

of kin quarrelled it as a deed to his own benefit and behoof, and which restricted the minor's power of disposal; for if they had remained moveable as they were left by the father, they would have fallen under his testament, and she might have disposed on them; but being heritable, she could not during her minority. The Lords found the tutor could not innovate the securities so as to prejudice the nearest of kin.

Fountainhall, v. 1. p. 511.

1688. July 13.

CLARA and PATRICIA RUTHVENS *against* HUGH WALLACE.

No. 230.

Mr Ruthven, when he went abroad, having granted a factory with consent of his curators, to Hugh Wallace, and obliged him to count to a *quorum* of the curators; and he having accordingly counted to them for some years, and being pursued by Mr. Ruthven's sisters, craved to be assoilzied for the years he had counted.

Answered: A factor to a curator is in effect in the case of a curator; and although the counting may give him the benefit of his having the curators *primo loco* discussed, yet the factor must be liable *in subsidium* to the minor's representatives, although he hath given up his instructions to the curators.

The Lords sustained the reply, and ordained the factor to depone, and produce what instructions he had in his hands.

Harcarse, No. 999. p. 282.

1688. July 28.

CAPTAIN GEORGE RAMSAY *against* LORD DALHOUSIE and TUTORS.

No. 231.

Mr. John Ramsay, third brother to my Lord Dalhousie, having, in absence of his second brother, served himself tutor of law to my Lord's children, upon the tutors testamentary lying off and neglected to accept, for whom Sir John Ramsay, one of the tutors testamentary, became cautioner, and was by him appointed factor, and acted as such several years;

The testator's second brother, after his return from abroad, took out brieves to serve himself tutor of law; of which service a bill of advocation was presented, upon these reasons; *1st*, There is already a tutor of law served and retoured, whose service ought first to be reduced; *2do*, A *quorum* of the tutors testamentary had accepted, which excludes any tutor of law.

Answered: The first service of tutory was null *ex evidentiâ rei*, it being notour that John was but the third brother; *2do*, The tutors testamentary had lain off for several years, and suffered a tutor of law to serve; and Sir John Ramsay, one of the testamentaries accepting, had renounced the office, by becoming cautioner for the pretended tutor of law.

No. 231. The Lords repelled the first reasons of advocacy, but sustained the second; and found, that the tutors testamentary accepting before the brieves of tutor of law were served, though not within a year of the defunct's death, when they might have accepted, did exclude the service, and that Sir John might yet accept as tutor testamentary.

Harcarse, No. 1001. p. 282.

No. 232. 1693. February 16. CATHCART of Carleton against BROWN of Colston.
Tutors neglecting to form inventories, are liable to forfeit all their expenses.
Fountainhall.

* * This case is No. 45. p. 3509. *voce* DILIGENCE.

No. 233. 1693. February 22.
COUNTESS of CALLENDAR against The EARL of LINLITHGOW.
A nomination of tutors to an infant heir does not fall, though a *quorum* do not accept; but in such a case the Lords obliged the acceptors to find caution, though regularly testamentary tutors are not put to find caution, unless there be a suspicion of their malversation, *vel si vergant ad inopiam*.
Fountainhall.

* * This case is No. 94. p. 14701. *voce* SOLIDUM ET PRO RATA.

No. 234. 1693. January 11. DOUGLAS against CARMICHAEL and LOCKHART.
What tutors ought to find caution?
The relict and children of Lieutenant Douglas against the Lord Carmichael and Sir William Lockhart. The Lords sustained the two accepting tutors, in respect the nomination bore a clause, that, failing of the rest, any one of them should have liberty to act, and that the word "failing" was not only by death after acceptation, but signified failing any way; and therefore found the letters orderly proceeded; but superseded extract for 15 days, that, in that space, they might exhibit the papers on oath; but would not let them be delivered up to the factors, but to lie in the Clerks' hands, till the tutors shall come home, so as the factors might have inspection of them, in order to prepare and form the inventories, conform to the act of Parliament 1672. Some proposed to have them sealed up till the tutors returned and discharged; but seeing these differences were also nominated