

1665. *January.*LYON *against* FARQUHAR.

No. 144.

Whether a
tutor may up-
lift principal
sums?

John Lyon of Inneresk, as tutor testamentar to James and Alexander Annans, charges Sir Robert Farquhar for payment of 3200 merks of principal owing to umquhile Mr. Thomas Annan by bond, payable to him, and, after his decease, to his two bairns; who suspends, upon this reason, that, by the testament wherein he is tutor nominated, he has only power to uplift the annual-rent; likeas, the principal sum is sufficiently secured by responsal cautioners, and (if need be) the suspender is willing to give further security, at the sight of the Lords. It was answered, That by the testament he is *simpliciter* nominated tutor; and though the after words of the testament give him power to uplift the annual-rent, yet it excludes him not from doing diligence, and to uplift the principal sum; and if he should do no diligence, he would be liable to all hazard; neither will the charger debate, whether the present security be sufficient or not; but it is sufficient that the tutor, being unquestionably responsal, desireth to have power of the money himself, to the behoof of the pupils, that when their necessity shall urge, either for putting them to callings, or otherwise, he may be readier to make it forthcoming, as becometh a faithful tutor.

The Lords sustained the charge for the principal sum.

Gilmour, No. 131. p. 95.

No. 145.

1665. *January.*BOYD *against* KINTORE.

In an action pursued at the instance of John Boyd, Bailie of Edinburgh, against Mr. William Kintore, the Lords found, That albeit a tutor be not countable, in law, for annual-rent of any annual-rent uplifted by the tutor, and resting unexpended at the time of the tutory, yet what annual-rents are resting by him at the expiry of the tutory, or for which he is countable, as not having done diligence for the same against the debtor, the tutor is obliged for annual-rent thereof continually after the time the pupil passes pupillarity.

Gilmour, No. 132. p. 96.

1665. *January 10.* WILLIAM REID *against* JOHN REID.

No. 146.

Exhibition of
a defunct's
writs at the
instance of his
heirs sustained,

William Reid pursues John Reid, as his tutor, to deliver all writs belonging to the pupil's father, or which were in his custody and possession *quovis modo*, introduced with by the tutor; who alleged, The pupil could have no interest in any writs but those which belonged to his father.

The Lords found, That the pupil had interest to call for exhibition and delivery of all writs that were in his father's possession *quovis modo*, and ordained the tutor to exhibit all, without prejudice to any party having interest to crave the delivery of these writs, if they belonged to them.

Stair, v. 1. p. 247.

No. 146.
not only for such as belonged to the defunct, but for such as were in his possession at his death.

1665. February 4.

BEG against BEG.

Thomas Beg in Edinburgh having a son of his first marriage, and providing his children of two subsequent marriages to his means, the son of the first marriage pursues his father for his mother's third, and craves annual-rent therefor, he being minor, and his father his tutor of law, and therefore liable, as other tutors, for annual-rent.

Which the Lords found relevant.

Stair, v. 1. p. 264.

No. 147.

1665. June 10.

SWINTOUN against NOTMAN.

Swintoun in his testament, having named his wife tutrix to his children, and Notman and others, overseers; his relict within a year was married, and so her tutory ended. Shortly after Notman, received from her a number of several tickets belonging to the defunct, and gave his receipt thereof, bearing that he had received them in his custody, and keeping. Thereafter, he uplifted the sums, contained in some of the tickets, and gave a discharge to the relict, and second husband, of some particulars, and consented with the pupil, to a discharge to a debtor, which expressly bore him to be tutor testamentary, and did intromit with the rents of some tenements, and disposed upon some sheep. Whereupon Swintoun, the pupil, pursues him as tutor or pro-tutor, not only for all he intromitted with, but for the annualrent thereof, and for all the rest of the defunct's means, which he ought to have intromitted with, and to have called the tutrix to an account therefore, and condescended upon the insight and plenishing of the defunct's house, the goods in his shop, he being a merchant, the debts in his account books, and those due by his tickets, not only received by Notman, but by others, and for the remainder of his sheep, and other moveables, and for the rest of his rents, not uplifted by Notman. It was alleged for Notman; *1mo*, That that member of the libel was not relevant, whereby he was pursued, not only for that he intromitted with, but what he omitted, because a pro-tutor is not obliged as far as a tutor for the pupil's whole means; but this far only, that whatsoever he intromits with, as to that he is obliged as a tutor, to employ it, and preserved it, and so is liable for annual-rent therefore, and in that he differs from another *negotiorum gestor*, who is not liable for annualrent, but he is not liable for other particulars of others kinds, that he meddled not with; as albeit he had meddled with the tickets, yet that

No. 148.
Protutors are liable as tutors.