

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.

- 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