

they had served him heir, though the one gives him advertisement to seek restitution *intra annos utiles*, and the other does not; but here he was yet within minority, and he might revoke or seek redress.

Fountainhall MS.

No. 196.

1680. June 24.

WRIGHT, and JOHN HAMILTON, Her HUSBAND, against WILLIAM VEITCH.

In a tutor count, the Lords found the kain fowls of the pupil's lands might be used by the tutor as a casualty for his pains, and where they are numerous, then *eo casu* the burden of the administration will be proportionally great; and in buying land, the kains are not estimated; and it is to be presumed the tutor uses them when he is employed in his pupil's affairs; and though it be *officium gratuitum*, yet law deals strictly with them in the matter of diligence, and *gravatus in uno levandus in alio*.

Fountainhall MS.

No. 197.

It was found that a tutor might use the kain fowls of his pupil's lands.

1680. July 2. GIBSON against The LORD DUNKELD and THOMSON.

Mr. Alexander Gibson pursues a declarator against the Lord Dunkeld and Sir James Thomson, that the nomination of them to be tutors to Thomas Gibson his brother, by Sir John Gibson their father, might be annulled; because the defunct's Lady was named tutrix *sine qua non*, and she is dead; 2do, At least they ought to be removed as suspected tutors, because they made no inventory of the pupil's estate, conform to the act of Parliament, declaring their tutory null, who did not make eiks to the inventory, so soon as they came to knowledge. It was answered to the *first*, That a *quorum*, or *sine quo non*, when either they accept not, or die, does not vitiate the nomination; but it is ever presumed, that the defunct preferred those he named to all others, whether tutors of law or dative, so that *sine quo non* is only understood; that so long as such persons are in capacity, nothing should be done without them; to the *second*, The statute doth not annul the tutory for not making inventories, but for not making eiks, and cannot be drawn in consequence, being *stricti juris*. It was replied, That though there had been no nullity, yet the statute ordaining inventories to be made, imports an eminent duty of the tutors, the neglect whereof is a malversation and ground of removal, especially seeing the inventories were neither made at first, nor at any time since this process.

The Lords removed these tutors upon not making the inventories, but had no need to determine the other ground of the failing of the tutrix *sine qua non*.

Stair, v. 2. p. 781.

No. 198.

Tutors testamentary were removed as malversant for not making inventory of the pupil's estate.