

of her daughter to the tutor. And although that cannot be observed in the precise terms of the will, since her second marriage, yet the next to that ought to be followed, *scil.* the allowing the infant to be educated with the pursuer's father. No. 265.

*2dly*, As the tutor is next in succession to the child, the law presumes that he will not take sufficient care of preserving her life; and as his father is in the line of succession next to him, so some suspicion lies likewise against him; therefore, neither of them ought to be considered as fit persons for that purpose. And, from the decisions referred to, it appears, that even when a mother offered to aliment her child *gratis*, no regard was paid to it; so that the tutor's making such an offer cannot have any influence; especially considering, that whoever does it must be a loser, as the fund of aliment is so small.

The Lords ordained the child to be delivered up to the tutor, and found no aliment due for the future.

*C. Home, No. 33. p. 63.*

1736. February 19. SCOT against STRACHAN.

No. 266.

An agreement to give a gratuity to a person for undertaking the office of tutor, because the nearest relations declined the office, found not to bind the pupil.

*C. Home.*

\* \* \* This case is No. 40. p. 13433. *voce* RECOMPENSE.

1739. February 6. HUNTER and his TUTOR, Petitioners.

No. 267.

The procedure in a sale at the instance of a pupil and his tutor being found defective, in respect the heir-apparent of the pupil had not been called, a new process of sale was raised, wherein the next apparent heir, who was the pupil's younger brother, and to whom the same person was also tutor, was called, and who, as tutor to the next apparent heir now called, consented that the proof which had been led in the first process of sale should be repeated in this. It was found by a majority, "That the tutor could not wave the nullity, though the application for having said former proof sustained was made also with the concurrence of the creditors."

Tutor not allowed to wave a nullity, tho' all parties having interest consented.

*Kilkerran, No. 1. p. 583.*