much of his pupil's rents in his hand as would satisfy the same; because, 1*mo*, The casualties gifted being *debitum fundi*, and not *fructuum*, intromitters with the rents are not properly liable, but the ground; as preferable annual-renters will have no action of repetition against intromitters with by-gone years rents, but only a poinding of the ground, which is restricted by law even against tenants, to the value of certain terms' rents; 2*do*, The defender's intromission was necessary, which his office obliged him to, and also to apply the same to the sustenance of his pupil, payment of his debts, and his other necessary exigencies; nor could the pursuer have repeted from the creditors, whom the defender paid, had these arrested, or done other diligence, according to the nature of their rights; and as little can she repete from the defender.

No. 256. taxward of the Crown, no further liable, after his office of tutory was expired, to the donatar of the taxward-duties of the said lands, than *in quantum* he had in his hands of the pupil's rents.

Answered for the pursuer: The taxward-duties being *debitum fundi*, affect all intromitters, as well as the ground. And as a master hath hypothec upon the fruits for the current year's rent, much more is this competent to the superior for his feu-duty, or other services, contained in the *reddendo* of his vassal's charter. Now, the pursuer insists only for the taxward-duties of the several years intromitted with by the defender, who cannot pretend to be free, except *in quantum intus habet* of the rents not disposed of for his pupil's use, seeing he, as tutor, could not be ignorant of the taxward-duties belonging to the Sovereign, which are preferable to all creditors, and *bona fide* dispose thereof to other uses.

The Lords found, That the Earl of Ruglen having intromitted as tutor to the Earl of Cassillis, is no further liable to the pursuer than for what of the pupil's rents was in his hands.

Forbes, *p.* 670.

1715. *February* 15.

VISCOUNT of PRIMROSE *against* The EARL of ROSEBERRY.

No. 257. Effect of the nomination of a tutor *sine quo non*.

The late Viscount of Primrose did nominate several friends to be tutors and curators to his son, with power to them, or the major part of those who should accept and be alive, (his Lady being always *sine qua non*), to exercise, &c. and in case of my Lady's marrying again, the Earl of Roseberry is appointed *sine quo non* in her place. Upon the present Viscount's passing the age of pupillarity, all the tutors declined to be curators, (which they are allowed to do by the act of Parliament 1696), except the Earl of Roseberry, and therefore the Viscount takes out an edict for choosing new curators; which coming in by way of advocation,

It was alleged for the Earl, That the case was now to be considered in the same way as if it had occurred in the question of the acceptation of the tutors; and by the nomination, if none had accepted but the Viscountess, who was tutrix *sine qua non*, the nomination would have held, since not only no *quorum* is named, (and so any one who accepted is fully empowered), but also all dubiety is removed by the words of the nomination, viz. " the foresaid persons, or such of them as shall

No. 257. accept;" which can have no other import, but the giving the power to any one who should accept, since *pluralitas diversos effectus respiciens, in singularitates resolvitur.* Thus, in law, "*si sine liberis decesserit,*" though a plural expression, yet is fully answered by one child.

Answered for the Viscount: That the alternative, "or the major part of the acceptors," does as really and effectually determine a *quorum* as if a particular number had been named; for thereby certainly it was the father's intention, that at least as many should accept, as there still might be a majority, for preventing any stop in the management; and this could not happen in any number under three, since no number under that contains a majority; so that here, indeed, the *quorum*, in some manner, is less ambulatory or indefinite, since it may be less or more, according to the number of the acceptors; but this is certain, and is plainly a demonstration, that the smallest *quorum* must still be the majority of the acceptors, and consequently cannot be under two, nor the acceptors less than three; so that here the case is the same as where curators are named, and a particular *quorum* expressed, and not so many acceptors as make up the *quorum;* in which case, the curatory becomes null; 25th January, 1672, Sir James Ramsay *contra* Maxwel, No. 178. p. 9042. Further, that the quality of *sine quo non* did of itself likewise show, that it was not intended that the tutory should subsist in that one person; for a *sine quo non* necessarily supposes, that there must be other tutors acting with a less power. *Lastly*, That there is a very reasonable distinction in this case betwixt *tutory* and *curatory;* for though it may be presumed the father's will *in dubio* to prefer any one of the tutors nominated to a tutor in law, yet in the case of curators, who are only to concur and act with the minor, law has considered him to have a sufficient judgment to make a fit choice.

The Lords found, That in the case which hath happened, the father's nomination hath failed, and that the Viscount is at liberty to choose his curators.

Act. *Tho. Kennedy.* Alt. *Boswel.* Clerk, *Mackenzie.*

Bruce, No. 77. p. 93.

1715. *June* 28. DUNCANSON *against* DUNCANSON.

No. 258. Found, That a curator might employ in trade his female minor's stock, by connecting her with another, who was a merchant holden and reputed of knowledge and reputation in that trade, and also a female; and that he was not answerable for the event.

A minor's stock, though small, cannot be diminished, for the minor's aliment, by the curator.

Bruce.

*** This case is No. 37. p. 8928. *voce* MINOR.