

their entertainment, ay and while they should be of perfect age ; after the bairns past tutory, they having chosen curators, the curators pursued the said James Hamilton the tutor, to deliver the bairns' writs, that they might have the administration of their means ; and the said tutor alleging, that the writs should remain with him, seeing he had only right to intromit with the annual-rent of the monies left by the goodsir, for the bairns' maintenance, according to the goodsir's will, the Lords found, that notwithstanding, that by the testament, the goodsir had appointed the said James Hamilton to be tutor, yet that after the tutory, the bairns might choose others, to be curators to them, than the said James ; and that the said curators had good right to call the said tutor, for delivery to them of the writs, containing the means left to them by the goodsir, and that they ought to administrate the same ; but found that in respect the goodsir had left him to be tutor to his oyes, and gave him the rent of the money for their entertainment, while their perfect age, which the Lords found the goodsir might do of law in these things, which were left by himself to them, that therefore the rent of these monies, so left by the goodsir, should be paid to the said James Hamilton, even albeit the bairns were past tutory, so long as they were minors, at least so long as they remained with him in his company ; but the Lords modified the sum, which should be paid to him for the bairns' entertainment, to a reasonable sum, and would not allow, that the annualrent of the whole sums should be paid to that end, but a part, (which they modified) and the rest to be forth-coming to the bairns.

Act. Gibson.

Alt. Heriot.

Clerk, Gibson.

*Durie, p. 668.*

No. 127.

1633. February 12.

GOVAN *against* RICHARDSON.

Bessie Govan, a pupil, and her father as tutor and administrator in law to her, charging Margaret Richardson, who was obliged by her bond to the said Bessie Govan, in the sum of 200 merks, which sum being consigned in a suspension, to be given up, the suspender being found by the Judge, to be exonerated thereof lawfully, the Lords found the sum ought not to be given up to the father, who desired to lift the money as tutor to his bairn, until the time he found caution to make the same forth-coming to her, at her lawful age, in respect he was but a poor man ; and it was feared that he might spend the money to the bairn's prejudice.

*Durie, p. 670.*

No. 128.

1634. December 20.

GEORGE CAMPBELL *against* CATHARINE CHALMERS.

George Campbell, tutor dative to Charles Campbell, pursued Catharine Chalmers, mother to the pupil, for delivery to him of the pupil. Alleged, He could not be

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No. 129.  
Custody of  
the pupil.

No. 129. delivered to the pursuer, because he had chosen curators. Replied, The act of curatory was null, in respect the minor was yet within pupillarity, which he offered to prove by the mother's oath, by whose means the curators were chosen only to defraud the tutor. Duplied, Her oath cannot be taken in prejudice of the curators, who are not called here, neither can the act of curatory be taken away *hoc ordine*, but it must be reduced. The Lords repelled the allegiance, in respect of the reply.

*Spotiswood, p. 348.*

1634. December 20.

A. against B.

No. 130.

A tutor being pursued by the curators to exhibit and deliver to them the pupil, alleges, The pupil is minor, which he offers him to prove. It is answered by the curators, Ought to be repelled, in respect of the act of curatory standing, which ought to be reduced. The Lords sustained the allegiance for the tutor.

*Auchinleck MS. p. 246.*

1635. July 18.

EDMISTON against L. EDMISTON.

No. 131.  
Liability of  
the factor of  
a tutor.

One Edmiston, sister to the Lady Lugton, being executrix decerned to umquhile Edmiston her brother, who was provided by umquhile Andrew Edmiston of that ilk his father, to certain lands of Mellerstains, Fala, and others, being the son, and she one of the daughters, gotten by the said umquhile Andrew in his second marriage, with one Gordon his second wife, and whereto he was obliged to provide the bairns of that second marriage, by the contract of marriage made betwixt them; the said brother being deceased, this pursuer being one of the defunct's sisters, and she being only decerned executrix to him, and having licence to pursue, convenes ——— Edmiston now of that ilk, as heir to Sir John Edmiston of that ilk, his father, which Sir John was the eldest son of the said umquhile Andrew Edmiston of that ilk, begotten of the first marriage, and who survived the pursuer's brother, the only son of the second marriage, as said is; and which umquhile Sir John half brother to his defunct brother, surviving his said half brother, and for his non-age, not being capable of the office to be tutor to him, acquired a right of factory, to intromit with the said pupil's rents from him, who was served tutor lawful, and according to that factory intromitted with the rents and duties of the lands, whereto he was appointed to be provided by the contract of marriage foresaid, and in the which intromission the said umquhile Sir John continued, being factor after he was major, and so after he was capable of the office of tutory continually, to the time of his said half brother's decease; the pursuer being executrix, and having licence, as said is, pursues the heir of the said factor, for payment of all the duties of the saids lands, intromitted with by the said factor,