No 48. tutor could be liable for omitting to do diligence against Grange's estate for this debt; and the plurality found him not liable, but all agreed that the dubiety of a pupil's right was no ground nor defence, whereon a tutor or curator could seek to be exonered from not having done diligence for trying to recover the same. *Fol. Dic. v. 1. p. 241. Fountainhall, v. 2. p. 144.*

1709. *June* 11.

Mrs Grissel Bruce Lady Riddoch *against* Hugh Forsyth of Garvel.

No 49.
A tutor was found liable for annualrents of the pupil's money unuplifted by him during his office, and not allowed to discharge himself with the annualrents, yet resting in the hands of responsible debtors; but the Lords ordained the pupil to furnish him with the bonds for procuring payment of these outstanding annualrents.

In the action of compt and reckoning for tutory intromissions mentioned *voce* Tutor and Pupil, at the instance of the Lady Riddoch against Garvel; the tutor was found liable for any annualrents of the pupil's money run on unuplifted by him during his office, and not allowed to discharge himself with the annualrents, as yet resting in the hands of responsal debtors; though he offered warrandice and caution that they are not uplifted; in respect law obligeth tutors to state their pupil's annualrents in a principal sum bearing annualrent once during their office; and warranting the same to be still resting, doth only found a second plea to the minor upon the tutor's warrandice. But the pursuer was ordained to furnish the defender with the bonds for procuring payment of these outstanding annualrents. And the defender was to have allowance for cess, teind, and feu-duty of these years, for which he holds compt for the rent of the land, upon procuring declarations from the collectors of the cess, the chamberlains of the titular of the teinds, and superior of the lands, that the cess, teind, and feu-duties of such years were paid, and finding caution to relieve the pursuer thereof, albeit the defender had not the particular receipts to produce. But he got no allowance for incident personal charges in the pupil's affairs, not particularly instructed; in respect inventories were not given up in the terms of the act of Parliament 1672. Albeit it was alleged that the tutor had done the equivalent, by signing an inventory of the pupil's whole estate, writs and evidents, in presence of her nearest relations on the father and mother's side, and giving up the said inventory to be kept by them, as a charge and check against him.

Fol. Dic. v. 1. p. 241. Forbes, p. 331.

1710. *December* 14. Smith *against* Smith.

No 50.
A father gave up, in the inventory of debts due to him, a sum promised by his wife's brother, over and

Mr John Smith of Brousterland, dispones his land-estate to William, his eldest son; and, having five children besides, he grants a bond of provision, whereby he distributes 13,000 merks among them, payable after his decease, conform to the proportions he divides among them; and then he adjects this clause, 'and in case any of my foresaid children die without heirs lawfully pro-

No 50.
above the tocher. In an action against the curator for suffering this debt to perish, no writ appearing for it except the inventory, the Lords assoilzied the defender.

'create of their own bodies, their portion is to be divided equally amongst the 'remanent children surviving.' Two of these five bairns die, John before his father, and Patrick after him, without being married; whereupon Euphan Smith, and Harry Wallace, in Cumnock, her husband, pursue William Smith, now of Brousterland, her brother, for payment, not only of the 2500 merks, as her own portion destinate to her, but likewise for her third part of her two brothers John and Patrick, their portions, accrescing to her by the foresaid clause, they having both deceased without heirs lawfully procreate of their own body; and insisting first for her share of John's provision, it was *alleged* for the heir, that *quoad* her own tocher *non facit vim*, he never refused payment; but for John's, he ought to be assoilzied, because the bond of provision expressly bore it was given him as a competency for his better living; and he deceasing before his father, had no more need of it, and became extinct, and could never transmit to his brother or sisters, especially he having predeceased the granter, whose death was the term of payment; and it cannot be in any better case than if it were a legacy; but *ita est* if the *legatarius* die before the testator, the legacy, both by the common law and ours, becomes void and null; and it is plain the sum was not due till the first term of Whitsunday or Martinmas after his father's death, this uncertain term *pro conditione habetur*, and never existing by his dying before that time, his portion extinguished, as has been oft found by the Lords, where bairns provisions are made payable at their age of 16 or 18, and they die before they arrive at that age, the provision becomes simply void, and is not so much as due when the year is come wherein they would have arrived at that age, if they had lived; 17th January 1665, Edgar *contra* Edgar, *voce* IMPLIED CONDITION; and 22d February 1677, Belchies, IBID. *Answered*, They opponed the clause of the bond as express as man's invention could make it, that the portion of the deceasing without heirs of his own body, shall divide among the survivors. Now I subsume, John died without heirs of his body, *ergo* his portion accresces; neither does the father distinguish whether he die before him or after; and it is known that the *vulgaris substitutio si hæres non erit*, comprehends also the other case *si hæres esse non potuerit, tam casum noluntatis quam impotentiæ*; and, though the term of payment be the father's death, yet that was *dies certus*; for, though the time and manner of his death was uncertain, yet that he behoved to die sometime was most certain. Whereas, in the decisions cited, the term of payment was utterly uncertain if ever they should arrive at their age of 16, so that in Brousterland's bond of provision to his children, the obligation immediately commenced, though not exigible till his death; *dies obligationis cesserat, licet non venerat dies solutionis*. THE LORDS found John's portion accresced to the surviving children, and so admitted Euphan to her share, and that the heir was liable in it; for, they thought the children substitute appeared by the father's will to be *personæ prædilectæ*, and he intended they should rather have the deceaser's portion than the heir.

No 50.

Then she insisted for a share of Patrick's portion, who outlived the father. *Alleged*, That Brousterland, his eldest brother, having bred him a surgeon, and furnished him with all necessaries in his journey to Darien, he, by his testament, made his eldest brother his universal legatar. *Answered*, They did not controvert the legacy, in so far as it was onerous *et in rem versum*; but *in quantum* gratuitous, the substitution being a fideicommiss, he could neither prejudge nor divert it out of the channel, the father's will being the sovereign rule, and who was a much more competent judge where his succession should land, than a minor could be; and so it was found, 31st January 1679, Drummond *contra* Drummond, *voce* FIAR ABSOLUTE, LIMITED, where a sister assigning her portion to a stranger, was found not to prejudge the clause of substitution annexed to her portion, which parents, in their donations, may clog as they see fit. And so Patrick could not convey his father's bounty to a hand where the father never designed it. *Replied*, Law does not require onerous adequate causes in children's disponing their portions; but it is enough if there were rational considerations moving the party thereto; and so it was found, that a parent might give a provision to a second wife, (though he died within the year), notwithstanding of a specific clause of conquest in his first contract, in favours of the children of that marriage, 16th June 1676, Mitchel *contra* the Heirs of Littlejohn, No 11. p. 3190. THE LORDS found Patrick might legate his portion for rational causes of his brother's educating him, &c. though they were not adequate.

Then she insisted, in the *third* place, against her curators, that her father gave up in the inventory of his debts 1000 merks promised him by Brown of Thornidykes, besides the tocher he got with his sister, and the curators had neglected to do any diligence for the same, but suffered it to perish. *Answered*, This was a very thin and slender omission, for they neither have bond nor decreet to constitute the debt; likeas, for twelve years, during which the marriage stood, Brousterland himself had not pursued it. The tutory lasted six years, and never a word of it; so, if he had cast out the minor's money on such a groundless claim, he might have been justly blamed; and Thornidykes always denied the promise when spoke to; and his circumstances are such as little was to be expected that way, though it had been referred to oath. THE LORDS assoilzied the curator from this article.

Fol. Dic. v. 1. *p.* 241. *Fountainhall, v.* 2. *p.* 606.