minor was Major, whereby the curator might have a valid discharge thereon, which he could not lawfully now give, and would not supply it by caution: And because the minor desired, that he might have up the evidents of such of his lands as he held by other holding than ward, whereby he might obtain himself entered and infeft in the same, and so eschew the danger of nonentry; the Lords found (albeit the curator and his cautioner were liable for these dangers to the minor) yet to eschew such prejudice to the minor, and that he might not be put to such action, that he might borrow, and take upon trust from the Clerk any of his writs whereof he had use, and which he would desire for that effect, upon good security to the clerk, to re-deliver the same to him again, at the day unto the which they should be borrowed. This was done to eschew the minor's prejudice; but in legal manner they found by process, that the minor could not crave them, the curator not being removed, nor pursued as suspect; for the minor had diverted from his curator foresaid, and was married without the curators' advice, whereby they agreed not in their business. No. 114.

Act. *Nicolson & Mowat.* Alt. *Stuart & Burnet*, minor.

*Durie, p. 508.*

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1630. *July* 21. VALANCES *against* DR. FORRESTER.

No. 115.

A man having left his wife tutrix to his children with others of his friends; if she only have intromission during her widowhood, and continue the same after she is married to another husband, although she lose her tutory by her marriage, yet she will be liable to the children for payment of the annualrent of the sum and duties uplifted by her, as well as if she had continued to be tutrix. This was found between Valances and Robert Fleming their tutor, against Dr. Forrester, who married their mother,

*Spottiswood, p. 347.*

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1631. *February* 22. JOHN FINNIE *against* PATRICK OLIPHANT.

No. 116.

John Finnie, pupil, pursued his mother, and Patrick Oliphant, her husband, for a modification whereby he should be entertained, in respect she had her life-rent of all his estate. The mother offered to take her son and entertain him freely herself. The Lords preferred the boy's tutor to his keeping, to whom the mother was ordained to give a modification for the pupil's entertainment, though he was not a tutor testamentar, but only dative.

*Spottiswood, p. 347.*

*** Auchinleck reports this case:

No. 116.

A tutor, by law and practick of this realm, will get the mother compelled to deliver the pupil to him, and likewise will get a modification from her of reasonable maintenance to the heir, in case the mother be infeft in life-rent in all his heritage, albeit he have no ward lands, but burgage.

*Auchinleck MS. p.* 242.

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No. 117.

1631. *February* 25. MELVILLE *against* DRUMMOND.

Umquhile David Drummond dies in England, and left behind him a son, born in England, and leaves Archibald Drummond of Gibliston his executor and administrator, who intromits with his goods and gear, both in England and Scotland. Mr. Thomas Melville takes a tutory dative to the minor, and pursues the executor for exhibition of the defunct's testament, and to make count and reckoning of his intromission. It was first excepted by the defender, that the minor was born in England, and having the most part of his estate there, there could no tutor dative be given by the Theasurer of Scotland, who had power to pursue him for exhibition of count or reckoning. It was answered, that the minor was a Scotsman, although born in England, and had means in Scotland, and was answerable and subject to the Scots law. The Lords repelled the exception, and ordained him first to exhibit the testament.

*Auchinleck MS. p.* 242.

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No. 118.

1631. *uly* 21. EARL of KINGHORN *against* GEORGE STRANGFATHER.

It is the tutor who ratifies a deed, not the pupil with his consent.

In the action pursued by the Earl of Kinghorn against George Strangfather; Alleged, the decreet of non-entry and comprising following thereupon, could not be reduced, because the Master of Glammis, tutor for the time to the pursuer's father, had ratified the same decreet and comprising. Replied, not relevant to say the tutor had ratified, unless the pupil with consent of his tutor had done it; for the tutor alone can do no deed in prejudice of his pupil but what is null in law. Duplied, the tutor has *liberam administrationem bonorum pupilli*, and what he doth therein cannot be quarrelled as null by way of exception; but if the minor be prejudged by his deed, he has his choice, either to pursue his tutor personally for it, or to seek to be restored against that deed. Triplied, neither of these two can benefit the pursuer, the tutor not having an heir, and the benefit of restitution not being now competent after so long a time: And there was represented a great inconveniency that might befal minors, if tutors might dilapidate their estates at their pleasure, and make private rights in prejudice of the minors, which could