No. 167. he is not liable for by-gones; the only remedy that we have, being, that if a tutor nominate *cessaverit per annum et diem*, there is place for a tutor-dative; and this decision the Lords did consider in general without any speciality in this case, and declared that thereafter they would adhere thereto.

Gosford MS. p. 136.

1671. *February* 21. JOHN ARMOUR *against* JAMES LANDS.

No. 168.
A tack let by a tutor, until a sum lent the tutor should be paid, was sustained even after expiry of the tutory.

A bond granted by a tutor is not good against the pupil, unless the creditor prove it *in rem versum*.

John Armour pursues his tenants of some tenements in Edinburgh, for mails and duties. Compearance is made for James Lands, who produces a bond granted by umquhile George Armour, bearing, that George Armour, as tutor testamentar to John Armour, had borrowed 500 merks from James Lands, and obliges him, his heirs, executors, and assignees, to repay the same, and thereby sets some of the said tenements to James Lands, ay and while he be satisfied of the 500 merks, and thereupon alleges he must be preferred to the mails and duties till he be paid. It was answered, this bond and tack was not sufficient, in respect he does not bind himself as tutor, nor the pupil, but his own executor and assignees, and so it must be the tutor's own debt; *2dly*, This debt cannot burden the pupil simply upon the assertion of the tutor, but the creditor ought to have seen the sum applied to the pupil's use, and therefore must yet allege *in rem versum*; otherwise, if the naked assertion of tutors may burden the pupils when they borrow their name, it is a patent way to destroy all pupils, tutors being oftentimes insolvent; *3dly*, The tutor could not set a tack of the pupil's lands longer than he had interest as tutor, *ita est*, the tutory is ceased by the tutor's death.

The Lords found, that this creditor behoved to instruct the sum applied to the pupil's behoof; which being proved, they sustained the tack.

Stair, v. 1. *p.* 725.

Gosford reports this case:

In a pursuit for mails and duties at Armour's instance, compearance was made for James Lands, who, for instructing his interest, produced a bond granted to him by George Armour, tutor to the said John, for the sum of 500 merks, bearing a tack of a tenement of land belonging to John his pupil, ay and while he should be paid; and thereupon alleged, that he ought to be preferred, because it being in the power of tutors to set their pupils' lands, the tacksman had good right thereto, seeing the tutors are obliged in law to count for the rents thereof, for which they ought to find caution, but that will not prejudge the tacksman of the benefit of his tack, *etiam functa tutela*, the tack being granted for sums of money which the tutor might have employed for the pupil's behoof. It was answered for the minor, that the tutor had no power to set tacks for security of his own behoof, and therefore of necessity the tacksman ought to instruct, that the

sum lent to the tutor was employed for the pupil's behoof. The Lords did prefer the pupil, and found that a tack set by the tutor could not endure longer than his own life, or expiring of his office, unless it were for a cause applied to the pupil's behoof, and that the tutor being obliged was not relieved thereof. No. 168.

Gosford MS. p. 158.

1671. *July* 19. SHARP *against* CRICHTON.

The Lords were of opinion, that a tutor could not warrantably make a sum that was heritable before his tutory, moveable, *ad hunc effectum*, to empower his pupil to testate thereon, in prejudice of his heir; but they did not think but a tutor might have rendered heritable a sum that was moveable before his office, though thereby the pupil would have been incapable to testate thereon. No. 169.

Harcarse, No. 14. p. 296.

1671. *November* 18. CASS *against* ELEIS.

A pro-curator is liable as if he were curator, though there be other curators authorised, and that not only for his intromissions, but his omissions, from the time he begins to act as curator. No. 170.

Stair.

*** This case is No. 42. p. 3504. *voce* DILIGENCE.

1672. *January* 3. CASS *against* ELLIES.

Found that a tutor intromitting with coal-rent, where there is quotidian *obventu*, in the beginning of that year wherein the minor becomes major, is not obliged to continue his intromission a day after the majority, though it happen between legal terms. No. 171.

Harcarse, p. 296.

1672. *January* 3. A *against* MARQUIS of HUNTLY.

A tenant of the Marquis of Huntly being pursued to remove by him and his curators, excepted upon a tack set by my Lord Middletoun, as tutor to the Marquis. No. 172.