third share; and there was produced a testificate of Balloche, that there was an agreement. No. 142.

Notwithstanding whereof, the Lords refused to take the tutor's oath, *ex officio*, seeing they found, albeit it were affirmative, it could not prove against the pupil.

Stair, v. 1. p. 236.

1665. *January* 10. KER *against* LOGIE. No. 143.

In a reduction of a tutory dative, at the instance of a tutor in law, betwixt Ker and Logie, the Lords found these reasons relevant, that the tutory dative was taken within year and day after the father's decease, albeit before there was a possibility before the serving the tutor in law, in respect of the surcease of justice betwixt May, 1659, and June, 1667, during which time there was no Chancellary open.

Newbyth MS. p. 17.

*** This case is reported by Gilmour:

John Ker having died intestate, leaving two young children, in May, 1659, after which time there was no Chancellary-office for the space of two years; and, in June, 1661, John Ker, goodsir and nearest agnate, did take out brieves for serving himself tutor in law, and caused execute the same; but, in the mean time, William Logie, goodsir on the mother's side, obtains passed in the Exchequer a gift of tutory dative; and thereafter he obtained two decrees against the said John Ker, by which he poinded his goods, and rendered him unable to find caution, till he obtained suspension, and got the decrees turned into a libel; and now the said John Ker pursues a reduction of the said tutory dative, upon this reason, that before the service *annus utilis* was not out-run, nor before the taking the tutory; and the reason why he did not find caution sooner was the defender's fault, who rendered him unable; and withal, the defender is suspected, his daughter having married a second husband, to whom she has children, so that it may be presumed he will let a part of these bairns' means fall to his other oyes; and a practick was alleged, in June, 1632, betwixt Irvine and Elsick, No. 123. p. 16260. It was answered, That *annus utilis* is not allowed in this case, the pursuer having time enough to prosecute his legal right, and might have done it long before the defender purchased the dative. And though it were true that the pursuer was poinded, yet that is no reason to make the pursuer's right good, and to reduce the defender's, it being a legal execution, putting the pursuer to no such incapacity as to excuse him so as to render his null right valid; and the practick meets not, for in that case the service and gift under the Quarter Seal were *debito tempore* expede, and the tutor did administrate, though he did not find caution.

The Lords preferred the pursuer to the subsequent dative, he finding presently sufficient caution, which was ordained to be done.

Gilmour, No. 124. p. 92.