

ANNUALRENT.

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(DUE BY TUTORS AND CURATORS.)

hands; he could not be liable for the annualrent of that annualrent, after the expiring of the tutory, seeing the curators might immediately uplift and employ the same; and the tutor was not obliged to uplift, seeing the pupil was not thereby prejudged, who could have gotten no annualrent if they had been uplifted. *3tio*, They found, that a tutor dying within the years of the tutory, and uplifting; his heirs or executors were only liable to pay annualrent for those annualrents uplifted after the expiring of the years of pupillarity of the minor, and not after the death of the tutor; notwithstanding it was agreed, that the reason of tutors not paying annualrent during the tutory did cease in this case, viz. The taking pains and administrating without any other recompence; for they thought it was hard to make the heirs liable farther than their predecessor; and that the heirs of the tutor being liable to the surviving or succeeding tutors, immediately to make payment of their intromission; if they should do no diligence, they ought not to pay annualrents for annualrents intromitted with, *usura usurarum* not being favourable in law, especially against the heir of a tutor who did faithfully administrate during his lifetime: Yet the last case seems to have its own difficulties, and to be very disputable *in utramque partem*; seeing it may be alleged, that *morte tutoris finitur tutela, et nummi pupillares non debent esse otiosi*: But all being considered; the Lords found and decided *ut supra*.

Gosford, MS. No 161. p. 63.

No 47.

1625. July 1.

GOLDMAN against GOLDMAN.

GOLDMAN, daughter to umquhile William Goldman in Dundee, and her curators, pursue Charles Goldman, who was her tutor, for payment to her of the sum of 1400 merks; which sum Margaret Jack, good-dame to the pursuer, by her bond, wherein this same defender was bound as cautioner to the minor, for the said Margaret, was obliged to pay to the minor, after the decease of the said Margaret; and in respect the said defender paid not the principal sum to the pursuer, after the decease of the principal party obliged in the bond, the defender being cautioner for payment thereof, as said is; and being her tutor; who ought to have done diligence to seek her sums from any of her debtors; and of the law, who is obliged to have put the same to profit, *cum nummi pupillares non debeant esse otiosi*; and consequently, who was far more obliged, being her tutor, and her debtor, as cautioner foresaid; and therefore she pursues the said defender for payment of the said principal sum, together with the yearly annualrent thereof since the time of the defunct's decease, who was principal party obliged; which annuals were acclaimed from the defender for his cessation to pay the sum at the term appointed by the bond, he being her tutor, who of the law ought to have

No 48.

A tutor, who was liable, as cautioner, for a sum due to his pupil, was found accountable for annualrent, from the term of payment, in respect of his negligence in not making due payment; although, by the principal's insolvency, he could not have had relief; but it was found, that, from the expiry of the

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tutory, till he
was charged
by the minor,
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employed the money to the use of his pupil; and which not being done, *propter cessationem et negligentiam tenetur ad usuras*.—This action was sustained by the LORDS for the profits, since the term of payment, against the defender, *propter cessationem*, and for his negligence, to pay the principal sum at the term of payment in the bond; albeit the defender *alleged*, That the bond bore no annual, and that he was but a cautioner, who had probable cause not to pay the principal sum, while he was interpellated or charged, far less ought he to be commanded to pay annual; and how soon he was charged, he obeyed, and made present payment of the principal, which ought to relieve him of annuals, especially seeing he was destitute of all relief of the principal, for whom he had paid; seeing the woman for whom he was cautioner, by her testament given up by herself, was not answerable to relieve him, for her debt was much more than her free goods; and albeit he was her tutor, yet it was excusable to him, not to pay annual for that which he never got, but which he behoved to pay out of his own gear, without relief, especially where the bond remained ever with the mother to this pursuer, and her husband, who yet hath the same, and might have interpellated him thereby in due time, so that it cannot be counted his negligence. This allegation was repelled; and the defender being tutor to the minor, and she having no other tutor, was found subject in payment of all the annuals, since the term of the bond, *ob solam cessationem*, to pay at the said term the principal sum, albeit he was only cautioner, and had no relief for his payment of the principal sum, and albeit he was never interpellated.—But the LORDS found, after the years of the tutory expired, he was not subject in any annual to the minor, but from the time the defender was charged by the pursuer and her curators, and not for any terms preceding the charge, after she past her tutory. *Debentur usuræ ex constitutione Severi et Antonini in Semisses, quando tutor pecunias minoris in suos usus converterit, l. 1. Cod. de usuris pupil. vel consuetudinarias si otiosas habuit. Apud nos indistincte consuetudinarias tantum semper sunt prestandæ. Verum jure civili etiam finito officio donec rationes tutor reddiderit. Quod est decisum 24th Feb. 1627, Guthrie contra Guthrie, No 46.*

A& Nicolson & Aiton.

Alt. Hope & Russel.

Clerk, Gibson.

Fol. Dic. v. 1. p. 40. Durie, p. 168.