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was not in a capacity to act as tutor, for, by the nomination in the testament, there were five tutors nominated, without any *quorum*, who did not all accept, and therefore the tutory was void in law, and John did only administrate as a friend, or as a *negotiorum gestor;* it was replied, That the nomination of five, not bearing that they were all joint tutors, but only that those five were tutors, without any *quorum*, it gave full power to any one of them who did accept to administrate; and, in case of their administration, they ought to count as well for omissions as commissions, unless they can allege that some of the rest did likewise accept and administer, *quo casu*, they might all be convened in an action of count and reckoning, at the pupil's instance; but, even then, every one of them are liable *in solidum* to the pupil both for omissions and commissions.

The Lords did repel the defence, in respect of the reply, and that notwithstanding of a former practique betwixt Swinton and ——————; for they found, That any tutor nominated, and accepting, and intromitting, is liable to the pupil to count for his whole estate, as well omissions as commissions, seeing it is free to a tutor nominated to administer or not; but, having once administrated as tutor, he is *passive* liable to the pupil for all that he can be charged with; otherwise, the condition of pupils would be most uncertain, and might suffer infinite prejudice, without remedy.

Gosford MS. p. 247.

1675. *June 3.* BURNET *against* BURNET.

No. 90.
All tutors accepting are liable to the pupil *in solidum* for omissions as well as commissions, reserving to those who did not intromit action against those who did.

IN an action of count and reckoning, at the instance of Burnet against his tutors, there being a report, stating how far the tutors were liable for their intromission, and it being craved, before advising of the cause, by some of the tutors, that they might be heard, it was alleged, That Burnet, being the only intromitting tutor during the whole years of his tutory, and being *solvendo*, ought only to be decerned, the rest being content to be cautioners that he should be sufficient to make forthcoming. It was answered for the pupil and his present curators, That the allegeance ought to be repelled, and the whole tutors decerned, because, in law, they were all liable *in solidum* to the pupil, and he was not obliged to discuss one of them as intromitting. The Lords did find, that the decreet ought to be given against them all; but reserved to the tutors who did not intromit action of relief against the tutor who had intromitted, seeing they were obliged to state the accounts of the tutor's intromission, and see the same applied and secured to the pupil, having accepted the office, which did oblige *ad commissa et commissa.*

Fol. Dic. v. 2. *p.* 283. *Gosford MS. No.* 753. *p.* 468.

1686. *January.* BAILIE SINCLAIR *against* LORD SINCLAIR.

No. 91.
Found in conformity with the above.

BAILIE GEORGE SINCLAIR having pursued the Lord Sinclair, his nephew, for payment of a bond of 4500 merks, granted by Hermiston, the defend-

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er's father, to the pursuer, as his provision conform to their father's destination,

Alleged for the defender: That the pursuer, having been one of his curators, *præsumitur intus habere ante redditas rationes.*

Answered for the pursuer: It is notoriously known, that he never intromitted, and that Sir James Cockburn, the co-curator, was sole intromitter; and the pursuer offered to find caution to refund, if he were found liable, in the event of count and reckoning.

Replied: All curators are liable *in solidum*, whether they intromit or not.

The Lords sustained the defender's reply.

Fol. Dic. v. 2. p. 383. Harcarse, (TUTORS AND CURATORS) *No. 985.*

*** A similar decision was pronounced, 9th February, 1684, Lockhart against Elies, No. 41. p. 504. *voce* ANNUAL-RENT.

1688. *January* 27. The MARQUIS of MONTROSE *against* His TUTORS.

No. 92.
A tutory found null, two tutors *sine quibus non* having failed.

THE deceased Marquis of Montrose made a nomination of ten tutors to his son, with a *quorum*, and his Lady and the Earl of Haddington to be *sine quibus non*. Haddington being dead, and the Lady incapable, by marrying Sir William Bruce's son, and no *quorum* being filled up, the rest scrupled to act, alleging the nomination fell and became void; and therefore caused raise a process, in the pupil's name, against themselves, craving they might be decerned to act. Sir John Nisbet thought, that it was the will of the Marquis that these should be preferred to all others, as long as any of them lived; and there being no *quorum*, that they behoved all to act jointly. It was contended by others to be null; and a decision was cited from Stair, 17th January, 1671, Drummond, No. 87. p. 41694.—But see 4th January, 1666, Fairfouls, *voce* TUTOR AND PUPIL, and 11th February, 1676, Turnbull, No. 23. p. 9162. *voce* MUTUAL CONTRACT. The Lady, his mother, offered to entertain him *gratis*, and at his age of ten years to quit him 2000 merks of her jointure, with her husband's consent. The annulling of the tutory was thought to be on a design to get him to breed Popish. But this would not hold, for the tutors in law were willing to serve; and though Graham of Braco, his nearest agnate, be within 25, and so cannot be his tutor in law, yet Graham of Urchill, the next agnate, is willing to accept, and is Protestant; and his aunt, the Lady Callendar, offers to keep him. Only, it is to be considered, if a tutory-dative at Exchequer will exclude the agnate.—L. 11. D. De testamentar. tutel.

The Lords, on the 31st of January, advised this, and could come to no resolution, there being several *non liquets*. On the 1st of February, it was resumed again, and they found the tutory null, the two *sine quibus non* having now failed. Ed-