

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 intented 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 intented 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-

No. 121. pil's means ; and this tutor is suspicious to have the keeping of her, because his son in law is nearest of kin to succeed to her ; notwithstanding whereof the Lords preferred the tutor to the mother in keeping the bairn, because the mother was married, and so by the superinducing of a *vitricus* to the bairn, she was *in potestate maritii* herself, and consequently she could not claim the charge of the pupil, who was herself under her husband's charge ; and also because this her husband had comprised the bairn's estate, for debt, whereunto he was made assignee by her father's creditors ; and also in respect that the tutor sick like offered to entertain the bairn on his own charges, without seeking any allowance or defalcation of the bairn's means therefore ; for which reasons the tutor was preferred, albeit the mother alleged that *superinductio vitrici* might well make the mother fall from the tutory, if she had been tutrix-testamentary, but will not in law make her to amit the benefit given in law to her, of educating her daughter within the years of infancy ; and seeing in law *multum tribuitur arbitrio judicis*, to estimate *ubi et apud quem pupillus educari debeat*, she alleged, that her motherly affection, and the sex of the pupil, should rather move the Judge to incline to the mother than to the other ; and as to the comprising used by her husband, it is to be presumed, that it is more probable and profitable, that that right should remain with her husband, who may and will use the same to the good of the bairns, than if it had been deduced by the creditors, who are mere strangers, and are not to be presumed to have carried the like respect to the pupil ; notwithstanding whereof the tutor was preferred, as said is.

Act. *Gilmour.*Alt. *Mowat.*Clerk, *Gibson.**Durie, p. 625.*1632. *March 28.* LD. LUDQUHAIRN *against* LD. HADDO.

No. 122.

A tutor having acquired a tack of teinds of the pupil's lands, and taken the same in life-rent to his own wife, who was the pupil's mother, and, after her decease, to the pupil himself, the Lords found this a lawful transaction with regard to the teinds of that part of the estate which was life-rented by the Lady ; but as to the remainder, found, That the tack did accresce to the pupil, with the burden of a proportion of the sum laid out by the tutor in acquiring the tack.

*Durie.** * This case is No. 49. p. 9503. *voce* PACTUM ILLICITUM.

No. 123.

In conformity with Auchterlony against Oliphant, No. 120.

1632. *June 29.* IRVINE *against* ELSICK.

The like (as in No. 120.) was found between a tutor of law and a tutor dative, where the lawful tutor having got himself served *debito tempore* within the