

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 practise 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 allegiance 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-