

1675. February 5. FULLERTON against BOYNE.

The Laird of Towie having nominated his Lady tutor to his only daughter and heir, and in case of her death or marriage, Colonel Fullerton, who was accountable to certain overseers yearly; the Lady having now married the Laird of Boyne, the Colonel pursues the Lady and her husband to deliver to him the pupil, who alleged that the pupil being a daughter, might be most conveniently educated with her mother, and that the Lords might and have frequently appointed the residence of the pupil not to be with the tutor, because the mother offered to entertain the pupil *gratis*, which the tutor could not refuse, unless he would likewise entertain her *gratis*. It was answered, *non relevat*, because *tutor datur personæ*, his chief duty and trust is the person of the pupil, her health, entertainment, and education, and she being of an opulent estate, her mother's offer to entertain her *gratis* could not alter the case, and she being now married to a second husband, had no more power of herself, and the pupil might by the influence of her or her husband be inconveniently matched.

The Lords repelled the defence as not relevant, and ordained the pupil to be delivered to the tutor.

Stair, v. 2. p. 317.

* * * This case is reported by Dirleton :

The deceased Laird of Towie having named his relict, now Lady Boyne, tutrix to his daughter, and in case of her marriage, Colonel Fullerton; the said Colonel pursued the Laird of Boyne for delivery of the said pupil. It was alleged, that her mother and her husband would entertain the pupil *gratis*. It was answered, that Boyne being her stepfather, and having no other relation, but that of *vitricus*, which in law is not favoured, his offer to entertain is not relevant against the tutor, who has the trust both of the pupil's person and estate; and it is to be presumed, that the offer of the stepfather is upon a design upon the pupil, her person and fortune, and that the case had been determined *in terminis*, 4th July, 1629, Langshaw against Mure, No. 108. p. 16252.

The Lords repelled the defence, and ordained the pupil to be delivered to the tutor.

Reporter, *Strathurd.*

Clerk, *Gibson.*

Dirleton, No. 242. p. 116.

1675. December 10. SCOT against KENNEDY.

A person disposing his means to pupils or minors, may so qualify his gift, as the means shall be administered by the persons named in his disposition, and yet the

No. 184.

A tutor-testamentary was preferred to the custody of his pupil, an heiress, in competition with her mother, married to a second husband, although she offered to entertain her *gratis*.

No. 185.

No. 185. minors may chuse curators, who will have the administration of any other estate belonging to them.

Dirleton. Stair.

* * This case is No. 87. p. 8970. *voce* MINOR.

1676. *December 13.* MELVILLE *against* MONTGOMERY.

No. 186. A tutor, who had intromitted with the estate of his pupil, a Lady, was found not entitled to sue her husband, after the dissolution of the marriage, upon an assignation to a debt which had been due by her, as the tutor had not settled his accounts.

Gosford.

* * This case is No. 164. p. 9845. *voce* PASSIVE TITLE.

1677. *January 13.* FERGUSONS *against* FERGUSON.

No. 187.
Duty of a
tutor to do
diligence.

Helen and Elizabeth Ferguson, the only children of ——— Ferguson of Threave, and Janet Ferguson his spouse, pursue Simon Ferguson their tutor, and insist on this point, that by their father's contract of marriage produced, the lands of Threave are provided to the heirs of the marriage, and so did belong to them; and albeit their tutor raised briefes, and served the same *affirmative*, yet he did not extract the service nor retour, but did collude with Thomas Ferguson, brother to the defunct, who disponed the estate to the tutor's brother, and was served heir-male, the lands having been formerly provided to heirs-male, which might have been prevented, if the tutor had retoured the daughters' service, who are provided heirs by the contract of marriage, and thereby the tailzie is broken, and were accordingly served by an inquest. Several witnesses being adduced to prove this point, and among the rest the tutor's brother, who deponed, that the tutor and he being uncles to the pursuers, and having taken advice of lawyers, they found that the pursuer's father was infest as heir-male to his father, and that by his infestment the lands belonged to heirs-male, and that there being no new infestment upon the contract of marriage, changing the succession from heirs-male to the heirs of the marriage, that the contract being only personal, could not instruct a valid service of the daughters as heirs of the marriage; but found only a personal action against the heir-male, to fulfil the contract, and to enter and denude himself in favours of the heirs of the marriage, and that the heir-male being an insolvent vagrant person, if he had disponed, his singular successor being infest *ex causa onerosa*, would be secure, and the pursuers get nothing; for preventing