

found, that the custody of the pupil ought to appertain to the donatar, and so ordained the pupil to be delivered to the donatrix.

No. 61.

Colvil MS. p. 394.

1586. November.

LEARMONTH against LESLIE.

Mr. John Learmonth, son to Laird of Balcomie, pursued Euphan Leslie his mother, to hear and see a letter of tack of his lands called Northbardie, as done by him in his minority to his great hurt and lesion, the said land being worth 12 chalders victual, and set for £.40. of duty. The first part of the reason of the summons was, that the consent of his curators was not duly interponed thereto, because they consented not presently, et in ipso actu negotii; but by a long space afterward, and of the law, in lege 9, § 5. D. De auctoritate et consensu tutorum vel curatorum ut statim in ipso negotio presens debet auctor fieri; and so of the law the consent of the tutor ought to have been interponed in ipso actu negotii et non ex intervallo. The Lords, after long reasoning, found the first part of the reasons of the summons founded upon that head, that the consent of the curators was *ex intervallo* interponed was not relevant, and that it might stand that the consent of the curators might follow *ex intervallo*.

No. 62.

The authority and consent of curators to the minor's contracting may be interponed, (contrary to the common law) *etiam ex intervallo*.

Colvil MS. p. 410.

1589. March.

KENNEDY against ———.

There was letters of horning produced against the Earl of Cassillis and Thomas Kennedy, his tutor; and because the executions which were against the tutors were not upon the back of the letters, nor yet registered in the Sheriff's books, according to the act of Parliament, the Lords found the same to be of none avail.

No. 63.

Colvil MS. p. 441.

1589. March.

DICK against NEAREST AGNATES.

There was a woman that deceased in Edinburgh, called Dick, who being the spouse of B. R. had certain tenements of land in heritage; and, after decease, she left some of her nearest kinsmen and agnates to be tutors testamentars to her bairns and their heritages. It was alleged by them who were nearest agnates of the father's side, that they might be preferred, and she could have no place to nominate in their prejudice, but, according to the laws and practick of the realm, the nearest of kin of the father's side should be admitted tutors. It was answered,

No. 64.

A mother having heritage may name tutorsto her children, though in prejudice of the nearest agnates.

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 dativo 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 dativo. The brother and nearest agnate of the tutor lawful raised summons and pursued the tutor dativo 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 dativo*; to which it was answered, That of the practick of the law of Scotland, there could be no tutor dativo 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 dativo. Afterwards the brother of the tutor lawful raised summons, and pursued the tutor dativo 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 dativo, that by law, when the lawful tutor is unable to execute his office, *tunc locus est dativo*. Replied, that by the practick there could be no tutor dativo 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.