

- No. 124. caution. The tutor dative pursues. The tutor lawful compares, and alleges, he can have no interest, but that he would be preferred to the tutor dative, being served tutor in law, and finding caution. It is alleged by the dative, he ought to be preferred, because he had not found caution within year and day after his service. The Lords preferred the tutor, in respect he had found caution; which cautioner would be answerable for all his tutor's intromissions, as well before as after the time of finding caution; and there is no time appointed by law of finding caution by tutors of law.

*Auchinleck MS. p. 245.*

1632. December 14.

LAIRD AUCHINLECK *against* LAIRD CATHCART and LADY CATHCART.

No. 125.

The Laird Auchinleck, assignee constituted by ——— Craig, pursues the Laird Cathcart, pupil, as heir to his father, and the Lady Cathcart, tutrix to her son, for payment of ——— merks, addebted by the umquhile Laird Cathcart to the said Craig, cedent. It is alleged by the Lady, That albeit she be tutrix for her son, yet the office astricts her not to pay out sums of money for her pupil, except the pursuer will prove that she, as tutrix, has intromitted, or might intromit with as much of the minor's gear as will pay the debt. Which exception the Lords found relevant.

*Auchinleck MS. p. 246.*

1632 & 1633. March 12. RUTHERFORD *against* DRYSDALE.

No. 126.

George Rutherford and Thomas Drysdale being nominated tutors, conjunctly and severally, to ——— Drysdale, minor, by his father's testament, Thomas Drysdale is only intromitter. George pursues Thomas, seeing he is only intromitter, and the said George being confirmed one of the tutors nominated, may be pursued by the pupil *in solidum*, that the said Thomas would make count of the said intromission yearly to him, as he should be required; or at the least finding sufficient caution to relieve him of all danger and action at the minor's hands. The Lords ordained him to find caution.

*Auchinleck MS. p. 246.*

No. 127.

A tutor testamentary may be required, by the future curators, to deliver the writs.

1633. February 6. HARPERS *against* HAMILTON.

The deceased George Harper, having in his testament left his means to George and John Harpers, his oyes, and therein appointing James Hamilton, to be their tutors, and the rest of their means left by him to be paid to James Hamilton, for

their entertainment, ay and while they should be of perfect age ; after the bairns past tutory, they having chosen curators, the curators pursued the said James Hamilton the tutor, to deliver the bairns' writs, that they might have the administration of their means ; and the said tutor alleging, that the writs should remain with him, seeing he had only right to intromit with the annual-rent of the monies left by the goodsir, for the bairns' maintenance, according to the goodsir's will, the Lords found, that notwithstanding, that by the testament, the goodsir had appointed the said James Hamilton to be tutor, yet that after the tutory, the bairns might choose others, to be curators to them, than the said James ; and that the said curators had good right to call the said tutor, for delivery to them of the writs, containing the means left to them by the goodsir, and that they ought to administrate the same ; but found that in respect the goodsir had left him to be tutor to his oyes, and gave him the rent of the money for their entertainment, while their perfect age, which the Lords found the goodsir might do of law in these things, which were left by himself to them, that therefore the rent of these monies, so left by the goodsir, should be paid to the said James Hamilton, even albeit the bairns were past tutory, so long as they were minors, at least so long as they remained with him in his company ; but the Lords modified the sum, which should be paid to him for the bairns' entertainment, to a reasonable sum, and would not allow, that the annualrent of the whole sums should be paid to that end, but a part, (which they modified) and the rest to be forth-coming to the bairns.

Act. Gibson.

Alt. Heriot.

Clerk, Gibson.

*Durie, p. 668.*

No. 127.

1633. February 12.

GOVAN *against* RICHARDSON.

Bessie Govan, a pupil, and her father as tutor and administrator in law to her, charging Margaret Richardson, who was obliged by her bond to the said Bessie Govan, in the sum of 200 merks, which sum being consigned in a suspension, to be given up, the suspender being found by the Judge, to be exonerated thereof lawfully, the Lords found the sum ought not to be given up to the father, who desired to lift the money as tutor to his bairn, until the time he found caution to make the same forth-coming to her, at her lawful age, in respect he was but a poor man ; and it was feared that he might spend the money to the bairn's prejudice.

*Durie, p. 670.*

No. 128.

1634. December 20.

GEORGE CAMPBELL *against* CATHARINE CHALMERS.

George Campbell, tutor dative to Charles Campbell, pursued Catharine Chalmers, mother to the pupil, for delivery to him of the pupil. Alleged, He could not be

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No. 129.  
Custody of  
the pupil.