

No. 306.

could have reaped from the farm, without such a degree of personal industry and exertion on his part as he was not called to bestow on their affairs. And all the Judges seemed to be of opinion, that, in accounting for the profits, he would be entitled to an ample recompence for his labour and attention in cultivating the lands.

The Lords, after advising memorials, found, "That the defender was obliged to account to the pursuers for the profits arising from the farm in question during the two years which were not run of their father's lease, at the time of his death, and also during the remaining thirteen years of the first tack, and during the whole years of the second tack obtained by him."

A reclaiming petition was preferred for the defender, insisting, that he should only be liable for the surplus rents.

After advising this petition, which was followed with answers, the Lords adhered to their former interlocutor.

Lord Reporter, *Dunsinnan.*

Act. Lord Advocate, *Solicitor-General.*

Alt. Dean of Faculty.

Clerk, *Menzies.*

C.

*Fac. Coll. No. 76. p. 137.*

1791. June 1.

SUSANNA VERE *against* The EARL of HYNDFORD, and Others.

No. 307.

The consent of a tutor named *sine quo non* is necessary to every act of administration, though he cannot do any thing in opposition to the other tutors.

The late Mr. Vere of Stonebyres having an only son, made a nomination of tutors and curators to him, in the following terms :

"I appoint the said Susanna Vere, *alias* Ogilvie, my spouse, Thomas Carmichael, Esq. of Maulslie, (now Earl of Hyndford), John Hamilton, Esq. of Westburn, William Porteous, Esq. of Carmacoup, John Bannatyne, Esq. of Castlebank, and Robert Bell, clerk to the signet, to be tutors and curators to the said Daniel Vere, my only son, during the whole years of his pupillarity and minority: And I hereby appoint three, or the majority of the above-named persons accepting and surviving, to be a *quorum*; the said Susanna Vere, while a widow and in life, being always one, and *sine qua non*."

After Mr. Vere's death, the whole persons named as tutors undertook the office. A difference, however, soon occurred between them; and the authority of Mrs. Susanna Vere, the widow, who had been named *sine qua non*, being disputed, mutual actions of declarator were brought by the parties, for ascertaining their several powers. For the other tutors it was

Pleaded: After the death or incapacity of a tutor named *sine quo non*, it has been held, that the whole nomination must fall to the ground, the intention of the testator appearing to exclude the other tutors from acting, when the one in whom he placed his chief confidence is no longer in a situation to fulfil the duties of the office. But it does not from thence follow, that the tutor *sine quo non* must approve

of every act of administration. In this way, the nomination of the other tutors would become wholly useless. No. 307.

It is true, that the writers on our law lay it down, in general terms, that without the concurrence of the tutor *sine quo non*, no act is valid. But the mistake which this want of precision might occasion is obviated by Lord Kames, who observes, that “where a number of persons are named jointly to execute any office, though they all must concur, it follows not that they must all agree. If they be all present, the will of the party naming them is fulfilled, and the opinion of the majority must govern the whole body.” In the present case, it should seem, that the nomination of the widow as *sine qua non* only applied to the case where a majority of the tutors were present; and that where the whole were assembled, she had no greater power than the other tutors; Principles of Equity, p. 254. L. 17. § 7. D. De receptis qui arbit.

Answered for the widow: The evident meaning of a nomination of a tutor *sine quo non* is, that no act shall be valid without his approbation. Hence it has been found, that upon the death or failure of a tutor named in this manner, the tutory is at an end. And surely, if the authority of the other tutors is thought to be completely done away where the tutor *sine quo non* is unable to act, it cannot be thought that the whole administration may be conducted in opposition to his opinion. The authority of Mr. Erskine is decisive, that no act is valid without the special concurrence of the *sine quo non*; and Sir George Mackenzie says, “that where there is a tutor *sine quo non*, he must always be one of the managers and consenters. The argument from the terms of the present nomination is evidently erroneous; the authority of the widow, as a tutor *sine qua non*, not being annexed only to the proceedings of the *quorum* named by the testator, but to the nomination itself; Erskine Instit. L. 1. Tit. 7. § 7.; Sir George Mackenzie, L. 1. Tit. 7. 16th June, 1742, Lord Drummore, No. 273. p. 16347.

After advising memorials,

The Lords found, “That though Mrs. Vere cannot act as tutor or curator by herself, yet that she has a negative on the actings of the other tutors.”

And after advising a reclaiming petition, with answers, the same judgment was given.

Reporter, Lord Swinton.

For the Widow, John Dickson.

For the other Tutors, Ro. Hamilton.

Clerk, Mitchelson.

G.

Fac. Coll. No. 184. p. 374.

1791: June.

HALIBURTON against MAXWELL.

The Lords found the husband was curator to his fatuous wife, in preference to the nearest agnate.—See APPENDIX.

No. 308.

Fol. Dic. v. 4. p. 388.