No. 247. could get from either, and seek what he wants off the other; for a minor getting, after majority, decree for his relief of cautionry, was not excluded from the benefit of reducing his bond upon minority; February 20, 1668, Farquhar *contra* Gordon, No. 65. p. 5685.; and the homologating one article doth not infer the homologation of another article in the same writ; November 22, 1662, Primrose *contra* Dun, No. 85. p. 5702.

The Lords sustained the defence to exonerate the curators only as to what Enterkin actually intromitted with.

Forbes, p. 204.

1708. *December* 31.

MRS. GRIZEL BRUCE, Lady Riddoch, *against* HUGH FORSYTH of Garval.

No. 248.
A tutor found liable to account as such to the minor for rents that were no part of the *patrimonium pupillare*, in respect these had been uplifted and discharged by him *tutorio nomine*. But the minor being nearest of kin to the person to whom they belonged, was ordained to establish a title in her person as executrix to him, that she might, upon payment, discharge effectually the tutor's representatives.

James Alexander, in his daughter's contract of marriage with William Bruce, brother to the Laird of Auchinbowie, "disponed his lands of Riddoch in favours of the said William Bruce and Janet Alexander in conjunct fee and life-rent, and to the heirs of the marriage in fee, reserving to the said James Alexander, the disponer, and Grizel Inglis, his spouse, during all the days of their life-time, two chalders of victual allocated upon a particular part of the said lands." William Bruce died before James Alexander and Grizel Inglis, leaving James Forsyth of Garval tutor-testamentary to Grizel Bruce, his daughter; who possessed and uplifted as tutor the rent of the whole lands, including the reserved two chalders of victual, for several years. After expiring of the tutory, Mrs. Grizel and her curatrix pursued Hugh Forsyth of Garval, as representing the said James Forsyth, the pursuer's sole tutor, to count and reckon; in which process, she charged him with the two chalders of victual reserved to the grandfather and grandmother, for so many years as they were uplifted by James Forsyth *tutorio nomine*.

Answered for the defender: He cannot be charged to count to the pursuer for the rent of the life-rented lands, which were no part of the *patrimonium pupillare*, but he is liable in repetition for the same to the representatives of the pursuer's grandfather, who can only exonerate him effectually; neither doth it alter the case, that the pursuer represents her grandfather, seeing the defender can only be liable to count to her, as executor to the grandfather, for the simple rents, without interest; whereas, in a count and reckoning with her as a pupil, he would be liable also for annual-rent of these rents.

Replied for the pursuer: The tutor having uplifted the reserved rents *tutorio nomine*, it is not the defender's business to dispute the pupil's right to the same; for, if tutors were allowed to free themselves from this way of counting for the pupil's rents, because the pupil had no right thereto, it were of dangerous consequence, and might induce tutors to propale the secrets and latent defects of their pupils' rights, in order to free themselves from a count and reckoning.

The Lords found, That the defender must count as tutor to the minor for the reserved two chalders of victual uplifted and discharged by James Forsyth *tutorio nomine*; but, for the defender's further security, ordained the pursuer to establish a title in her person as executrix to the grandfather, that thereby she may discharge the defender, upon payment. No. 248.

Forbes, p. 294.

1709. *June* 11. BRUCE *against* FORSYTH.

No. 249.

No allowance given to a tutor for incidental personal charges in the pupil's affairs not particularly instructed, in respect inventories were not given up, in terms of the act of Parliament 1672; although the tutor had done the equivalent, by signing an inventory of the pupil's whole estate, writs, and evidents, in presence of the nearest relatives on the father's and mother's side, and giving up the said inventory to be kept by them as a charge against him.

Found, That the pupil must give the tutor allowance for cess, teinds, and feu-duty, upon procuring declarations from the collectors of the cess, and the chamberlains of the titulars and superior, that such cess, teind, and feu-duties were paid, and finding caution to relieve the minor thereof, although the particular receipts were not produced.

Forbes.

*** This case is No. 49. p. 3512. *voce* DILIGENCE.

1710. *February* 8.

WILLIAM RANKINE, *alias* LITTLE of Libertoun, *against* LEWIS JOHNSTON and HENDERSON.

No. 250.
How far tutors and curators ought to be liable for omissions.

William Rankine, pursues Lewis Johnston and Henderson, as his tutors-testamentary, to count and reckon for their administration; and he charging them for not doing diligence against his debtors and tenants, they alleged, by the nomination they are made only liable to count for their actual intromissions, and not for diligence and omissions, and so that quality and restriction must be the only rule of counting. Answered, That clause is against the very essence and nature of a tutory, as it stood established by law preceding the act of Parliament 1696, where parents are allowed to dispense with that exactness, to encourage tutors to accept; but prior to that law there was no such allowance. The law deferred so much to the choice of parents, as to relax those nominated by them from the oath *de fideli* or finding caution, but never allowed them that they should not be answerable for such diligence, as a prudent man uses in his own affairs; and if any