No 341.

him as an apprentice in Jamaica for four years; *2do*, a certificate by one of the bailies in Edinburgh, whereby Hay is said to have certified before him, that he was thirty-four years of age at subscribing the said indenture, which he did voluntarily; *3tio*, The copy of an affidavit emitted by Cornelius Obrien, overseer of a plantation in Jamaica, certifying, that in 1739 one Charles Hay arrived at his plantation, and died some time between 28th December 1742 and 28th March 1743, to the best of his memory; *4to*, The attestation of a notary in Jamaica, certifying, that the above were true copies of the original indenture and of Obrien's affidavit; *5to*, A letter, bearing date, Kingston, July 1741, (which however appeared to be altered by erasure from "1739") from Charles Hay himself to Blair the pursuer, desiring him to direct for him at the plantation above mentioned. It was questioned, how far the presumption arising from these adminicles was not so strong as to defeat the legal presumption of life, and sufficient to throw on the pursuer the *onus probandi*, that Charles Hay was still alive. Several objections were made for the pursuer, viz. That neither the indenture itself, nor Obrien's affidavit being produced, a certified copy of both, which is nowise authenticated, and depends solely on the credit of the person employed by the defender's agents to attest it, can never be held as probative in this country; That by the copy of the indenture, it appears, that neither the writer's name nor designation have been inserted, which is by our law a statutory nullity. And it was further urged for the pursuer, That as he was to be considered as *in possessorio*, having drawn some years payment of this annuity, a presumption of this kind, which might have had force to have barred his claim, had he only been *in petitorio*, must, in the present case, be held as quite insufficient to cut down the legal presumption of life. The Lords, in respect that the pursuer refused to undertake any proof of Charles Hay's being in life, found, that the presumption of his having died before the 28th March 1743, was more pregnant than the legal presumption for life; and remitted to the Ordinary to proceed accordingly. See Appendix.

Fol. Dic. v. 4. p. 134.

1765. *June* 19.

James Buchanan of Tilliecheun and his Factor *against* John Buchanan of Lardrismore.

No 342.
Tutor acquiring debts due by the pupil, whether it is presumed that they are acquired with the pupil's funds?

Mungo Buchanan of Tilliecheun died in the year 1708, leaving behind him two infant children, Robert and Elisabeth, mother to the pursuer, James Buchanan.

George Buchanan of Lardrismore, grandfather to these children, took upon him the administration of their affairs, and acted as their tutor; but he neglected, during the whole course of his administration, to make tutorial inventaries of the effects belonging to his pupils; and his son William, who succeed-

ed him in the management, never supplied his omission, or made up any state or inventory of the children's effects.

No 342.

Robert, one of the pupils, died in the year 1723, before he arrived at the age of twenty-one; so Elisabeth, mother of the pursuer, succeeded to the estate of her father. George and William Buchanans, who had acted as tutors to the children, in the course of their administration, had advanced considerable sums for their pupils; and, in order to prevent their estate from being torn to pieces by the diligence of creditors, they paid off such of the debts as were most pressing, and took assignments from the creditors whose debts were so paid, in favour of William, that he might afterward operate his payment from the estate of the minors, when their affairs came to be upon a better footing than they were when these debts were paid and assignments taken.

The debts so paid were all preceding the year 1708; but neither George, nor his son William, thought proper to put in any claim for the sums so advanced by them, until the year 1732, when they prevailed with the pursuer to enter into a submission, by which his claims against them, on account of their tutorial intromissions, and the sums due by them for his advances on their account, during their minority, were to be finally determined. This submission was conceived in general terms, and comprehended all clags and claims mutually subsisting between the parties; but no particular debt or debts was there condescended upon, as being the principal subject of the arbitration. Upon this submission, however, no decreet-arbitral was pronounced; so matters remained in the same situation between these parties they were in the 1708, down to the 1753, when William Buchanan above mentioned thought proper, for his own security, and to prevent prescription, to constitute his debts, and afterwards to obtain decreet of adjudication, both of which were in absence of James Buchanan the defender therein, who was abroad in Jamaica at the time, and who was afterwards advised to raise a reduction of these decreets of adjudication, upon the following grounds; *1mo*, That all the debts upon which the foresaid adjudication proceeded were prescribed, as it was not disputed that they were contracted before the 1708, and the years of prescription were more than run before the process of constitution was brought in the 1753; That it is in vain for the defender to shelter himself under the submission of the 1732, as being a sufficient interruption of the presciption; for the submission was only general, and could operate no further than a summons, which was never held to interrupt debts not particularly libelled; But, *2do*, Even upon supposition that the debts were not prescribed, it was *contended*, That the debts of Mungo, purchased by George and William during their curatorial management of the affairs of Mungo's infant children, could never be made the foundation of a claim against the pursuer, as coming in the right of these children.

That, when a tutor or curator acquires debts *durante tutela*, due by the minor, or any of his predecessors whom he represents, not only must the benefit from thence arising accresce to the minor, but the law takes it for granted, that

No 342. the money paid for these debts was advanced by the tutor out of the funds of his pupil. But, even upon supposition there was clear evidence that these debts had been acquired by George and William, with their own money, yet still no action could lie at the instance of them or their representatives against the pursuer, as in the minor's right, because they never accounted for their intromissions; and it is an established rule in law, that it is not competent for a tutor to insist against his pupil for any claims he may have against him, *ante redditas rationes*.

Before the tutor has rendered a full account of his intromissions, the presumption of law is, *quod intus habet*, and that he is sufficiently paid for his disbursements out of the funds of the pupil, which he retains in his hands.

To these reasons of reduction, it was *answered*, on the part of the defender, John Buchanan, That the first reason of reduction, viz. prescription, was sufficiently obviated by the submission in the 1732, and by the vouchers and documents produced to the arbiters at that time; from which it plainly appeared, that the debts in question were the subject of that submission.

As to the *second* reason of reduction insisted on by the pursuer, the defender *contended*, That the presumption of law there founded on was not applicable to the present case; for that George and William were not, properly speaking, tutors or curators, but only protutors or procurators; and that the law has no where said, that the presumptions established against tutors and curators are to be extended to them. But, even upon supposition, that the presumption could be carried thus far, the force of it is entirely removed by what is instructed and proved to have been the situation of the minor's funds, which show it to be absolutely impossible, that the debts purchased by the defenders, and upon which the decreet of adjudication was obtained, were acquired by the funds of these minors. Mungo their father, by whom all these debts were contracted, lived in labouring circumstances, and died overpowered with debt. His father's widow liferented the half of the estate, the whole rent of which extended only to the trifling sum of L 400 Scots, and subject to a feu-duty of L. 210 Scots to the superior. Mungo died before his mother a good many years; and, when the estate devolved upon the minors, it was burdened with the jointure of their grandfather's widow, and their own mother; so that, after payment of these burdens, it is evident, that their fund of subsistence would be extremely inconsiderable: Hence it appears altogether chimerical to assert, that the law, in such a case, would presume that the debts were purchased with the minor's funds.

With regard to the other presumption, which operates against tutors claiming against their pupils *ante reditas rationes*; it has been already shown, that the presumption of *intus habere* cannot possibly apply to the present case, as there were no funds belonging to the minors with which these acquisitions could be made; and, at any rate, any claim, at the pursuer's instance, against the defender, on account of his father's or grandfather's intromissions, is entirely cut

off by the decennial prescription of tutors' accounts. Neither was the force of this removed by the answer made to it by the pursuer, that, if the decennial prescription operates against him, it must equally operate against the defender; for it ought to be observed, that the debts upon which the decreet of adjudication was pronounced did not arise from the balance of the tutorial accounts, but was composed of claims founded upon extraneous grounds of debt, and sufficiently authenticated.

No 342.

The Court, in giving their opinions upon this cause, seemed to lay the principal stress of their reasoning upon the proof that was brought of Mungo, father to the minor, being in labouring circumstances, and having died in a condition not to pay his debt, and upon the excessive burdens which were proved to affect the essate during the minority of the pupils, and the administration of the defender's predecessors, which they seemed to be of opinion were sufficient to elide the ordinary presumptions in laws established in such cases.

"The Court repelled the reasons of reduction; but found the defender liable to account for his predecessor's intromissions." See Tutor and Pupil.

A. C. *Fol. Dic. v.* 4. *p.* 130. *Fac. Col. No* 16. *p.* 27.

1765. *November* 20. Symon *against* Macdonald.

No 343.

James Macdonald of Kineton granted an obligation to John Symon, in these words: "I hereby oblige myself to dispone two ox-gates of the west side of Micrass to your son, when you shall think fit; or to pay him 1800 merks, as to me shall seem proper."

The son was minor at the time; and, before his majority, the father gave a discharge of the obligation, bearing, that the 1800 merks had been paid to himself and his creditors.

In an action brought by the son, "the Lords found, that the father's discharge, bearing payment of the said price to himself, and his lawful creditors, is a sufficient document of payment."

Act. *Crosbie.* Alt. *Ilay Campbell.*

G. F. *Fol. Dic. v.* 4. *p.* 131. *Fac. Col. No* 20. *p.* 236.

1767. ——. Straitons *against* Straiton.

No 344.

Robert Straiton died, leaving a son, George, and three daughters. George went to Jamaica as a mariner in 1763. In 1767, the Lords, on application of one of the sisters, sequestrated the land estate left by the father; and the factor pursued the other sister and her husband, who were in possession of part of