

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* ,

the Lords found this last point, which was debated contentiously *in presentia*; 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.

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.

No. 164.

*Gosford MS. p. 85.*