

* * Auchinleck reports this case :

No. 116.

A tutor, by law and practick of this realm, will get the mother compelled to deliver the pupil to him, and likewise will get a modification from her of reasonable maintenance to the heir, in case the mother be infest in life-rent in all his heritage, albeit he have no ward lands, but burgage.

Auchinleck MS. p. 242.

No. 117.

1631. *February 25.* MELVILLE *against* DRUMMOND.

Umquhile David Drummond dies in England, and left behind him a son, born in England, and leaves Archibald Drummond of Gibliston his executor and administrator, who intromits with his goods and gear, both in England and Scotland. Mr. Thomas Melville takes a tutory dative to the minor, and pursues the executor for exhibition of the defunct's testament, and to make count and reckoning of his intromission. It was first excepted by the defender, that the minor was born in England, and having the most part of his estate there, there could no tutor dative be given by the Theasurer of Scotland, who had power to pursue him for exhibition of count or reckoning. It was answered, that the minor was a Scotsman, although born in England, and had means in Scotland, and was answerable and subject to the Scots law. The Lords repelled the exception, and ordained him first to exhibit the testament.

Auchinleck MS. p. 242.

No. 118.

It is the tutor who ratifies a deed, not the pupil with his consent.

1631. *uly 21.* EARL OF KINGHORN *against* GEORGE STRANGFATHER.

In the action pursued by the Earl of Kinghorn against George Strangfather ; Alleged, the decret of non-entry and comprising following thereupon, could not be reduced, because the Master of Glamis, tutor for the time to the pursuer's father, had ratified the same decret and comprising. Replied, not relevant to say the tutor had ratified, unless the pupil with consent of his tutor had done it ; for the tutor alone can do no deed in prejudice of his pupil but what is null in law. Duplied, the tutor has *liberam administrationem bonorum pupilli*, and what he doth therein cannot be quarrelled as null by way of exception ; but if the minor be prejudged by his deed, he has his choice, either to pursue his tutor personally for it, or to seek to be restored against that deed. Triplied, neither of these two can benefit the pursuer, the tutor not having an heir, and the benefit of restitution not being now competent after so long a time : And there was represented a great inconveniency that might befall minors, if tutors might dilapidate their estates at their pleasure, and make private rights in prejudice of the minors, which could

never come to light, till all means of repairing the minor were lost, as in this case the ratification alleged was never heard of for the space of fifty years till this time ; so that the party prejudged by it, could never seek to be restored against it, he being ignorant of any such thing ; yet the Lords sustained the allegiance.

No. 118.

Spottiswood, p. 347.

1631. July 15.

GRANT *against* GRANT.

No. 119.

Competition
of tutors.

The relict of Grant of Carron, being tutrix testamentary left to his bairns, which relict being married thereafter to a second husband, more than a year after the decease of her said first husband, whereby she ceasing to be tutrix testamentary, the nearest agnate is served tutor lawfully, and sworn, and finds caution ; but before his service be retoured to the chancellary, within a month or thereby after the service, he dies ; after whose decease, within the year after the tutrix testamentary's marriage with her second husband, albeit long after the expiring of an year after Carron's decease, there is a tutory dative granted by the King, and expedè ; and after this dative there is another, the next surviving agnate served tutor lawful, which is expedè within less than a year after the decease of the first tutor lawful, and within less than year and day after the marriage of the tutrix testamentary ; which two tutors contending for the right, the tutor lawful, albeit posterior, and albeit more than a year after the defunct's decease, was preferred to the tutor dative, seeing the first tutor lawful, and also the second now contending, were served within the year, after the tutrix testamentrix's marriage ; and during the time of her right of tutory testamentary, there were no place to any agnate to claim to be tutor lawful ; so that the tutory lawful being expedè within the year after her marriage, at which time of her marriage the tutory began only to be competent, to be claimed by the nearest agnate, the Lords sustained the same, and preferred the tutor lawful, whom they found only to have right, and that the time of their cessation to claim the tutory, ought not to be counted from the time of the decease of the bairn's father, but from the time of the tutrix testamentrix's marriage, within which space of one year thereafter, the tutor lawful was served, as said is ; and that the tutor dative had no right to claim the same, except the agnate served had ceased a year complete, after the relict's marriage, seeing she being tutrix testamentary, there was a middle impediment, to debar them from claiming to be tutors lawful ; wherefore the cessation ought not to take beginning of calculation, from the husband's death, as if the year after expiring, and they not claiming the same, there should be place to a dative ; but the count of the years cessation should begin at that time, when they might be tutors lawful, which was after the relict's second marriage, and no sooner ; but because the tutor lawful had not found a sufficient cautioner, but a person un-responal, the Lords ordained him to find another answerable cautioner for him, otherwise they would not authorize his gift of tutory.

Act. Gibson

Alt. Baird.

Durie, p. 596.