No. 286. no party to it; and they alleged that Weir had omitted to plead, That there lies no presumption against a tutor, that the defunct's debtors, who were then insolvent, were solvent at the commencement of the tutory: That the rule in all cases is, that the pursuer must prove his libel; and as the libel, by the minor and his new tutor, was, That the minor had sustained damage by the omission of his tutors, it was incumbent upon the then pursuers to prove, that the debtors were become in worse circumstances than they were in when the tutory commenced.

The Lords "Repelled the defence."

It was thought to be rightly judged in the process against Weir, That the presumption is for the solvency of the debtors at the commencement of the tutory, and that the tutor can only be exonered for not doing diligence, upon proof brought by him that they were insolvent at the commencement of the tutory, or became such within six months thereafter.

Kilkerran, No. 14. *p.* 590.

1755. *December* 12.

HENRIETTA, DUCHESS DOWAGER of GORDON, *against* His MAJESTY'S ADVOCATE.

No. 287.
Furnishings by a curatrix to a minor beyond the interest of his patrimony, sustained as an article of discharge to the curatrix.

Lord Lewis Gordon having been attainted of high treason by statute 19th of the King, and his estates surveyed, the Duchess of Gordon, his mother, entered a claim for £.1433 Sterling. Of this sum £.1345 Sterling had been advanced by the claimant in payment of bills drawn by Lord Lewis, from the 7th of January, 1740, to the 8th of June, 1745, upon merchants with whom the Duchess had given him credit. And the remaining £.87 was made up of accounts of furnishings which she had likewise paid for him.

Objected for the Crown: 1*mo*, The bills were all drawn by the late Lord Lewis when a minor, and the Duchess his curatrix ought not to have advanced more for his annual expense than the yearly interest of his fortune, which did not exceed £.1000 Sterling capital; so was found 17th November, 1680, Sandilands against Telfer, No. 201. p. 16300. which judgment ought to be followed *a fortiori* in the present case; for that during a great part of the time in which these bills were drawn, Lord Lewis enjoyed a lucrative employment in his Majesty's service, being a Lieutenant on board a ship of war.

2*do*, As these advances made by the Duchess exceed the total amount of her son's patrimony, it cannot be imagined she intended that a debt was thereby to be created against him, to reduce him to bankruptcy, or that she had any view to repetition from him of a sum greater than all he had in the world; more especially, as she took no obligation from him to repay these sums, it must be presumed that they were advanced by her *ex materna pietate et animo donandi*. And further, as his Majesty, in the year 1735, granted to the Duchess a pension of £.1000 Sterling per annum for the better support of herself and children, which pension she

enjoyed during the whole period that the advances in question were made, these sums will be presumed to have been advanced out of that fund. No. 287.

3tio, The accounts must likewise be presumed paid with her son's money, or by way of donation, as they were paid upon receipts without taking assignations; and some of the furnishings were posterior to the 24th June, 1745, and so could not affect the forfeited person's estate, which from that period was vested by statute in the Crown.

Answered for the claimant to the first: Lord Lewis, by reason of the sudden death of the Duke his father, had no patrimony left him; a legacy of £.500 bequeathed to him by his grandmother, and his tenth share of his father's executory, amounting nearly to as much more, were his only funds; these in no view could be considered as a patrimony. The sums themselves were insufficient to carry on his education in a manner suitable to his birth. His choice led him to enter into the navy; and as he could receive no pay until the ship was cleared off, which did not happen before his attainder, it was both proper and necessary to advance such a sum as would enable the son of a noble family to appear suitably to his birth. The sums advanced by the Duchess do little exceed £.200 a-year; a sum nowise extravagant. The law surely cannot be so unreasonable as to confine him to the interest of sums evidently insufficient to support him like other gentlemen in the service, though not of equal birth. It is allowed that a curator may encroach upon the minor's stock for payment of an apprentice-fee, or setting him out in the way of trade. The case here is truly the same; and though it has been found in one case, that a tutor ought not to expend more upon the aliment of his pupil than the yearly annual-rent of his patrimony, yet this was never found in the case of a curator, nor does the same reason hold equally in both cases. The expense of an infant is inconsiderable; that of a minor must be greater. The minor, now advanced in judgment, makes choice of the employment he is to follow, and concurs with his curator in judging a larger sum necessary to fit him out for that employment. It would be unbecoming in a minor to challenge such a sum, honestly laid out by the curator at his desire; and there is no instance where such objection ever was sustained.

To the second objection answered: There is no foundation for the *præsumptio donandi*. When a curator gives credit to the minor on his going abroad, and answers the bills he draws from time to time for his subsistence, it has never been doubted, that such payments made upon the minor's draughts behoved to be admitted as good articles in the curator's accounts; and as this claim would have been good against Lord Lewis, it will be so against the Crown. Written documents were taken from him by the merchants at the advance of the money; and these were preserved and delivered to the Duchess, and are now produced and founded upon. With regard to the pension, the Duchess can show, that she had bestowed upon Lord Lewis his full share of it, abstracting from the bills, which make the subject of this claim, as she laid out the expense of his aliment and education from his father's death, until he came to be fifteen years of age. At any

No. 287. rate she did not become debtor in the pension to her children; and as she had the power of distribution, she might give to Lord Lewis or not as she pleased.

With respect to the third: It is not usual for curators, paying accounts due by minors, to take conveyances from the creditors. A third party paying accounts due by another upon receipt, is entitled to repetition. And though it is true, that some of the articles were furnished after the 24th June, 1745, yet they were all furnished *bona fide* before he had any accession to the Rebellion, and therefore were all equally just debts.

"The Lords sustained the claim to the extent of the bills claimed on, amounting to the sum of £.1345 6*s*. 10*d*. Sterling."

Act. *Ferguson.* Alt. *M'Queen and King's Counsel.* Reporter, *Strichen.* Clerk, *Kirkpatrick.*

W. S. *Fac. Coll. No.* 170. *p.* 252.

1757. *March* 8.

ANDREW PLUMMER *against* His TUTORS and NEAREST RELATIONS by the FATHER'S SIDE.

No. 288.

Tutors authorised to sell an heritable subject for the utility of the pupil, though not necessary on account of debts.

Four physicians in Edinburgh had originally joined in erecting an elaboratory, for preparing and selling chemical preparations, and a theatre for the accommodations of students attending their lectures upon chemistry. All their shares came at length into the person of one of the four, Dr. Plummer; who continued the project alone, and died in very good circumstances.

The Magistrates of Edinburgh, desirous that the project should continue in the person of a physician, offered to the tutors of the Doctor's son an unexceptionable price for the elaboratory.

It was plain, that the work could not be continued in the person of the infant; that the buildings of the elaboratory could not profitably be turned to any other use; and that the bargain was highly beneficial for the infant; for which reason, he and his tutors applied, by summary petition, to the Court, to be authorised to make the sale; on this ground, That the *egestas* of a pupil was not the only ground for the interposition of the Court to authorise a sale, but that an utility, founded on a necessity like the present, was likewise a ground for it; for which the doctrine of the civil law was quoted, contained in *Voet, Tit. De rebus eorum qui sub tutelæ*, &c. § 8.

The Lords thought they could not authorise the sale in this summary form, but that an action should be raised for that purpose; which accordingly was done, by the pupil and tutors, against his nearest relations: And then

"The Lords found, That it was for the utility of the pupil to sell the elaboratory; and therefore authorised the tutors to sell it."

Act. *J. Dalrymple, And. Pringle.*

J. D. *Fac. Coll. No.* 21. *p.* 36.