as being tutrix-dative, it was alleged, That the mother could not authorize him, because, by the gift of tutory, his said mother and John Drummond are made tutors jointly, and the said John being dead, the tutory was void. It was replied, That, by the death of John, the whole office did accresce to the mother, as in tutories and acts of curatory, where some are appointed *sine quibus non* by the death of any of them, the full power and office do accresce to the surviving tutors or curators. The Lords did sustain the defence, notwithstanding of the reply; and found a difference betwixt this gift and a clause appointing tutors *sine quibus non;* because, in that case, the tutory or act of curatory are not void by the decease of one of these appointed to be *sine quo non*, whereas this gift, being granted as said is, is *ipso jure* null, and there is no necessity of a new gift; yet, lest the minor should sustain prejudice by this delay, they did authorize his advocate to be tutor *ad hanc litem.* No. 87.

Gosford MS. No. 316. *p.* 140.

1672. *January* 25. RAMSAY *against* MAXWELL.

No. 88.

AN act of curatory, bearing a nomination of curators, three of whom to be a *quorum*, it was found, There could be no curators, unless three had accepted.

Fol. Dic. v. 2. *p.* 384.

*** This case is No. 178. p. 9042. *voce* MINOR.

1672. *February* 14. ELLEIS *against* SCOT.

No. 89.
Tutors being nominated, without mention of conjunctly and severally, or of a *quorum*, those who accepted were found authorized to act.

MR. JOHN ELLEIS having charged Mr. George Scot for a bond granted to him, he suspended, and alleged, That Mr. John was his tutor, and it behoved to be presumed *intus habuit.* The Lords superseded to give answer till the tutor's accounts were closed; in which it was alleged, That there being five tutors nominated, without mentioning conjunctly and severally, that two only having acted, they could not be liable as tutors, because the nomination being of five, it must be understood to be those jointly, not being otherwise expressed; so that those who acted, having no sufficient active title by which they could have pursued as tutors, they can only be liable as intromitters, in so far as they actually intromitted, and not *pro omissis.*

The Lords repelled the defence, and found the accepting tutors liable for omission and intromission.

Fol. Dic. v. 2. *p.* 384. *Stair, v.* 2. *p.* 69.

*** Gosford reports this case:

IN a count and reckoning at Mr. George Scot's instance against Mr. John Elleis, as tutor, he having charged Mr. John with several articles of omission, seeing he

No. 89.

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-