1808.

FORBES, &c. *v.* HONYMAN, &c.

[Fac. Coll. vol. xiv. p. 90.]

WM. FORBES of Callender, Esq., and ROBERT FORBES of Castleton, . . . } *Appellants;*

SIR WM. HONYMAN of Armadale, Bart., one of the Senators of the College of Justice, Sir JOHN DALRYMPLE HAY, Bart., &c., Trustees appointed by John, Earl of Galloway, . . . . } *Respondents.*

House of Lords, 31st May 1808.

TRUST—SALE—TITLE—TRUSTEES—QUORUM—SINE QUA NON.—Estates were bought by the appellant, which belonged to the Earl of Galloway, and were sold by his trustees. In the Earl's trust-deed, he conveyed his estates to certain trustees named, including his Countess as one, 'or such of them as should accept,' providing that a majority should be a *quorum,* and that the Countess should be 'one of 'the *quorum* and *sine qua non.*' Four out of nine trustees only accepted, and the Countess was one who did not accept. The purchaser therefore objected to the disposition granted by these trustees; alleging that, as the *sine qua non* had not accepted, the trust was gone. Held the disposition as so granted good and unexceptionable, it being granted by all those who had accepted, and the Countess and her son having signed the disposition as consenters.

Lands, consisting of several baronies, belonging to the Earl of Galloway, were sold in lots by public auction. The articles of roup bore: "That the trustees should be bound "and obliged to grant and subscribe formal and valid dis-"positions of the foresaid lands and others, in favour of the "pursuers, and their heirs and assignees."

The appellant, William Forbes, purchased several lots, at the price of £22,320, for which he, and the other appellant as his surety, granted their bond, in terms of the articles of roup, to pay the price, one half at Martinmas, and the other half at Whitsunday 1808, to bear interest at five per cent.; but under condition of receiving an unchallengeable title.

A day after the sale, and in order to get quit of the obligation to pay interest on the price at five per cent., he offered immediate payment, on receiving a valid disposition. But, on investigating the title, it occurred to the appellants that the disposition offered was not valid.

The whole estate, including that sold, was left under

trust, to trustees specially named in the trust deed, of whom there were ten names, including therein the Countess of Galloway, his widow. The acceptors or acceptor, survivors or survivor, were empowered to act. Power was also given to assume others; and the deed further declared the "majority of said accepting trustees shall be a quorum;" "*providing always that the said Anne, Countess of Gallo-* "*way, my beloved wife, shall be one of the said quorum and* "*sine qua non.*"

Of the ten trustees, one predeceased the Earl, and of the remaining nine, only four accepted the office. The Countess of Galloway was among the number of those who did not accept. Without this *sine qua non*, it was maintained the trustees' powers were at an end. But the disposition tendered to the purchaser was signed by those four trustees, and also by the Countess dowager of Galloway, and her son, the present Earl, as *consenters merely*. Yet the appellants, apprehending the title as defective, brought a bill of suspension, stating the case, which was followed by answers and replies. Lord Hermand reported the case to the whole Court, which instructed him finally to refuse the bill. And, on reclaiming petition, the Court adhered.* Dec. 12, 1807. Feb. 3, 1808.

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* Opinions of the Judges :—

Lord President Campbell said:—"Upon a very strict and literal construction, there is room for doubt here; but I am clear that the Earl, in making this trust, did not trust to her alone. The case of natural death is specially mentioned as the case chiefly in view, but, suppose she was civilly dead *quoad* this deed, by marrying another husband, or by forfeiture, non-acceptance, &c., what then? In my opinion, there should be evidence that Lady Galloway refuses to accept. The title must either be in the accepting trustees, or the trust has fallen; and it is in the present Earl of Galloway, who is heir of line, heir male, heir of tailzie and provision to his father; and both titles are founded on. The lands in question are not tailzied, but, on the contrary, are allowed to be sold. I therefore think the interlocutor clearly right. The case of Lord Drummore, &c. *v.* Somervail, reported by Lord Kilkerran, 24th Feb. 1742, ('Tutor and Curator,' No. vi.) I think decisive.

"The Court were of opinion, that if the Countess Dowager had accepted, her consent as a *sine qua non* would have been necessary to validate all the proceedings under the trust deeds; but, by the terms and conception of the deed, it did not appear to have been the intention of the granter that her non-acceptance should dissolve the trust; and even if it had, the title would then have been in the present Earl, who concurs in the sale."—Fac. Coll.

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Against these interlocutors the present appeal was brought to the House of Lords.

*Pleaded for the Appellants.*—As the said trust-deed provides that the said Anne, Countess of Galloway, shall be a *sine qua non* in the quorum of trustees appointed to act, on her refusal to accept, the whole machinery of the trust fell and became ineffectual. The existence and constitution of the trust is made thus to depend absolutely on the circumstance of the Countess of Galloway accepting, but she having declined as a trustee, and it not being declared, that if the Countess should not accept of the trust, a majority of the remaining trustees should be authorized to carry it into execution, the whole trust falls to the ground. If it had been so declared, then the four acting trustees might have been entitled to make an effectual sale of the property; but the very reverse of this is said: for there is a precise unambiguous declaration that the Countess dowager should always be one of the quorum, and *sine qua non;* or, in other words, that there could be no legal quorum without her. Mr. Erskine, in his Institutes, in speaking of tutors, says that "non-acceptance or death, or supervening incapacity of a tutor or curator *sine qua non*, hath necessarily "the same effect, for without a *sine qua non* no act of administration is valid, which rule holds in the nomination "of tutors by a father, in which he has fixed a certain "number for a quorum, though there should be as many "tutors left alive, after the supervening incapacity of the "*sine qua non* as constituted a quorum."

Erk. B. 2, tit. 7, § 30.

*Pleaded for the Respondents.*—The conveyance being to the persons therein named, *or such of them as shall accept*, no right can vest but in those who do accept. Therefore, as to those who did not accept, their interest is precisely the same as if their names were not in the deed. The Countess of Galloway was one of those who did not accept, therefore her interest ceased, and, along with her non-acceptance, fell also the condition of her being one of the quorum, and a *sine qua non* of that quorum of accepting trustees. Of course, if she did not accept, she could not be of the quorum, far less a *sine qua non* of that quorum. But the consequence of her non-acceptance did not make the trust deed to fall otherwise. It remained good to those remaining trustees who accepted; and the obvious meaning of the deed was, that the Countess should be a *sine qua non* if she accepted of the trust. Besides, the consent of the Countess

and of her son, the present Earl, ought to remove all possible objections.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors be, and the same are hereby affirmed, with £50 costs.

For Appellants, *Wm. Alexander, Ad. Gillies.*

For Respondents, *Ar. Colquhoun, Sir Sam. Romilly.*

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JAMES SMITH, Merchant in Leith, and ALEX. M'CAUL, ALEX. STEWART, and WILLIAM M'NEIL, Merchants in Glasgow, *Appellants;*

ALEXANDER ALLAN, Merchant in Glasgow, ANDREW TEMPLETON, Merchant there, Trustee on his Sequestrated Estate, *Respondents.*

House of Lords, 21st June 1808.

INSURANCE—CONCEALMENT—SUBMISSION—PERSONALIS EXCEPTIO.—In the insurance of a ship and cargo, the underwriters refused to pay, on the ground of concealment of circumstances. Held, that the circumstances were not such in their nature as to affect the validity of the policy, and not such as they were bound to communicate.

The ship Bellona, a letter of marque, belonging to the respondent, and commanded by Captain M'Gruer, cut out of the Bay of Campeachy, in the Gulf of Mexico, a Spanish ship laden with logwood. The ship papers were not on board at the time of capture, so that there were no legal means of *ascertaining her name.*

Upon the following letters of advice from the captain, an insurance was effected by the respondents. On the 19th November 1798, they received a letter, dated 18th Sept. preceding, from Captain M'Gruer, and which enclosed copy of one sent by him previously, dated 10th September, as follows:—

" Ship Bellona, Charleston, 10th Sept. 1798.

" Alexander Allan, Esq.

" Dear Sir,

" I did myself the pleasure of writing to you 26th ult.,