1664. *June* 17. JAMES JUSTICE *against* EARL QUEENSBERRY.

No. 139.

James Justice, as having right to a bond of 6000 merks, due by the Earl of Queensberry, pursues the Earl, and the Lord Drumlanrig, his son, as taking his estate, with the burden of his debt, to pay it; who alleged, No process, because the pursuer's right was an assignation, granted by a tutrix, not bearing in name of the pupil, or as tutrix, in his name, because, being in infancy, he could not subscribe; but bearing to be done by her, as taking burden for the pupil.

The Lords found the assignation not formal, not bearing the pupil disponer with his tutrix; but yet found the letters orderly proceeded, the charger, before extract, producing a ratification by the pupil and tutrix, formally done.

Stair, *v.* 1. *p.* 203.

1664. *July* 21. SCOT of Braidmeadow *against* SCOT of Thirlstoun.

No. 140.
A decree obtained against a curator by a minor for liberation of the curator from his office was found not to liberate the curator from the office, even for omissions after the decree.

Scot of Braidmeadow pursues Scot of Thirlstoun, his curator, for count and reckoning; who alleged, Absolvitor, because the pursuer having convened the defender, before the Sheriff, to count and reckon, and to renounce his curatory, he was then decerned to renounce the office, and did count for by-gones. The pursuer answered, No respect to that decree, because it was during his minority; in which time the defender had a competent defence, that he was not countable; and for the renunciation of the office, it was a great lesion to the pupil, which the curator should not have yielded to, but proponed a defence against the same, that he could not pursue his curator to renounce, unless he had condescended, and instructed malversation. The defender answered, That he had just reason to suffer sentence, because his pupil was irregular, and meddled with his own rents by force, and mispent the same.

The Lords, notwithstanding of the decree, ordained count and reckoning; and found, that the decree could not liberate the curator, even for his omissions after, but reserved to the defender, before the auditor, to condescend what deeds the pupil had done before, as being relevant *pro tanto*.

Stair, *v.* 1. *p.* 220.

1664. *November* 18. SMITON *against* NOTMAN.

No. 141.
Protutors are liable as tutors.

The deceased John Smiton did, by his latter-will, nominate Margaret Curror, his spouse, Robert and Bessie Smitons, their bairns' executors, and did nominate his wife tutrix, and George Curror of Houden, James Notman, burgess of Selkirk, and James Curror, his father in-law, overseers. The relict meddled as executrix and tutrix, having confirmed the testament, and after her second marriage did

No. 141. meddle also. The children did raise a process against the heirs of James Notman (who, being overseer, did meddle also with the defunct's goods) for all that did belong to the defunct intromitted with by him, or as he who ought and should have intromitted with the profits thereof, *super hoc medio*, that he was overseer nominated, and if so, pro-tutor, after the second marriage, and death of the relict, by subscribing discharges, and intromitting as tutor. It was alleged, That, as overseer, he could not be pursued, not being any ground of a passive title; nor as pro-tutor, where there was a tutrix nominated. And though he might be conveneable *rei vindicatione*, *in quantum* he did actually intromit with, yet not for what he did not intromit with; seeing albeit *suo periculo* he did intromit with some things for which he was countable, yet having no legal title by which he could legally intromit, or call and convene debtors and havers of the defunct's goods, he ought not to be pursued for what he did not meddle with, and far less ought to be pursued for the interest. It was answered, That the pro-tutor having meddled *eo nomine*, it ought to be imputed to himself that he had not a lawful title as tutor, who without doubt might have procured a tutory dative, which could not have been denied him; at least if it had, another would have obtained the same, and been forced to find caution: And therefore, seeing he *immiscuit se* as tutor, he must be liable as if he had been tutor nominated, or tutor in law, or tutor dative; in either of which cases he would have been countable for the whole estate and interest, and for *omissa* as well as *commissa*.

The Lords, before answer, ordained the pursuer to produce all the papers subscribed by the pro-tutor which he would make use of to prove the pro-tutory, with a full charge of the *commissa et omissa* by himself or by the tutrix, or by the rest of the overseers; and then, after consideration of his and their carriage, they declared they would consider *in quantum* he should be liable, whether for his own *omissa* as well as *commissa*, and whether for the *omissa* and *commissa* of the rest also.—See No. 148. p. 16273.

Gilmour, No. 114. *p.* 84.

1664. *December* 7. ECCLES *against* ECCLES.

No. 142.
A tutor's oath not relevant to prove a condition or agreement with the defunct against the pupil.

In an action of a count and reckoning betwixt the two infants, it was alleged for the defender, That he being pursued upon his father's back-bond, obliging him to make count and payment of the means of umquhile Fergus Eccles, his brother, to Thomas Eccles, and umquhile Andrew Eccles, the pursuer's father. It was answered, Upon condition that Mr. Hugh, the defender's father, should have the third part to himself, the question was concerning the manner of probation. The pursuer alleged, It was only proveable *scripto*, he being a pupil and his father dead. The defender alleged, It was proveable by the tutor's oath, being so likely in itself, that Mr. Hugh being the third brother should have the third share, and that Thomas, the tutor, did accordingly allow him the