the diſcharge; wherein the defender *alleging*, That he could not be conveened *in ſolidum* for the whole, becauſe the purſuer had two tutors given conjunctly, likeas the acquittances were ſubſcried by them both; and therefore he *alleged* he could only be liable for his own part, and the other tutor ſhould be ſubject in the other half, eſpecially ſeeing he was the purſuer's own uncle.——The Lords found, That the purſuer might purſue any of the tutors as he pleaſed *in ſolidum* for the whole debt received; for any of the tutor's omiſſion would make the tutor liable for all, far more their intromiſſion, without neceſſity of diviſion: And in reſpect the defender, the time of his father, (who was tutor,) his intromiſſion, was only a pupil of two year's old, and that his father died immediately thereafter, and that his father had not the exerciſe of the office of tutory, but one year only, and that he could not be acquainted that his father was tutor, nor what deed he had done as tutor, and that there was no purſuit moved againſt him all this time theſe 25 years bypaſt, but only within theſe two or three years laſt bypaſt; therefore the Lords found, That he was not ſubject to the purſuer in any annualrent, for the ſum received by his father as tutor, as ſaid is, except only for the terms and ſpace ſince he was cited in this action, viz. By the ſpace of two or three year, but for no other term or year preceding; and therefore aſſoilzied him from all preceding terms. And ſo this privilege of minority, or *privilegiatus*, was found conſiderable againſt another minor; albeit this cauſe has no affinity with privileged cauſes, tending only (as is requiſite in all law) that minor's money, received actually by their tutors, ſhould not be kept from the minors idly; and that the miſchance of the tutor's death ought not to prejudge him of the ordinary benefit in law of tutor compts; but the ceſſation moved the Lords to aſſoilzie from the bygone annualrents. (*See Solidum et pro rata.*)

No 45.
The heir, an infant at the time, found liable only from the time of intenting action againſt him, which was not till after twenty-five years.

Act. ——. Alt. *Rollock.* Clerk, *Gibſon.*

Fol. Dic. v. 1. *p.* 40. *Durie, p.* 705.

1627. *February* 24. Guthry *againſt* Guthry.

No 46.
A tutor uplifted his pupil's money, bearing intereſt, and gave his own bond. His heir liable, not from intenting action, as in the above caſe, but *inſtanter*.

Francis Guthry purſued Margaret Guthry, as heir to her father, who was one of the two curators to the purſuer, for payment of the ſum of 2800 merks, which pertained to the purſuer, and was lying upon land, and was redeemed by the debtor; and after the redemption, the ſum was taken up, and received by the two curators, who, and each one of them, bound and obliged them conjunctly and ſeverally, at the time of the uplifting thereof, to make the ſame forthcoming to the purſuer, their minor; and therefore the purſuer called this defender, as heir to her father, who was one of the ſaids two curators, to repay to him the ſaid principal ſum, with the yearly profits ſinceſyne. This purſuit was ſuſ-

No 46.

tained againſt the defender as heir, repreſenting only her father, one of the ſaids curators, *in ſolidum* for the whole ſum; and it was found, That it ought not to divide betwixt the two curators, in reſpect that by the tenor of the bond, they had both obliged themſelves, conjunctly and ſeverally, as ſaid is; and alſo this action was ſuſtained againſt her, for the whole profit, ſince the uplifting thereof, albeit ſhe *alleged*, That ſhe was minor, alſo that ſhe could not be ſubject to pay annualrent, becauſe by the deceaſe of her father, who was curator, and ſo by the ceaſing and expiring of his office, there was no more obligation of the law, whereby the defender could be holden to pay profit; for, by his deceaſe, the purſuer had proper action to purſue *hoc ipſo momento* after his deceaſe, for payment of the principal ſum, but had no action for profits, eſpecially againſt her who was a minor, for *poſt mortem curatoris curſus uſurarum ſiſtitur:* Which allegeance was repelled, and the minor, heir to the curator, found ſubject to pay the profits, ſicklike as her father would have been, if he had been living, and if he had retained the ſum, after the years of his office was expired; for his death, or the retaining of the ſum after the purſuer's majority, could not make the ſum to reſt unprofitable to the purſuer, the ſame being once ſpecially lying upon land, and after redemption uplifted by him, and the purſuer's majority, and not ſeeking that principal ſum, was found no cauſe to make his action, for the profits to preſcribe, or become extinct. (See *Solidum et pro rata.*)

Act. ——. Alt. *Heriot.* Clerk, *Hay.*

In what manner curators liable for annualrent.

1627. *March* 1. In the ſame action The Lords found, That curators were not obliged for the profit of the minor's money, which they had received after a term, by the ſpace of a month, or two, or three, the money being conſigned by the debtor at the term, and by dependence of proceſs, the ſame not being given up while the ſpace of two or three months thereafter; ſo that the Lords found, That the curator could not be countable for that term's annual, ſubſequent to the conſignation, not being uplifted, as ſaid is; except it could be verified that the curator employed the money, and received profit therefor, the ſame term.

Partibus ut ſupra.

Fol. Dic. v. 1. *p.* 40. *Durie, p.* 281. 284.

*** The ſame caſe is thus reported by Spottiſwood:

Francis Guthry conveened Margaret Guthry, heir to umquhile Hercules Guthry, unto whom, (being then curator to the ſaid Francis,) there was delivered 2800 merks, for redemption of lands wadſet, belonging to the ſaid Francis, to make the ſaid ſum, with all the bygone annualrents, forthcoming to him.—*Excepted* by her: No annualrent, ſince the deceaſe of her father, becauſe ſhe is

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. No 46.

Spottiſwood, (Tutors and Curators.) *p.* 344.

1669. *July* 9.

Mr William Kintor *againſt* The Heirs and Successors of Logan of Coat-field.

No 47.
A tutor not bound to uplift the annualrent from the debtors, if reſponſal, 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 pupillarity.

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 decreet 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 decreet, 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 reſponſal 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 omiſſis*, 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*, 1*mo*, 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

* *See* Note under page 504.