1771. *December* 7.

DAVID PARKHILL of Craiglockhart, *against* ROBERT CHALMERS of Larbert.

No. 296.
A tutor, who obtained in his own name a lease of subjects formerly held by his pupil, but which had been acquired after the former lease had expired, and when the pupil had become of perfect age, found not accountable for the profits.

John Parkhill, the pursuer's father, and Alexander Chalmers, father to the defender, had, for several years prior to Parkhill's death in the year 1750, a joint concern in several leases. One of these was a lease of the Isle of May-lights from the family of Scotstarvet; ten years of which, at John Parkhill's death, were to run.

John Parkhill left his two sons, David and Alexander, under the guardianship of Alexander Chalmers and others; but the chief management of their affairs devolved upon Chalmers.

The lease of the Isle of May-lights was to expire at the term of Whitsunday 1760; and in November 1759 Alexander Chalmers procured a renewal of it for eleven years, from Whitsunday 1760, for an additional rent of £.50. Alexander Chalmers died in 1760, and was succeeded by his son Robert the defender.

David Parkhill went early in life into the army; he was of age in September 1758; and, after being several years abroad, he returned to Scotland; and on the 2d November 1761 granted a discharge to his tutors of their management of his affairs during his minority.

He again left the country; and having returned in the year 1768, he soon thereafter brought an action against the defender, concluding, *inter alia*, to have it found that he was entitled to an equal share and interest in the renewed lease of the Isle of May-lights for the period of the lease entered into at Whitsunday 1760.

In support of this ground of action the pursuer pleaded:

1*mo*, Wherever a tutor takes any step, or enters into any transaction which would have been a natural and proper one in the administration of his pupil's concerns, the law, whatever may have been his views, presumed favourably of his intentions; so that the benefit of the transaction *ipso jure* accrued to the pupil. This was the rule of the Roman law, Nov. 72. C. 5; and the same salutary regulation, as consonant to the natural principles of justice, made a part of the system of the law of Scotland. Lord Stair, B. 1. T. 6. § 17. Bankton, B. 1. T. 7. § 39. 17th Feb. 1732, Cochrane against Cochrane, No. 263. p. 16339.

The same equitable doctrine prevailed in England. Laws of this description were held to be of the nature of a trust; and the benefit of course communicated to those for whose behoof it was presumed the trust had been undertaken. Gen. Abridg. of Equity, V. 1. P. 7. Trin. 1728, Carter against Horn; Vernon, 276. Mich. 1684. 1. Palmer against Young; Abridg. of Equity, V. 2. P. 741. in a case decreed by Lord Chancellor King. Upon the same principle, a person acting as trustee was bound to communicate the benefit of any ease or lucrative transaction he had entered into with respect to his constitutent's debts; 6th March 1767, Earl of Crawford against Hepburn, No. 46. p. 16208.

No. 296. 2*do*, The defender's argument, that as the lease had not been entered into till after he had ceased to be a tutor, admitted of a satisfactory answer. Although the lease had not been obtained till after the pursuer's majority, the operations and scheme for procuring it had been set on foot long before; which was equally inconsistent with the defender's duty as a tutor. In the just construction of law, the tutorial office did not cease by the pupil's arriving at perfect age, but continued so far at least as related to the trust, confidence, and faithful administration, till such time as the tutor had given up the management, and rendered an account. L. 2. § 5. D. De Admin. et Peric. Tut. et Cur. Novel. 72. C. 5. § 1.

The defender answered:

1*mo*, That whatever rules and restraints a tutor may lie under, these could not subsist beyond the tutory itself. It never was supposed that one, who happened once to have been a tutor, could, after the expiring of his trust, be tied up for ever from dealing in any thing in which his former pupil may have had a concern. If such was the law, no man would ever become a tutor; but, on the contrary, it was undeniable, that after the expiring of the office, the tutor or curator was as free to contract respecting the estate or concerns of his former pupil as any other person. In the present case, accordingly, the pursuer had become of age two years before the new lease had been obtained; which had not again been taken till that lease, in which alone he had any interest, had expired.

2*do*, Whatever might be the rule of law in matters of any ordinary nature, and although it were incumbent upon a tutor to renew a common lease, which, during his pupil's minority, had expired—there was no law which obliged a tutor to run any hazard either with or for his pupil, or to enter into partnerships with him in mercantile adventures of any kind. If this lease therefore had expired during the pursuer's minority, the defender would even have thought himself to blame in engaging his ward in such an adventure. Had he done so, and had it turned out a losing concern, he would have been liable; and as he could not have bound the minor in case of loss, no law could force him to take the risk upon himself.

At advising this cause, several Judges were of opinion, that as the subject of the lease was of a fluctuating and precarious nature, it would have been improper to have continued the minor in it, though the lease had fallen while he was under age. Others, again, thought, that if the lease had expired during minority, it ought to have been renewed, and, at any rate, that the tutor should not have taken it to himself. The majority, however, were clear, that as the pursuer was out of minority before the lease had expired, it was no longer incumbent on the defender to get it renewed in its former terms; more especially as the pursuer was so individually situated, that he could have given no assistance in the management of the subject, and would not, in all probability, have been accepted of by Scotstarvet as a tenant.

The following judgment was pronounced: "Find the defender not bound to communicate to the pursuer any share of the benefit arising on the lease of the

May-light duties, set by Scotstarvet to Alexander Chalmers, the defender's father, in November 1759, to commence at Whitsunday 1760; and remit to the Ordinary to proceed accordingly." No. 296.

Lord Ordinary, *Auchenleck.* For Parkhill, *Sol. H. Dundas, Lockhart.*
Clerk, *Campbell.* For Chalmers, *Rae, Ilay Campbell.*

Fac. Coll. No. 116. *p.* 142.

*** This case was appealed. The House of Lords ORDERED, That the appeal be dismissed, and the interlocutors complained of be affirmed.

1772. *August* 11.

JOHN MOWAT, a Minor, and DANIEL MOWAT, his Father and Factor, *against* JOHN FORDYCE of Ardo.

No. 297.
Not competent to a debtor, in a sum secured by heritable bond devised to a minor, to object that the factory granted by the minor to his father is not a good title to sue for and uplift the money, as being a deed authorising *in rem suam.*

Fordyce, as purchaser of the estate of Ardo, being, by the articles of roup, obliged to retain in his hands 12,000 merks of the price, to answer an annuity of 600 merks *per annum* to the widow of Gordon, the former proprietor, he granted an heritable bond for that sum to Mrs. Gordon, in life-rent, and her son, William Gordon, in fee, on the precept of sasine in which they were infeft in the estate of Ardo, for their respective rights of life-rent and fee. And this bond was afterwards conveyed by William Gordon, the fiar, by disposition and assignation, to George Turner; and by him, in like manner, to Agnes Murdoch; who having occasion for 3000 merks, took up that sum from Fordyce, the debtor, in part.

Thereafter, in pursuance of a destination by John Mowat of Jamaica, ordering £.500 Sterling to be laid out by his executors, on heritable security in Scotland, and of a transaction between these executors and the said Agnes Murdoch, she conveyed the remaining principal sum of 9000 merks, with said heritable bond itself, in favours of (the testator's father) John Mowat, senior, in life-rent, and, after his decease, to John Mowat, junior, and the other children of Daniel Mowat, (the testator's brother), in their order, precisely in the terms of John Mowat of Jamaica's will.

Fordyce having been threatened to be charged with horning, at the instance of John Mowat, junior, the institute, and the said Daniel Mowat, his father and administrator-in-law, he presented a bill of suspension, setting forth, that this institute was a minor, residing in Jamaica, and that, as the conveyance of this bond in his favour contained a strict substitution to other heirs, failing him, and those of his body, it was a matter of dobut, whether he, a minor, could alter or defeat such substitution; and, *2dly*, That, at any rate, there was no feudal title in this minor. For though Mrs. Gordon and her son, the original creditors, were infeft on this