his death, Agnes and Jean bought Sophia's share of the succession at L.250 sterling; and after Thomas's death, he being in possession of Dalvenan by another temporary right, a gift of liferent escheat, William Crawfurd uplifted the rents as factor for the daughters, and counted for them to them. There is now a ranking and sale of the estate, and Agnes having been married to Captain Mowat, and in the contract of marriage having made over that debt wholly to him, and she being dead; there arose a competition betwixt Captain Mowat claiming the whole debt in right of his wife, (and for instructing her right, produced a letter from William Crawfurd to Agnes, dated 19th November 1735, acknowledging that the right was in his person in trust for her behoof, when Thomas Spence was alive, and a conveyance by William Crawfurd in 1742, after Thomas Spence's death, to Gilbert Lautie, and a formal back-bond of trust by him to Agnes)—and Jean claiming the half as heir-portioner of her father, and joint purchaser of Sophia's share. Lord Minto, Ordinary, found that the right had been purchased with Thomas Spence's money, and that William Crawfurd had no sufficient authority to prefer Agnes, and therefore found that the two sisters should be ranked equally. But on a reclaiming petition, we on 7th January altered, and found William Crawfurd's letter and Lautie's back-bond sufficient evidence of the trust for behoof of Agnes. But upon a reclaiming bill, alleging *inter alia* that Spence could not afford so large a provision, which would amount to L.600 or L.700 sterling to one daughter, while he had no remaining free gear either for his own support or his wife's liferent, or for the other two daughters; and far less would Agnes and Jean have purchased Sophia's share at L.250 sterling; therefore, (27th December) we remitted to an accountant to examine and report the state of his affairs at his death; and by that it appeared, that besides that debt, his free gear, deducting his debts, did not much exceed L.100 sterling; and therefore, as it was impossible that Agnes would have joined in purchasing Sophia's third share at L.250, had the debt been her own, we again altered, and found that the trust in Crawfurd's person was for the behoof of the father, and preferred the two parties equally; and this I mark to show how difficult it is, in consistence with justice, strictly to observe the act 1696. 23d January 1753, The Lords adhered.

No. 16. 1752, Jan. 22. WILLIAM KENNOWAY *against* ROBERT AINSLIE.

GEORGE AINSLIE disponed his tenement in Newbattle to his daughter Jean in 1721, and thereafter in 1723 disponed it to his brother Robert, on the narrative of sums of money paid. After George's death, Kennoway, the son of Jean Ainslie, alleged that the disposition to Robert was in trust and under back-bond; and pursued exhibition of that back-bond; wherein Robert compeared, and produced his disposition to exclude the pursuer. And in that process Mr Patrick Middleton deponed that Robert had granted a back-bond acknowledging and declaring the trust for behoof of George, in order to his carrying on a certain process; that the back-bond was lodged by George in his, Middleton's, hands, where it remained for several years, till George was on death-bed, when Robert came to him, and told him that his Brother George wanted to see the back-bond, upon which he gave the back-bond to Robert, and knew not what afterwards became of it. And William Junkison deponed that he heard Robert Ainslie own that he had

granted to his brother a back-bond, and that it was lodged in Mr Patrick Middleton's hands, and that he had got it from him, and had burnt it. Kennoway next pursued a declarator of trust against Robert, and Lord Dun assoilzied, because there was no proof in terms of the act 1696. The pursuer reclaimed, and some of the Lords thought there was a fraud in Robert Ainslie, and therefore proveable by witnesses. I could not agree upon that footing, because every breach of trust may be accounted a fraud, so that would be a repeal of the act 1696. But I thought, that though the act made a written declaration of trust necessary, yet it did not follow that where such had been granted, and either lost casually, or stolen, or robbed, that therefore the right was lost, for still the tenor might be proved, or if stolen or robbed by the trustee, that theft or robbery might be proved by witnesses, and he obliged to make it up;—that here was sufficient proof against Robert of his unwarrantably abstracting and destroying the back-bond, and therefore the trust might be declared against him; and the Lords found accordingly; and renewed this interlocutor on a transference against his heir.

TUTOR—CURATOR—PUPIL.

No. 1. 1734, July 9. MILLER *against* DUNNING AND WEIR.

THE Lords refused the bill as incompetent by summary bill.

No. 2. 1735, July 24. CHILDREN OF EARL OF WEMYSS *against* THEIR BROTHER.

THE Lords demurred whether the tutors being only liable for intromissions but not for omissions they could be decerned personally for intromissions in their factors hands; and therefore the pursuer insisting only for decreet against them for the interest, the same was restricted accordingly. 2dly, They found the clause committing the education of the children to their mother was not a condition of the aliment, and refused the bill *in toto*.

No. 3. 1735, Dec. 5. GRAHAM *against* THE EARL OF MARCH.

THE Lords were of opinion that the rule that a tutor cannot alienate without authority of a Judge extends to heritable debts as well as rights of property; but this being an alienation in favour of the debtor or reverser who had a right to compel him to receive his money, they found the authority of a Judge not necessary, and assoilzied from the reduction. The President doubted of this interlocutor. Lord Newhall thought a tutor had right to uplift heritable debts as well as personal. It was asked if this would extend to proper wadsets. But many of us doubted of that point, because a proper wadset is *pactum de retrovendendo*,—29th January.—5th December, The Lords adhered to the interlocutor marked 29th January last unanimously, at least *nem. con.*; and indeed it seems