

No. 92. received no prejudice by her subscribing of any writs, and that it was very favourable to give her action, to seek registration of her contract matrimonial; and the Lords found it not necessary, to intent action, to give curators to defend her son; seeing they found, that any person, either of the father-side, or mother-side, of kin to the pupil, might seek tutors to the minor, to defend and authorize him, who being so sought, the Lords would give them curators *ad hanc litem* summarily, without any further process; and also there were more tutors in the testament.

Act. Hope.

Alt. Nicolson, younger.

Clerk, Gibson.

Durie, p. 185.

1626. February 23. SIBBALD against HAY and LINDSAY.

No. 93.

The Lords found an act of tutory and curatory in the books of the Canongate null, because it was not subscribed by the parties.

Kerse MS. fol. 150.

1627. July 6. CAMPBELL against CAMPBELL.

No. 94.

Tutors testamentary were preferred to dative, altho' they had not begun to act for six years.

In a suspension, Campbell against Campbell, the Lords preferred tutors testamentars nominate to a minor (whereof the Laird of Langshaw was one) to the tutor dative, in the administration of the minor's goods, notwithstanding that the tutor dative alleged, that he ought to have been preferred, seeing the tutors testamentars had fallen from their office, there being six years since the defunct's decease who nominated them tutors, during the which space they had done no diligence, neither to administrate the minor's affairs, nor to care for her person, as was incumbent on them of the law, until now that the tutor dative had intented this pursuit in favours of the minor; and that the said tutor dative having married the minor's mother, hath had the only care of her all this time; likeas as the said tutors testamentars were curators to the heir-male, who in this process was convened for that deed which he was obliged to fulfil to this pupil, so that they could not be both curators to the one party and tutors to the other; which allegiance was repelled, seeing they found, that this cessation of the tutors testamentars could not prejudice them of their office of tutory, which they were now willing to administrate, albeit after six years expired, in regard there was no prejudice sustained by the minor, nor done to her in the mean time, which could be qualified any ways; and although they were curators to the heir-male, who was charged to fulfil the deed libelled for the pupil, to whom they were tutors, yet that was found no impediment to them to continue tutors, seeing the heir-male offered real and ready obedience, and to fulfil the obligation to the other pupil, so that it was no litigious dispute betwixt these parties, which could hinder the effect of the tutors' administration of their pupil's goods, and the testamentars were preferred to the dative.

It is to be here considered, that of the law *quamdiu speratur tutela testamentaria non est locus dativæ vel legitimæ*, also *Vitricus de jure non datur tutor suo privigno*; and this tutor dative, before the tutory dative, had married the mother of this pupil, to whom he acclaimed to be tutor. Also the Lords found, that the Laird of Rowallan, who was father to the tutor dative, being one of the tutors testamentars, who having renounced to be tutor by his renunciation subscribed by him, and once produced before the Lords, albeit that thereafter he took up the same and desired to be admitted to the tutory with the rest of the testamentars, alleging that he might repent and return to the office; yet in respect of the said renunciation, the Lords found that he ought not to be tutor; but only the rest of the testamentars, and that he could not come back again.

Act. Hope.

Alt. Scot.

Clerk, Scot.

*Durie, p. 304.*

No. 93.

1627. November 20. ADAM and HIS CURATORS *against* FAIRHOLM.

In a removing pursued by Adam and his curators against Fairholm, the defender defending himself by a tack, set by a minor with consent of his curators to him of the lands libelled; the Lords repelled the exception, in respect that the tack foresaid was set and consented to by curators, chosen by the minor since the first act of curatory was made, which first curators had not consented to that tack, and who being lawfully and orderly removed and discharged by a competent Judge; and which not being done, there could no other second act of curatory be made, nor no other curators of new again could be thereafter given to him; and therefore the said tack being subscribed by another new chosen curator, and not consented unto by the curators chosen by the first act; the Lords repelled the exception, and found the tack null, as wanting the consent of the first chosen curators standing, unremoved; but this was received *ope replica*, without necessity of reduction, against a tack clad with possession, and consented to by curators, conform to an act of curatory standing unreduced.

Clerk, Hay.

*Durie, p. 314.*

No. 94.

Minor cannot name curators twice.

1627. July. NASMITH *against* NASMITH.

Found, That a tutor (*fnita tutela*) may buy lands, or comprise the minor's monies, where he had led comprisings of the legal reversion before.

*Kerse MS. p. 150.*

No. 95.