

**No. 59.**  
*fieri non potest*, found to take place in the law of Scotland.

It was answered *a Domino de Sanquhar*, that he that was son to the tutor could not be heard to allege any tack, because the said tack was purchased by the said tutor during the time of his tutory, *et summa fraude et dolo se gessit*, to obtain a tack and assedation of the thing already acquired to the pupil, nam de jure tutor in rem suam vel in eo negotio quod ad se principaliter pertinet auctor fieri non debet L. 1. D. De auctoritate et consensu tutorum; the which allegiance was admitted by the Lords, and granted letters conform, notwithstanding of the tack acquired by the tutor to his son during the time of the office of the tutory.

*Colvil MS. p. 358.*

1583. *April.*

SHARP, Supplicant.

**No. 60.**  
 A tutor in law being absent and at the horn, the Lords sustained a tutory dative without removing the other.

In an action of the Earl of Cassillis being pupil, compeared Mr. John Sharp, advocate, and produced a letter of tutor-dative, whereintil he was made tutor-dative to the said Earl, because Thomas Kennedy his tutor of law was in sundry respects unable, sometime at the horn and far off, and not ay ready to the authorization and defence of the pupil, who had many weighty actions adō. It was alleged against the tutor-dative, that of the law, *tutorem habenti tutor dari non potuit*, and as it was practised betwixt Saint Colme and the Earl of Garvie, into the cause of the L. of ——— pupil. The Lords nevertheless admitted the said letter of tutorie et hoc juxta L. Licet C. In quibus casibus tutorem vel curatorem habenti tutor vel curator dari potest.

*Colvil MS. p. 360.*

1584. *January.*

HAMILTON *against* LADY ERNOCK.

**No. 61.**  
 The donatar of ward, though himself a minor, found entitled to the custody of the pupil's person during ward. See *Achans*, No. 19. p. 16220.

The ward and marriage of the Laird of Ernock was disponed to a daughter of the Laird of Dalziel, who was minor. The donatar pursued the Lady Ernock for deliverance of the heir that was a pupil, alleging that the custody and keeping of the pupil being past the age of seven years, appertained to her by reason of the ward. It was alleged by the mother, that she ought to have the keeping of her own bairn, and the will of the dead ought to be fulfilled, and that the donatrix, *quæ propter defectum ætatis seipsum regere non potuit*, not potuit alios. To the which it was answered, that it behoved of necessity that the custody of minor and pupils that warded, appertained to them that had the right of the ward; and as the donatrix that was minor was capable of the ward, so was she in keeping of the pupil; and as to her minority and less age, she might be into that case as into all others, governed and ruled by the advice of her tutors and curators. The Lords

found, that the custody of the pupil ought to appertain to the donatar, and so ordained the pupil to be delivered to the donatrix. No. 61.

Colvil MS. p. 394.

1586. November.

LEARMONTH against LESLIE.

Mr. John Learmonth, son to Laird of Balcomie, pursued Euphan Leslie his mother, to hear and see a letter of tack of his lands called Northbardie, as done by him in his minority to his great hurt and lesion, the said land being worth 12 chalders victual, and set for £.40. of duty. The first part of the reason of the summons was, that the consent of his curators was not duly interponed thereto, because they consented not presently, et in ipso actu negotii; but by a long space afterward, and of the law, in lege 9, § 5. D. De auctoritate et consensu tutorum vel curatorum ut statim in ipso negotio presens debet auctor fieri; and so of the law the consent of the tutor ought to have been interponed in ipso actu negotii et non ex intervallo. The Lords, after long reasoning, found the first part of the reasons of the summons founded upon that head, that the consent of the curators was *ex intervallo* interponed was not relevant, and that it might stand that the consent of the curators might follow *ex intervallo*.

Colvil MS. p. 410.

1589. March.

KENNEDY against ———.

There was letters of horning produced against the Earl of Cassillis and Thomas Kennedy, his tutor; and because the executions which were against the tutors were not upon the back of the letters, nor yet registered in the Sheriff's books, according to the act of Parliament, the Lords found the same to be of none avail.

Colvil MS. p. 441.

1589. March.

DICK against NEAREST AGNATES.

There was a woman that deceased in Edinburgh, called Dick, who being the spouse of B. R. had certain tenements of land in heritage; and, after decease, she left some of her nearest kinsmen and agnates to be tutors testamentars to her bairns and their heritages. It was alleged by them who were nearest agnates of the father's side, that they might be preferred, and she could have no place to nominate in their prejudice, but, according to the laws and practick of the realm, the nearest of kin of the father's side should be admitted tutors. It was answered,

No. 62.

The authority and consent of curators to the minor's contracting may be interponed, (contrary to the common law) *etiam ex intervallo*.

No. 63.

No. 64.

A mother having heritage may name tutor to her children, though in prejudice of the nearest agnates.