

**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