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 prejudge the nearest of kin. No. 229.

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; 1*st*, There is already a tutor of law served and retoured, whose service ought first to be reduced; 2*do*, A *quorum* of the tutors testamentary had accepted, which excludes any tutor of law.

Answered: The first service of tutory was null *ex evidentia rei*, it being notour that John was but the third brother; 2*do*, 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.