

**No. 64.** That the heritage and lands that appertained to the bairns came of the mother, and they succeeded to her, and not by the father. The mother had sufficient reason to nominate.

*Colvil MS. p. 451.*

1590. December. GRAHAM against DICKSON.

**No. 65.**  
A tutor in law having been fugitated for a crime, a tutor dative was appointed in his place. The next agnate was notwithstanding preferred to be tutor in law.

There was one Graham, who being served tutor lawfully and nearest agnate to his brother's son, being but an infant and pupil, was, for certain crimes, fugitive from the law, and denounced rebel, and put to the horn. In the meantime, and within year and day after the service of tutory, there was one Dickson that purchased the gift of a tutor dative. The brother and nearest agnate of the tutor lawful raised summons and pursued the tutor dative to hear and see his gift to be discharged, and he to have the lawful administration of the office during the time of the inability of his brother, as nearest agnate to him. It was alleged for the part of the tutor, That of the law, where the lawful tutor is not able to use and exercise the office, *tunc locus est dative*; to which it was answered, That of the practick of the law of Scotland, there could be no tutor dative given until the time year and day was expired after the service of the tutor lawful; and so within the year and day, the time that the tutor lawful was unable, the administration of the office should appertain to the nearest agnate. The which was found by the Lords.

*Colvil MS. p. 456.*

Spottiswood reports this case :

One Graham as nearest agnate being served tutor lawful to his brother's son, afterwards for some certain crimes became fugitive and put to the horn, upon which one Dickson purchased the gift of a tutory dative. Afterwards the brother of the tutor lawful raised summons, and pursued the tutor dative to hear and see his gift discharged, and him to have the lawful administration of the office of tutory during the time of the inability of his brother as nearest agnate to him. Alleged by the tutor dative, that by law, when the lawful tutor is unable to execute his office, *tunc locus est dative*. Replied, that by the practick there could be no tutor dative given till year and day was expired, after the service of the tutor lawful, within which space the administration should belong to the nearest agnate. Which was found by the Lords

*Spottiswood, p. 345.*