautioner, the creditor was *particeps fraudis*, and did collude with the curator in engaging his minor. No 73.

THE LORDS considering, that the charger did not plead his interest as a singular successor, but was content that his cedent Brown should depone, they found only the knowledge and collusion of the creditor of importance to annul the curator's consent to a deed not directly to his own behoof; and therefore, before answer, ordained Brown's oath to be taken *ex officio*, that it might appear whether there was any collusion or not. See TUTOR and PUPIL.

Fol. Dic. v. 1. *p.* 577. *Stair, v.* 2. *p.* 73.

1706. *January* 24.

MRS MARGARET SHAW *against* Sir JOHN SHAW of Greenock.

MRS MARGARET SHAW and her curator *ad litem*, having pursued Sir John her brother, for payment of the principal sum and annualrents contained in her bond of provision; the defender *non fecit vim* as to the annualrents, but *alleged* he could not be obliged to pay the principal sum, being a debt fairly acknowledged and secured beyond exception, to a curator *ad litem*, where there was

No 74.
A bond of provision in favour of a daughter was so qualified, that 'she should