

1624. November 19. RAMSAY against HAY.

No. 89.

Curators chosen by one within pupillarity, though he were *pubertati proximus*, are not lawfully chosen, and so may be cassed, and the act of curatory reduced.

Spottiswood, p. 334.

* * Durie reports this case :

In a suspension of charges raised upon a decree-arbitral, at the instance of one Ramsay *contra* Hay, the Lords found the submission and decree-arbitral null, in the same suspension, summarily, without reduction; because the submission was for the right of tutory of a minor betwixt two tutors; the one alleging himself to be tutor lawful, and the other testamentary; which right was submitted by them, and what satisfaction either of them should do to others for their rights; which the Lords found was not lawful to submit: And sicklike they found the decree null, because the Judges had decerned the one tutor to give to the other, for giving over of his right, some of the defunct's gear, which pertained to the minors, whose tutory was controverted; and so it was not lawful to give away the goods pertaining to the pupils for acquiring of the said right of tutory, by any of them, seeing thereby the pupils were evidently damnified.

Act. Lermonth.

Clerk, Gibson.

Durie, p. 149.

1625. June 22. MARQUIS of HAMILTON and His CURATORS.

No. 90.

Found, That minors' curators may be chosen by a procurator in their absence.

Kerse MS. fol. 150.

1625. July 30. LA. STONYHILL against HER SON.

No. 91.

The Lady Stonyhill, relict of Sir Robert Dobie, pursues registration of her contract of marriage, against her son, as heir to his father, and the defender compearing and alleging, that she being left tutrix testamentary by her husband, to the defender *sine qua non*, she could not pursue her own pupil, her son, whom of law she ought to defend, until the time she had intented a pursuit, to hear curators given to him, to defend him; which allegiance was repelled, and the pursuit was sustained at her instance; albeit it was also alleged, that she had accepted a tutory, by subscribing of sundry writs, as tutrix to the defender; which was also repelled, in respect that she renounced the office of tutory, and that the pupil had

Tutrix *sine qua non.*

No. 92. received no prejudice by her subscribing of any writs, and that it was very favourable to give her action, to seek registration of her contract matrimonial; and the Lords found it not necessary, to intent action, to give curators to defend her son; seeing they found, that any person, either of the father-side, or mother-side, of kin to the pupil, might seek tutors to the minor, to defend and authorize him, who being so sought, the Lords would give them curators *ad hanc litem* summarily, without any further process; and also there were more tutors in the testament.

Act. Hope.

Alt. Nicolson, younger.

Clerk, Gibson.

Durie, p. 185.

1626. February 23. SIBBALD against HAY and LINDSAY.

No. 93.

The Lords found an act of tutory and curatory in the books of the Canongate null, because it was not subscribed by the parties.

Kerse MS. fol. 150.

1627. July 6. CAMPBELL against CAMPBELL.

No. 94.

Tutors testamentary were preferred to dative, altho' they had not begun to act for six years.

In a suspension, Campbell against Campbell, the Lords preferred tutors testamentars nominate to a minor (whereof the Laird of Langshaw was one) to the tutor dative, in the administration of the minor's goods, notwithstanding that the tutor dative alleged, that he ought to have been preferred, seeing the tutors testamentars had fallen from their office, there being six years since the defunct's decease who nominated them tutors, during the which space they had done no diligence, neither to administrate the minor's affairs, nor to care for her person, as was incumbent on them of the law, until now that the tutor dative had intented this pursuit in favours of the minor; and that the said tutor dative having married the minor's mother, hath had the only care of her all this time; likeas as the said tutors testamentars were curators to the heir-male, who in this process was convened for that deed which he was obliged to fulfil to this pupil, so that they could not be both curators to the one party and tutors to the other; which allegiance was repelled, seeing they found, that this cessation of the tutors testamentars could not prejudice them of their office of tutory, which they were now willing to administrate, albeit after six years expired, in regard there was no prejudice sustained by the minor, nor done to her in the mean time, which could be qualified any ways; and although they were curators to the heir-male, who was charged to fulfil the deed libelled for the pupil, to whom they were tutors, yet that was found no impediment to them to continue tutors, seeing the heir-male offered real and ready obedience, and to fulfil the obligation to the other pupil, so that it was no litigious dispute betwixt these parties, which could hinder the effect of the tutors' administration of their pupil's goods, and the testamentars were preferred to the dative.