

No. 121. pil's means ; and this tutor is suspicious to have the keeping of her, because his son in law is nearest of kin to succeed to her ; notwithstanding whereof the Lords preferred the tutor to the mother in keeping the bairn, because the mother was married, and so by the superinducing of a *vitricus* to the bairn, she was *in potestate mariti* herself, and consequently she could not claim the charge of the pupil, who was herself under her husband's charge ; and also because this her husband had comprised the bairn's estate, for debt, whereunto he was made assignee by her father's creditors ; and also in respect that the tutor sick like offered to entertain the bairn on his own charges, without seeking any allowance or defalcation of the bairn's means therefore ; for which reasons the tutor was preferred, albeit the mother alleged that *superinductio vitrici* might well make the mother fall from the tutory, if she had been tutrix-testamentary, but will not in law make her to amit the benefit given in law to her, of educating her daughter within the years of infancy ; and seeing in law *multum tribuitur arbitrio judicis*, to estimate *ubi et apud quem pupillus educari debeat*, she alleged, that her motherly affection, and the sex of the pupil, should rather move the Judge to incline to the mother than to the other ; and as to the comprising used by her husband, it is to be presumed, that it is more probable and profitable, that that right should remain with her husband, who may and will use the same to the good of the bairns, than if it had been deduced by the creditors, who are mere strangers, and are not to be presumed to have carried the like respect to the pupil ; notwithstanding whereof the tutor was preferred, as said is.

Act. Gilmour.

Alt. Mowat.

Clerk, Gibson.

*Durie, p. 625.*1632. March 28. LD. LUDQUHAIRN *against* LD. HADDO.

No. 122.

A tutor having acquired a tack of teinds of the pupil's lands, and taken the same in life-rent to his own wife, who was the pupil's mother, and, after her decease, to the pupil himself, the Lords found this a lawful transaction with regard to the teinds of that part of the estate which was life-rented by the Lady ; but as to the remainder, found, That the tack did accresce to the pupil, with the burden of a proportion of the sum laid out by the tutor in acquiring the tack.

*Durie.*\* \* This case is No. 49. p. 9503. *voce* PACTUM ILLICITUM.

No. 123.

In conformity  
with Auchterlony  
against Oli-  
phant, No.  
120.

1632. June 29.

IRVINE *against* ELSICK.

The like (as in No. 120.) was found between a tutor of law and a tutor dative, where the lawful tutor having got himself served *debito tempore* within the