No. 160. same to have been so *ab initio*, unless it were positively proved, that the money, when lent, was the father's; and found, that the father's assignation, as lawful administrator, could not exclude the son; but that point, whether the debtor's paying to the father's assignee, during the son's pupillarity or minority, was neither positively alleged by the parties, nor considered by the Lords.

Stair, v. 1. p. 494.

1668. *January* 11. GRANT *against* GRANT.

No. 161.

A tutor is not liable for the value of services of the pupil's tenants, by harrowing, plowing, shearing, &c. though he receive these services in kind, because he could not force the tenants to pay the price for the same.

Stair.

*** This case is No. 313. p. 12172. *voce* PROCESS.

1669. *July* 22.
NAPIER, and DR. BALFOUR, her Husband, *against* MR. WOOD.

No. 162.

Wood being pursued, as heir to his father, who was one of the tutors to the Doctor's wife, for count and reckoning, there were produced, for instructing the charge, two confirmed testaments, wherein the defender's father was tutor nominated. It was alleged, That the testaments could not instruct the charge, because the inventory was not given up by the tutors, but by the relict; and therefore the bonds themselves ought to be produced for instructing the debts. The Lords notwithstanding found the testaments sufficient to instruct the charge, seeing the tutor not only was nominated in the confirmed testament, but did administrate, and therefore he himself was obliged to make forthcoming the bonds contained in the inventory.

Gosford MS. p. 75.

1669. *July*. SUTTIES *against* ———.

No. 163.
In what manner the tutor is to be chargeable with annual-rents.

In the action *tutelæ*, Sutties *contra* the heirs of the deceased tutor, who had died *durante tutela*, the Lords found the defenders liable for annual-rent of house and land-rents, consisting in money from the next term (viz. half a year) after the terms of payment. But if the rents were victual, they allowed the tutor a whole year to uplift, and employ the same on annual-rent, or do diligence therefor; and that he was obliged to have uplifted and employed, or done diligence in the respective times mentioned. 2*do*, But it was found, that the tutor was not bound

to uplift annual-rents, although he had occasion to expend on the minor's affairs for paying debts, which he did out of land-rents or principal sums; and that the tutor was not liable to employ annual-rents, though actually uplifted, whether they were current annual-rents within the tutory, or due in arrears before the pupil's predecessor's death, although all the minor's estate left should be but by-gone annual-rents; and that he might expend the land-rents, though he had annual-rents lying by him. *Item*, Found the pursuers obliged to allow of what annual-rent was in the debtor's hands, they being solvent. But here the pursuers did not examine things strictly, most points being decided of consent. *Item*, The Lords are in use to find, that tutors and their heirs are liable for annual-rent of annual-rent, after expiring of their office of tutory, seeing they should have had all in readiness. But here the tutor died before the minor's pupillarity expired; and here the defenders did not oppose. And in the action Kintore *contra* ,

No. 163.

the Lords found this last point, which was debated contentiously *in præsentia;* and if the tutor died *pendente tutela*, that his heir was not liable for any annual-rents remaining in responsal debtor's hands, seeing the debtor neither ought nor should have lifted the same *durante tutela;* although he ought and should have them ready lifted, if he had lived to the expiring of the tutory. And as to the annual-rents actually uplifted, and not expended by the tutor, who died *durante tutela*, the tutor's heir was only found liable for annual-rent thereof after the minor's tutory expired, and not *a tempore mortis testatoris;* which was carried by one vote, upon this reason, that as the heir's father might have kept them by him all the time of the tutory, the heir should not be in a worse case, and the next tutors may pursue for them at any time; and the pursuit here was not till the minor was *pubes;* but found, *in quantum* the tutor or his heir is *lucratus* by them, that they should be liable.

Harcarse, No. 13. *p.* 295.

1669. *December* 4.

RIDDELL and JOHNSTON *against* RIDDELL of Hayning.

No. 164.

Johnston of Powdoun, younger, being tutor dative to Riddell, his sister's son, did pursue Hayning for payment of 4000 merks due to his pupil. It was alleged for the defender, That he was served tutor of law, at least had raised a brieve of tutory, being nearest agnate, within year and day of his brother's decease, and was thereafter served; so that he being now willing to retour the service, and find caution, he ought to be preferred to the tutor dative; for which he alleged a practick, in June, 1629. The Lords notwithstanding preferred the tutor dative, and found the practick did not meet, seeing Hayning, as tutor of law, had never administrated by the space of four years, being himself debtor to the pupil, whereas the practick alleged the tutor of law was served within year and day, and had constantly administrated the pupil's affairs, which was the reason that the Lords did admit him to find caution, albeit there was a gift of tutory obtained.

Gosford MS. p. 85.