

* * Forbes reports this case :

No. 255.

1712. *February 22.*—Sir Robert Gordon having summarily complained, to the Lords of May and Myreland, two of his curators, for several malversations in the management of his affairs, and craved that they might be ordained to consent to the nomination of William Cuming of Craigmill to be factor for managing the estate, upon his finding sufficient caution, these two curators declined to consent to the factory, pleading, That in a matter where they were to act at their peril, they must be allowed the freedom of their will and choice. They judging it uneasy, if not impracticable, for them to prosecute duly their trust, when the minor so breaks in upon them, and, being totally alienated from their counsels, forceth them to follow, and not to advise him by bringing the administration in every material article to the arbitrement of the Judge, did, for their own ease, and exoneration, offer a demission, craving that the Lords would appoint Sir Robert to choose new curators, seeing the office of curatory, as most other gratuitous offices, is of its own nature resignable upon several occasions, Stair, Lib. 1. Tit. 6. §. 26.

Answered for Sir Robert Gordon : Where curators unreasonably refuse to interpose their consent with the minor, the Lords ordain them to do it ; and their duty always binds them whether performed voluntarily, or by decret of the Judge, which supplies their consent. They may well discharge their duty and trust, notwithstanding there is a factor necessarily appointed for the more immediate and troublesome part of the management. The curators may resign, or refuse to act upon their peril, but can never expect that the Lords will receive such a demission ; especially when given in after this manner, before counting, or any legal process of exoneration.

The Lords 29th November last, found, That the curators, having once accepted the office of curatory to Sir Robert Gordon, cannot demit, but must continue in the administration, and consent to the nomination of a factor for managing the estate.

But Sir Robert Gordon having this day given in a nomination of Mr. Robert Gordon of Cluny, a sufficient person, to be his curator in the room of May and Myreland, the Lords did thereupon accept of their demission.

Forbes, p. 592.

1713. *February 18.*

MARY COUNTESS OF CASSILLIS *against* The EARL OF RUGLEN.

The Countess of Cassillis, as donatar of the taxward-duties of some lands held by the Earl of Cassillis of the Crown, pursued the Earl of Ruglen, as intromitter with the rents of the said lands the years libelled.

Alleged for the defender : Any intromission he had being as tutor to the Earl of Cassillis, he could not be liable to pay the taxward-duties, unless he had as

No. 256.

A tutor who had intromitted as such, with several years rent of his pupil's lands, held

much of his pupil's rents in his hand as would satisfy the same; because, *1mo*, 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 pointing of the ground, which is restricted by law even against tenants, to the value of certain terms' rents; *2do*, 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.

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.

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 advocacy,

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. 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.

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