No. 250.

ren in the event of her falling under the curatory and government of another husband, was shocking both to law and sense.

The Lords were much divided in their opinions about this point. And those who pleaded against the paternal faculty of naming tutors with a privilege of not being subject to answer for omissions, yielded, That a father might by granting a bond oblige his son and heir not to quarrel the tutor named, upon the account of omissions; and so do that *per ambages*, he could not directly do. However, it was found by the plurality, That the defenders *qua* tutors were liable only in the terms of the pursuer's father's nomination, for their actual intromissions, and not for omissions; but in regard they were also curators, not by nomination of the father, but by the minor's election, they were liable *qua* curators for omissions, as well as intromissions.

Forbes, p. 391.

1711. *January* 5. GEORGE PYPER, Merchant in Montrose, Supplicant.

No. 251.
A curator *ad litem* authorized to give in for a minor a renunciation to be heir to his father.

George Pyper, a minor, about eleven years of age, being pursued, as heir to his father, at the instance of James Innes, merchant in Aberdeen, for payment of £.296 Scots, and a day taken for the defender to renounce to be heir, the Lords, upon a petition offered for the minor, authorized William Smith, merchant in Montrose, the petitioner's uncle, to be curator *ad litem*, to sign and give in for him a renunciation to be heir to his father.

Forbes, p. 473.

1711. *January* 13.

JAMES FORRESTER, Son to the deceased William Forrester, Writer to the Signet, and His TUTOR, *against* ROBERT FORRESTER, late Bailie in Edinburgh.

No. 252.
What kind of voucher of payment will defend the debtor against the subsequent suit of the minor?

In the action at the instance of James Forrester and his tutor against Robert Forrester, for payment of £.73 owing by him *per* ticket to the deceased William Forrester, James' father, the pursuer offered to prove, by the defender's oath, that the ticket was in William Forrester's hands at his death, which the defender unwarrantably got up and retired. The defender having deponed, that he paid the money to one of the pursuer's tutors in presence of and with consent of the rest, who thereupon delivered up his ticket, the pursuer alleged, That it were dangerous to sustain a debtor's oath, that he retired his bond from his creditor's tutors, upon payment made to them, as a sufficient exoneration of the debtor, law having fixed a rule, that the debtors of minors shall pay to their tutors only upon getting a discharge, which is necessary, not only to exonerate the debtor, but also to constitute a charge against the tutors for what they uplift.

Answered for the defender: That he having retired his ticket, is free by the brocard, *instrumentum penes debitorem repertum præsumitur solutum*, although it were

never so clearly made out that the debt was once resting; and the pursuer having no other mean of probation but the defender's oath, it doth sufficiently prove the payment. No. 252.

The Lords found, That the ticket being in the defender's hand, the oath proves, that the sum contained in the ticket was paid to one of the pursuer's tutors in presence of and with consent of the rest, and the ticket retired; and therefore found the defender not liable, and assoilzied.

Forbes, p. 475.

1711. *January* 18. AITON of Kinnaldie *against* SCOT.

No. 253.

A tutor having submitted his pupil's claim, and the pupil being charged upon the decree-arbitral, the Lords had no occasion to determine the general point, If tutors might submit, because they found the decree-arbitral could not afford a summary charge against his pupil, but only an ordinary action; but they declared, that they would decern the pupil to implement, unless he could instruct evident lesion.

Fountainhall.

*** This case is No. 22. p. 14997. *voce* SUMMARY DILIGENCE.

1711. *November* 14.

SIR PATRICK AIKENHEAD'S CHILDREN of the First and Second Marriage.

No. 254.
What are the powers of tutors to transact?

In the action betwixt Sir Patrick Aikenhead's children of the first and second marriage, mentioned 26th June 1711, another point fell to be debated; that the friends and tutors finding that there was not a sufficient estate to fulfil the conditions of both contracts, they entered into a contract of communication, by which they were to bear a proportional loss; the benefit whereof the bairns of the second marriage claimed, that their eldest brother might be restricted thereto, and not get his full provision made up. Objected, that tutors cannot bind their pupils by transactions upon their means, especially where he was so well founded as to be a preferable creditor, his mother's contract being *prior tempore* and so *potior jure*; and it were of very dangerous consequence to allow tutors to transact clear rights; for that is no ordinary deed of administration, but a downright alienation; and therefore being to his manifest lesion, he craves to be reponed *ex capite minorennitatis et læsionis;* and it is evident the friends' main design by that contract was to preserve and ingather the father's estate, that the subject of their payment might not perish, nor be consumed and dilapidated by their entering into pleas. Answered, it is very true, there be cases in which minors are restored against their tutors transactions, as appears *ex L. L.* 22, 25, 36, 41 *C. De transact.* Yet it must be