

ANNUALRENT.

513

(DUE BY TUTORS AND CURATORS.)

PRO-TUTOR.

1630. July 17. VALLANGE *against* KINCAID and FORRESTER.

THE deceased Vallange, in his testament leaving Kincaid his wife his executrix, and also tutrix, with other two friends, to his bairns; which testament being confirmed by her, and she remaining intromittatrix with his goods, thereafter she marries Doctor Forrester for her second husband, and she and he continue in intromission diverse years after this second marriage; thereafter, the other two tutors testamentary, who before accepted not the office, pursue the relict as tutrix, and her said second husband, who also had given his bond to be accountable for the minor's goods, *hiscæ nominibus*, viz. as pro-tutrix, and as intromitters, and in respect of the said bond, to make count, reckoning, and payment to them, as now accepting the office of tutory, of the saids goods and whole profits, since the time of their intromission, unto the time of the payment of the principal sums: Wherein the husband and his wife compearing, *alleging*, That they cannot pay any annualrent since the time of their second marriage, because then she lost her office, and so ought not to be considered as a tutrix to pay profits, but as any other stranger, and who being so respected, could not be subject in annualrent; but these two tutors were only in law answerable to the minors for annualrent; so that their own omission till now to accept the office of tutory, and to do the duties thereof, that omission ought to be burdenable to themselves, and not to the relict, who was not tutrix since her said marriage.—THE LORDS notwithstanding found, That albeit where there are tutors, a pro-tutor is not ordinarily obliged and bound in annualrent for the minor's goods, yet that here, she continuing in the same intromission, which she had when she was tutrix, and having confirmed the testament, that she was subject and her husband in paying of annualrent, for the sums and goods intromitted with by her; seeing the goods remained in her and her husband's possession, and they had not exonerated themselves by any contrary action of tutory, or other action whereby she might have been freed of her intromission.

No 49.
The Lords found a pro-tutor liable in the annualrents of money uplifted by him, as a tutor would have been.

A.G. Robertson.

Att. Morvat & Gilson.

Clerk, Gilson.

Fol. Dic. v. 1. p. 40. Durie, p. 531.

* * Spottiswood mentions the same case thus:

July 21. A MAN having left his wife tutrix to his children, with others of his friends; if she only have intromission during her widowhood, and continue the same after she is married to another husband, although she lose her tutory by her marriage; yet she will be liable to the children for payment of the annualrent

(DUE BY TUTORS AND CURATORS.)

No 49. of the sum and duties uplifted by her, as well as if she had continued to be tutrix.

Spottiswood, (TUTORS and CURATORS.) p. 347.

* * * See the same case from Auchinleck, No 23. p. 490.

No 50.
Found in like
manner.

1637. July 5.

M'DUFF against M'DUFF.

ONE M'Duff being confirmed executrix to her brother John M'Duff, and pursuing the executors of umquhile M'Duff, which umquhile M'Duff was nearest of kin to the said John M'Duff, the pursuer's brother, and who died minor, and which umquhile M'Duff was that person, who, being nearest of kin, as said is, ought to have been tutor to the pupil; to pay to her the sums and goods intromitted with by him, together with the profits thereof since the time of his intromission: In which action it being controverted, if this defender, as executrix convened to the defunct, or the defunct's self, if he were living, could be convened as subject in annualrent for the monies alleged intromitted with by him, seeing it was alleged he was never tutor, and so not liable in annualrent.—THE LORDS found, That the defunct being that person, who might have been tutor in law to the pupil, albeit he was not tutor, yet having intromitted with the pupil's means, and so as pro-tutor behaving himself, was liable in annualrent to this pursuer, for all years since his intromission, for *nummi pupillorum non debent esse otiosi*, and so the LORDS repelled the allegiance, and decerned for the annualrent.

Act. *Nairn.*

Alt. ———.

Fol. Dic. v. I. p. 40. Durie, p. 848.

* * * Compare this Division of ANNUALRENT, with the Title TUTOR and PUPIL.

ANNUALRENT due by FACTORS and their CAUTIONERS.

1631. January 29.

HUME against HUME.

No 51.
The relict
and heir of a
factor found
not liable to
pay the an-
nualrent of

ELIZABETH HUME, relict of umquhile Robert Hume of Corfrig, who, and her husband for his interest, had obtained decret against one Hume, her father's brother, for payment of certain goods and gear, pertaining to her by her father's testament, wherein this Hume, who was decerned executor nominate and con-