1670. *February 5.*

TUTOR of COLZEAN *against* The NEAREST of KIN of the PUPIL.

No. 165.
Extent of discretionary powers of a tutor to allow abatement of rent.

The tutor of Colzean having cited the nearest of kin of his pupil, to hear and see it found and declared, that the pupil's lands were set too high, and could not be kept at these rates, and that the tenants were in arrear before his tutory in great sums, which, if he should exact, would cast the land waste; and that it was for the good of the pupil, to set the land at lower rates, which it might be able to pay, and to quit so much of the arrears, as the tenants might pay the rest, and be able to continue and possess;

There being no compearance, the Lords gave commission to certain gentlemen in the country to examine the rate of the land, and the conditions of the tenants, who have reported several of the rooms to be too high set, and what ought to be given down, and what behoved to be quit to each tenant, that was deep in arrear, to enable him to pay the rest, and labour the ground.

The Lords approved the report, with these qualifications, *first*, That the tutor should discharge nothing simply, but only till the pupillarity was past, that himself and curators might then proceed as they saw cause, and that the tutor, before any abatement of the rooms, should cause make intimation at the market-cross of the jurisdiction, and at the parish church, that such lands was to be set at such a place, such a day, and whoever bid most for them, being sufficient tenants, should have them, and that at the said day, if a better rate was not got, the tutor might then, or thereafter, set at the rates contained in the commission.

Stair, v. 1. *p.* 668.

1670. *February* 24. APPLEGIRTH *against* LOCHERBY.

No. 166.

A discharge granted by a tutor of all preceding duties, but the receipt bearing only one year's duty, was found to liberate from the pupil, convening the party near 30 years thereafter, reserving only action against the tutor.

Gosford. Stair.

*** This case is No. 46. p. 13466. *voce* REDEMPTION.

1670. *July* 19. MARGARET SCRIMZEOUR *against* ALEXANDER WEDDERBURN of Kingennie.

No. 167.
A tutor testamentary de-

Umquhile Major William Scrimzeour having nominated Alexander Wedderburn of Kingennie, and two others to be tutors to his daughter; she now pursues

a tutor account, wherein this question arose, and was reported to the Lords by the auditors, viz. the defunct having died in September 1650, the tutor did not accept the nomination, or begin to act till the end of the year 1653, in which time the tutor alleged that a part of the pupil's means perished, and became insolvent; and craved to be liberated thereof, on that ground in his discharge. It was alleged for the pupil, that the tutor must be liable from the time that he knew that he was nominated tutor, for albeit he might have abstained absolutely, yet once accepting the tutory by nomination of a testament, wherein a legacy was left to himself, he must count as if he had accepted it at the first, for which there were adduced many citations of law. It was answered for the tutor, that in the Roman law, tutors were obliged to accept so soon as they knew their nomination, unless they could free themselves by the excuses allowed in that law; but with us it is absolutely free to accept or refuse without any excuse; and it is only the acceptance that obliges, and so can have no effect *ad præterita* as to that which perished before acceptance; especially in this case, the defender being but one of three tutors nominated, he ought to have had a time to endeavour with the rest to accept, and his lying out was in such a time, in which judicatures did cease by war and troubles. The English, after the battle of Dunbar in September 1659, being possessed of Edinburgh, and the public records, there was no Session kept till the year 1652 or 1653.

No. 167. laying for some time to accept, was not found liable for what perished during non-acceptance.

The Lords found the tutor was not liable for any thing that perished before his acceptance.

Stair, *v.* 1. *p.* 698.

*** Gosford reports this case:

In an action of count and reckoning pursued at the said Margaret's instance against Kingennie as her tutor, wherein he was charged for omission in not pursuing several debtors. It was alleged for the defender, that he being but one of three tutors nominated, whereof one did altogether refuse, and another delayed to near three years after the testator's death, at which time the defender did likewise accept, that therefore he could only be liable for omission from the date of his acceptation, especially seeing the testator was killed at Dunbar, after which judicatories were not established for more than two years. It was replied, that it is clear by the civil law, that tutors are liable from the time of their nomination, at least from the time that it might come to their knowledge, as is clear, *D. L. 5.* and *L.* 8. *De Administratione et periculo tutorum.* The Lords, notwithstanding of the reply, did sustain the defence, and found that there was great difference betwixt our law and the civil law as to the acceptation of tutors, for by their law *officium tutoris* was *necessarium et publicum*, and none could refuse it but upon a just excuse alleged and found so by the Judge; whereas, by our law, the nomination of a tutor does not oblige to accept; so that it being voluntary, until he declares himself under his hand, that he accepts, or that *gerit se pro tutore*

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