

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 mariti* 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 Oli-  
phant, 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

year, yet not having found caution two years thereafter, *medio tempore* Alexander Bannerman of Elsick takes a dative, and with the pupil, Margaret Irvine, pursued an exhibition of some writs, &c. that were in the lawful tutor's hands; who having compeared, and alleged, that he having found caution, though after the dative, should be preferred; the Lords did accordingly prefer him to the tutor dative.

No. 123.

*Spottiswood, p. 348.*

\* \* Durie reports this case :

One Irvine being served tutor lawful to a pupil, but not having found caution *de fidei administratione*, as use is, divers years after he was served Bannerman of Elsick takes a tutory dative to the said pupil, and finds caution, and intents action thereon for delivery of some writs of the minors to him as tutor; and the other tutor lawful compearing, alleging that the dative had no place to call for the same, seeing he was tutor lawful, served and retoured *debito tempore*, within year and day, and so had only interest to pursue for the pupil, as his tutor; and the dative alleging, that this service was alike as if he had not been served, seeing he had not found caution, whereby the service was void, and he had expedite a tutory dative, which behoved now to have place, seeing the tutor lawful had found no caution; and the other answering, that seeing the tutor was retoured *debito tempore*, the not finding caution could not make it to fall, seeing he now offered caution, and that the pupil sustained no prejudice in the mean time, and that he as lawful tutor had intromitted, and had the handling of the pupil's affairs, for the indemnity whereof the cautioner now found would be liable *ab initio*, so that the pupil could have no prejudice; and the dative contending, that it was no time now to offer caution, after his gift was expedite, and caution found by him, and after the other's so long cessation, which made him to fall from his office, the Lords found, that the not finding caution within the year by the tutor lawful, and the intervening dative, and caution found by the dative, before any caution found by the tutor lawful, was no cause to exclude the tutor lawful, and to prefer the dative, but preferred the lawful to the dative, notwithstanding of the lawful tutor's cessation to find caution, divers years after his service, and permitted him yet to find caution, which was received, seeing the tutor lawful had administrated ever since his service, and that it was not qualified, that the pupil had received any prejudice, or that the tutor lawful had done any wrong.

Act. Mowat.

Alt. Davidson.

Clerk, Gibson.

*Durie, p. 638.*

1632. July 9.

A. against B.

A tutor of law serves himself tutor, and intromits; but finds not caution. After year and day, another takes a tutory dative. The tutor hearing of the dative, finds

No. 124.

Found as above.