

(DUE BY TUTORS AND CURATORS)

minor, and so not obliged thereto.—THE LORDS found, That she was no less obliged in payment of annualrent than her father, if he had been alive.

Spottiswood, (TUTORS AND CURATORS.) p. 344.

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1669. July 9.

MR WILLIAM KINTOR *against* The HEIRS and SUCCESSORS of Logan of Coat-field.

LOGAN of Coat-field having become cautioner for the tutor of Burncastle, and inhibition used upon the act of caution, Mr William Kintor having right by progress from Burncastle, obtained decret against the Representatives of the tutor, and of Coat-field the cautioner, for payment of the annualrent of 10,000 pounds, due to the pupil by the Marquis of Hamilton, and the like sum due by the Earl of Buccleugh, in respect that the tutor was obliged to have uplifted these annualrents, and employed them for annualrent; and thereupon pursues a reduction of the rights granted by the tutor's cautioner, as being granted after the cautioner was inhibited. These acquirers raise a reduction of Mr William's decret, and repeat the reasons by way of defence, *alleging*, That the tutor nor his cautioner were not obliged for the annualrents due by the Marquis of Hamilton and Earl of Buccleugh, because they were in responfial hands, and the pupil had no damage; for it was free for the tutor to uplift the annualrents of pupils' money, when secure, at any time during the pupilarity; but here they offer to prove the tutor died *durante tutela*, and so was not liable when he died, to uplift these secure annualrents, or to have employed them.—The pursuer *answered*, That the Lords had already found, at the same pursuer's instance against John Boyd, No 40.* that the tutor was liable for annualrent, not only *pro intromissis*, but *pro omisissis*, and for the annualrent of the pupil's annuals *a finita tutela*, which is finished, either by ending the pupilarity, or the death or removal of the tutor.—It was *answered*, That the Lords' interlocutor was only in the case that the tutory had been finished in the ordinary way, by the age of the pupil; for that way of ending thereof, could only have been foreknown by the tutor, that within the same he might lift the pupil's annuals, and give them out on annualrent; but he could not foresee his own death, but might justly think he had time before the expiring of his tutory, to lift and employ; and so the tutor not having failed in his duty, his cautioner is free.—It was *answered, imo*, That by the Lords' daily practice, tutors are liable for the annualrents of rents, of and within a year after the rents are due; and there being so much parity of reason in annualrents, it cannot be thought just that the tutor was not obliged to lift them till the end of his tutory; for albeit he might have kept them in his hands unemployed, and only to leave them employed at the ish of his tutory, yet he was obliged to uplift them; and if by any

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A tutor not bound to uplift the annualrent from the debtors, if responfial, more than once during the tutory. If he died before the end of his charge, he was not liable. If he did uplift it, his heir is liable, not from his death, but from the end of the pupilarity.

* See Note under page 504.

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accident, as being prevented by death, he did not employ them, that accident should be on his peril, not the innocent pupil's. *2do*, If need be, the pursuer offers to prove, the annualrents were uplifted by the tutor; and so those that represent him, and his cautioners, are liable for the annualrent therefor, at least from the death of the tutor.

THE LORDS found, That the tutor was neither obliged to uplift, nor give out on annual, the annualrents of his pupil, if the debtors were responsal, but only once betwixt and the end of the pupilarity; and if he died betwixt and the end of the tutory, he was free both of the annual and annualrents thereof; but if he did actually uplift the annualrents, they found, That it was sufficient to employ them any time before the tutory ended; and found, That his heir was liable for annualrent, not from the tutor's death, but from the end of the pupilarity; and that he could be no farther liable than the tutuor, if he had lived, in respect that subsequent tutors were obliged to lift these annualrents from the former tutor's heirs, and employ them.

This was stopped to be farther heard.

Fol. Dic. v. I. p. 40. Stair, v. I. p. 632.

* * Gosford reports the same case thus :

THE said Mr William having recovered decret against the heir of the cautioners for the tutor to Logan of Burnside, against whom inhibition was served, pursuing a reduction of the disposition of the lands made by the curator, *ex capite inhibitionis*: Blackatter, and others, to whom the lands were disponded, did likewise intent a reduction of the decret, gotten against the tutor and his cautioner; upon this reason, That it was gotten by collusion, it being against law, so far as they were decerned to pay annualrent, for the annualrents of principal sums due by the Marquis of Hamilton and Earl of Buccleugh, which were never uplifted by the tutor; but, on the contrary, he died *durante tutela*, and they were thereafter uplifted by the pupil himself, and those having right from him.— This case was much argued amongst the LORDS, as being of general concernment; and at last they did find and decide, That tutors uplifting annualrents of principal sums, they are only liable to pay annualrent therefor, as being a principal sum, after the expiring of the years of pupillarity, after which time they found them liable to pay annualrent; and herein they did find a clear difference betwixt tutors' intromission with the annualrent of principal sums due upon bond, and with the rents of lands: For, as to these they found tutors are liable to employ the rents of lands, within a term or a year at farthest, after they have made in money and sold; but, for the annualrent of money, they found them only liable after the expiring of the tutory, they having no benefit for their pains in discharging their office. *2do*, THE LORDS found, That a tutor not intromitting during the tutory, but leaving annualrents unuplifted in a responsal debtor's

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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 administering 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 administer 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.

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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

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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