

1631. December 17. AUCHTERLONY *against* OLIPHANT.

No. 120.

No prescription runs against a tutor testamentary, during non-acceptance.

John Auchterlony, left tutor testamentary by umquhile Peter Oliphant of Roscobie to his son, ——— Oliphant, pursues Lawrence Oliphant, who had married the relict, and had the pupil in his custody, to deliver to him the bairn. It was answered for Lawrence, That he ought to be assoilzied from the delivery, because he has a gift of tutory dative, and by virtue thereof had administered the pupil's affairs divers years preceding the intending of the cause; whereas the pursuer, being tutor nominated, had miskenned his nomination, and lain out from meddling with the office for the space of seven years. It was replied, That, *quamdiu speratur testamentarius non est locus dativo*, and the pupil had not received prejudice by the tutor's negligence; for so long as his mother lived she was infest in the life-rent of all his estate, and during her life-time the pupil had nothing wherewith he could intromit. The Lords repelled the exception, in respect of the reply, viz. that the minor had received prejudice by the tutor's cessation.

A tutor testamentar, although he has suffered another to obtain tutory, yet will be preferred to a dative, in case through the tutor testamentary's fault or negligence, the pupil has received no prejudice.

Auchinleck MS. p. 243.

* * * Spottiswood reports this case :

1631. December 17.—John Auchterlony, tutor testamentary nominate to John Oliphant, pursued Lawrence Oliphant for delivery of the said pupil to him. Excepted, absolvitor, because six or seven years since he had obtained of the King a tutory dative, by virtue whereof the minor ever since has been in the defender's custody, so that the pursuer cannot be heard to seek the minor, not having embraced the tutory at the beginning. Replied, The tutor dative can never exclude the tutor nominate, who may *quocunque tempore* embrace the office, for there is no prescription against tutors nominated, but they may at any time they please seek the benefit of the tutory, as well against tutors dative, as tutors of law, quia *quamdiu speratur testamentarius, non est locus dativo*. The Lords repelled the exception, and preferred the tutor testamentary though he had done nothing for so long a space; and the reason was, as the pursuer alleged, because the pupil's mother was alive all the time, during whose life the pupil had nothing; but as soon as he was dead, then he began to pursue his right.

Spottiswood, p. 348.

* * * Durie also reports this case :

1631. December 17.—One Auchterlony left tutor testamentary to John Oliphant, a pupil, by the pupil's father, pursues Lawrence Oliphant, who had married the

Bairn's mother, for delivery of the pupil to him ; and the defender alleging that he was tutor-dative lawfully made, and gifted five years or thereby, for this pursuit, and had made faith, and found caution, and was in possession of the bairn conform thereto, and had since administrated the bairn's affairs, so that the pursuer ceasing to accept the office, or to administrate now by the space of seven years after the decease of the testator, he could not now be heard as tutor to seek the bairn, but he as tutor-dative ought to be preferred to him, and continue in his possession ; the Lords notwithstanding of the cessation of the tutor testamentary, during the foresaid space of 7 or 8 years, and the defender's tutory dative and possession, repelled the allegiance, and found, that the pupil should be delivered to the tutor testamentary, against whom they found that there was no prescription for his cessation, *quia quamdiu speratur tutor testamentarius, non est locus dativo, neque legitimo* ; and the rather this was found, and the tutors testamentar's cessation found excusable, because the minor in the mean time had no prejudice in his person, lands, and goods, and that his mother was living except within the space of half an year, before the pursuer intended this action ; so that she having the whole, or most part of his estate, and of her motherly affection entertaining her son, he ceased to trouble her while she lived, and after her decease he intended this action against the defender her husband.

Alt. *Cheaf.*

Clerk, *Hay.*

Durie, p. 610.

1632. February 28. GORDON against CORSAN.

A tutor dative is found to have right to call for the pupil, who being a lass of 5 or 9 years of age, in her mother's keeping, and notwithstanding her mother offered to entertain her daughter *gratis*, yet because the mother was married to a second husband, and the tutor offered to entertain the pupil *gratis*, he was preferred.

No. 121]

Auchinleck MS. p. 243.

* * * Durie reports this case :

Hary Gordon of Kinstuir, as tutor-dative to Anne Hathorn, a pupil, pursues Geills Corsan, mother to the bairn, and Hugh Kennedy her second spouse, for delivery of the bairn to him, to be educated by him as tutor ; and the mother alleging, that she ought to have the keeping and education of her own bairn, seeing she was not past 5 years of age, and of the law being within infancy, the mother should be preferred to the tutor, both for that reason of infancy, and for that natural affection in-bred in the mother, which will beget a more allowable care of the education of her own only bairn, than can be presumed in a stranger ;—likeas she offered to entertain her *gratis*, without craving any allowance therefore off the pu-