

No. 305. benefit was to be derived from the latter. To suppose that any part of a statute was to have less effect, because it enforced the common law, is strange; and it is likewise a singular consequence of the defenders' argument, that while tutors are to be deemed liable for the smaller and less culpable omissions to which are annexed the peculiar penalties of the act 1672, they should be exempted from the penalties due to such as are grosser or more blameable, because these are likewise inflicted by the common law. Nor is there any distinction between tutors being liable for omissions or liable *singuli in solidum*. If there be misconduct in a co-tutor, it belongs to the rest to call him to account, and to have him removed as suspected. By the omission of that duty, they become each of them liable for such co-tutor.

The Lord Ordinary "found the defenders liable, conjunctly and severally, and *singuli in solidum*."

The defenders having reclaimed to the Court, the Lords, on advising their petition, with answers, adhered to the interlocutor of the Lord Ordinary.

A second reclaiming petition, presented by the defenders, and appointed to be answered, was likewise refused.

Lord Ordinary, *Swinton*. Act. *Wight, Abercromby*. Alt. *Dean of Faculty, Rolland*.
Clerk, *Gordon*.

S.

Fac. Coll. No. 32. p. 52.

* * This case was appealed. The House of Lords, 7th February, 1793, ORDERED,
That the appeal be dismissed, and the interlocutors complained of be affirmed,
with £.200 costs.

1789. June 26. GEORGE, &c. WILSONS, against JAMES WILSON.

No. 306.

A tutor obtaining, in his own name, a lease of lands formerly held by his pupils, accountable to them for the profits.

The father of the pursuers having died in the possession of a considerable farm, the defender undertook, in consequence of a faculty granted by the widow and other friends of the deceased, to manage their affairs. Afterwards the defender, as the nearest agnate, was appointed tutor, by the Barons of Exchequer, to the pursuers, who were in a state of infancy.

The defender then, apparently with the approbation of those connected with his pupils, entered into a bargain with the proprietor of the farm, whereby, after renouncing the subsisting lease, of which there were two years to run, he obtained a new one for fifteen years, in his own name, at an advanced rent of £.20. This sum, during the two years of the former lease, he became bound to pay to his pupils. When there were four years of this second lease to run, and while the children were still under his care, he obtained another lease for thirteen years, on his agreeing to pay an additional rent of £.30.

The defender having acquired, in this way, a fortune of several thousand pounds, an action was brought by George, &c. Wilsons, for obliging him to communicate to them the profits arising from those leases. The defender

Pleaded : It is true, that as a tutor cannot be *auctor in rem suam*, he is precluded in general from acquiring any property which had belonged to those under his protection, as well as from purchasing for his own behoof the burdens affecting it. But there is surely no reason for carrying this maxim of law any further. And particularly where a tutor could not have brought upon his pupils the loss arising from a hazardous undertaking in which he had engaged, he ought not, on a successful termination of his enterprise, to be compelled to give up the whole benefit to them. This would be to introduce, from notions of equity, a species of the *leonina societas*, which our law has reprobated, even in those instances where it has been expressly agreed to. Thus, if it was a proper act of administration in the defender to give up the current lease, and, as he was not obliged in his tutorial capacity to become overseer of the farm, such a measure seemed indispensably necessary for the welfare of the pupils themselves, he cannot now be challenged for this proceeding. And even although he were, by the most rigid adherence to the above-mentioned maxim, to be made accountable for the profits of those two years, during which he might have possessed in their right, it never can be thought just to extend his obligation to those of the subsequent years. And so it seems to have been determined in the last resort. 7th December 1771, Parkhill against Chalmers, No. 296. p. 16365.

Answered : The general rule is undoubted, that no person, while trustee or guardian for others, can acquire for his own behoof any right affecting their estate, or become master of those effects of which they are in possession. Let the transaction be ever so inconsistent with the situation of those under his care ; let it be unpromising in the highest degree, so that he would not be allowed to charge the loss resulting from it to their account ; still, if from thence a profit has arisen, he is obliged to communicate it, the law presuming, as he could not honestly avail himself of his knowledge of their affairs for enriching himself, that he never meant to do so. The circumstances of the present case cannot make room for an exception from the general rule. It was improper in the tutor, without some judicial authority, to surrender the lease which was current when he undertook the office. Had it not been given up, his pupils might till now have enjoyed the farm by tacit relocation, or in consequence of a new lease. And not only from his taking the new lease to himself, but also from his present opulence, derived solely from his farming operations, it is evident how extremely beneficial to them this would have been : Craig, Lib. 1. Dieg. 14. § 13. ; Stair, B. 1. Tit. 6. § 17. ; Bankton, B. 1. Tit. 7. § 39. ; Erskine, B. 1. Tit. 7. § 17, 19. ; Principles of Equity, B. 2. Ch. 2. ; Act of Sed. 25th December, 1708 ; 20th March, 1632, Laird of Ludquhairn, No. 49. p. 9503. ; 19th June, 1745, Bee *contra* Biggar, No. 216. p. 6008. ; 6th March, 1767, Earl of Craufurd *contra* Hepburn, No. 46. p. 16208. Some of the Judges were of opinion, that the defender should only be obliged to pay over to the pursuers the surplus rents, this being the only advantage they

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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