

1566. December 12. GEORGE TOURIS against MAGNUS TOURIS.

No. 51.

Ane minor being male, efter the compleit age of xiiij. zeiris, may cheis cura-  
touris, and being within the said age and zeiris, hes na powar to cheis the samin,  
as being zit within tutorie: And gif it happin, at the chesing and electing of the  
saidis curatouris, to be alledgit and objectit, that the said minor hes na powar to  
cheis curatouris, be ressoun he is within the said age; and it be replyit be him, or  
ony in his name, that he has past and compleitlie fulfillit the said age, the samin  
reply sall be admittit to his probation; quia majorem ætatem alleganti incumbit  
probatio.

*Balfour, p. 121.*

1569. January 27.

JAMES SANDILANDIS of Calder against The TENENTIS of N.

No. 52.

A woman may be tutrix testamentar to hir bairnis, sa lang as scho remanis  
wedow: And gif scho beand left be hir husband tutrix testamentar to ony pupill,  
and thairefter maryis, scho tines and forefaultis the office of tutorie: And gif the  
said pupill intentis and persewis ony actioun efter the completing of hir marriage,  
not havand ane uther tutor admittit in the said tutrix place, the defendar hes just  
richt be way of exceptioun to repell him *ab agendo*; because the said tutrix hes  
tint hir office in maner foirsaid, and the persewar, beand pupill, is not lauchfullie  
authorizit be ane tutor.

*Balfour, p. 116.*

1569. December 1. ROBERT BRUCE against WILLIAME BRUCE.

No. 53.

Contract or obligatioun beand maid be ony minor, without consent of his cura-  
touris, he havand tutouris and curatouris at the time of the making thairof, sould  
not be registrat, nor ressave ony executioun aganis him, and the minor may justlie  
alledge, he beand summonit to heir and se the samin registrat, that the samin  
aucht not to be registrat, be ressoun it was not maid be authoritie of his tutoris or  
curatouris, he beand then within the age of xxi zeiris.

*Balfour, p. 124.*

1574. June 1.

CRAIG against JOHNSTON.

No. 54.

A tutor-dative given by the King offering caution in due time before inferior  
Judges should be admittit to the administration, and so preferred to the tutor of

If a tutor in  
law do not

No. 54.  
find caution  
within the  
year, his ser-  
vice expires,  
and the King  
may name a  
tutor-dative.

law that is served tutor within year and day, gif his caution be not received before the Judge within the said space, yea, albeit his caution be offered and received, before the Judges received the tutor-dative's caution; for if the tutor of law's caution be not found within the said space, the service expires in the self, and prescribes in sic sort, that the King may dispoñe the dative thereof, quia via solemnia juris debent per impleri per tutorem legitimum infra annum et diem, neque purgatur mora ejus; although within eight days after the prescribed time he offered and gave caution; yea albeit he both offered caution, and the same received and marked before the tutor-dative offered and gave caution, in pretermittig the time prescribed to do that thing which is principally required. De necessitate actus tutoris legitimi locum cedit tutori dativo, who may at all time thereafter, viz. after the issue of year and day, seek the said office of tutory from the King; nor yet is it sufficient to the tutor of law being serving in due time to offer caution at any time thereafter when he pleased, quatenus actus debet per implori infra annum, alioqui nihil agitur, neque purgatur mora, although he either offer or give caution before the dative; for divers causes; 1st, Quia quoties pœna infligitur a jure, vel aliquid prætermittit a tempore prescripto, a jure mora non est purgabilis, quia nihil agit, consetur, ut dictum est; 2do, If the gift be given to the tutor-dative before the tutor of law offer caution, accumulando jura juribus purgatio moræ non admittitur, howbeit the time to find caution prescribed is not come, quia jam obstat medium impedimentum dativi, et hoc de facto diligentia legitimi tutoris, vel ratione ejus culpæ qui negligenter prætermittit, quod fateri debuit, as was in the action betwixt Mr. Thomas Craig, advocate, and William Johnston, (*infra;*) for this Johnston was served tutor of law, and pretermitted the caution until the year and day was gone; after the which Mr. Thomas Craig got the office of dative from the Prince, and offered caution, but the Bailies of Edinburgh remembering that William Johnston was served tutor of law, denied to receive Thomas' caution while they were farther advised, which, when William Johnston heard the combat, three days after the year and day, and offered caution, which the Bailies received; and Mr. Thomas perceiving this, meaned himself to the Lords, who received his caution; but the question thereof was moved before them, Which of the two should have the administration of the bairn called Johnston, brother's son to the said William, and sister's son to the said Mr. Thomas Craig? But the Lords, after divers informations given by the parties foresaid, decerned as said is, that the dative should be preferred for the cause foresaid.

*Cakvil. MS. p. 10.*

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1574. July 1. WILLIAME JOHNSTOUN *against* MR. THOMAS CRAIG.

No. 55.

The tutor of law sould be servit tutor, and also find caution sufficient within zeir and day, de fidei administratione, ac de rationibus reddendis: And gif he sufferis zeir and day to pass over without finding of caution, albeit he wes servit