er's father, to the pursuer, as his provision conform to their father's destination, No. 91.

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-

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monston and Harcarse voted for the subsisting of it; which, with other things, contributed afterwards to the laying them aside, which was done by letter from the King, on the 29th February, 1688.

Fol. Dic. v. 2. p. 384. *Fountainhall*, v. 1. p. 494.

*** Harcarse reports this case:

The Marquis of Montrose, in his testament, having left his Lady, Lord Haddington, Lord Perth, Drummelzier, and Sir William Bruce, conjunctly, or any of them, to be tutors to his son, his Lady, and, in her absence, my Lord Haddington, being *sine quo non*, the *quorum* was never filled up after the Lord Haddington's death and the Lady's marriage. The remaining tutors pursued a declarator, in the name of the pupil, that the nomination of the tutors doth subsist in them, *jure non decrescendi*, notwithstanding of the failure or incapacity of *sine quo non*.

Alleged for the pursuers: If this nomination fail, there will be place for a tutor of law, whose pretences the nomination was designed to obviate; and therefore, it is presumed, that the defunct intended it should be effectual; and as the non-acceptance of tutors to the number of the *quorum* named, or the non-acceptance of a *sine quo non*, would not vacate the constitution of a tutory, neither can it operate the destitution or extinction of it, as was decided, February 14, 1672, in Mr. Ellies's case, No. 89. p. 14695. and February, 1676, in Turnbull's case, No. 23. p. 9162. *voce* Mutual Contract. 2*do*, As the tutors are all liable *in solidum*, though the rest were dead, so they should find themselves in a capacity to act in this case, though the Lord Haddington be dead, and the Lady married, whereby she falls from the office. 3*tio*, The word "conjunctly" imports not, that failing any of them, the nomination expired; but only, that all the five were to act together, while they were capable to act. And the adjected words, "or any of them," import a lesser number to have been intended; which law determines to be the major part, and the *sine quo non* to be one of that number; but so long only as they are capable to officiate.

Answered, by the King's Advocate, for his Majesty, who had written to the Exchequer, to inquire if the tutory was evacuated, that he might see the minor authorised with tutors fit to be entrusted with the education of his person and management of his affairs: 1*mo*, The nomination is made, not only with a "conjunctly," but with a double *sine quo non;* whereof the one is substitute to the other; which implies, that it was the testator's *enixa voluntas*, that failing both the *sine quibus non*, the rest should have no power to act, and the nomination should expire; so the Lords found in Riccarton's case, No. 87. p. 14694. and in the case of Suttie against Suttie, (see Appendix,) that upon the death of one of two curators named *conjunctim*, the nomination expired. 2*do*, One of more interdictors named *conjunctim* dying or renouncing makes the interdiction fall;

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Craig, p. 106. *ad finem*. And, generally, mandates or factories granted to several persons conjunctly do cease, failing one of the nominees.

Replied: Tutors are in a quite different case from curators, or factors, or interdictors; for the defect of these may be supplied by the constituents, whereas the defect of tutors cannot be supplied by the defunct, or by the pupil, for want of judgment. *2do*, In the practique of Riccarton, there were but two *conjunctim* named, whereof one failing, there could no longer be any conjunction; whereas, failing one of three or more, conjunctly named, the nomination may subsist, since, notwithstanding there remains a conjunction. And here there was no irritancy adjected to the clause *sine quo non*, which seems necessary; L. 47. D. De administratione tutorum.

Duplied: Tutory expires upon the decease of a *sine quo non;* because defuncts often choose persons for that some other in whom they have an entire confidence are *sine quo non*. And there is not only a conjunct nomination, but a *sine quo non* adjected, with a substitution to the *sine quo non;* which termination argues *enixam voluntatem* in the defunct to trust none without the concourse of one of these.

The Lords found, That the constitution of the tutory was dissolved by the failing of the *sine quo non;* but were of opinion, that the tutor's actings since the Lady's marriage did subsist as valid, in regard this was a new decision.

Harcarse, (TUTOR) *No*. 995. *p*. 280.

*** Sir P. Home also reports this case:

THE Marquis of Montrose, by his testament, having named tutors to his son, in these terms, appointing them conjunctly, or any of them, and his Lady, and, in case of her absence, the Earl of Haddington, being always one, and the Lady being thereafter married, and the Earl of Haddington being deceased, there was a declarator raised, at the pupil's instance, against the rest of the tutors, and nearest of kin, for declaring that the rest of the tutors ought to continue and act as tutors, notwithstanding the marriage of the Lady and the death of the Earl of Haddington, who were the two *sine quibus non*. Alleged for the defender, That tutors are commissioners and mandataries; and when more persons are to act conjunctly in a commission, and some of them appointed *sine quibus non*, the rest cannot act without these; and if they refuse to accept, or be deceased, the commission becomes void and null; and was so decided in the case of a tutory, the 12th January, 1671, Drummond of Riccarton against the Feuers of Bothkennel, No. 87. p. 14694. where the Lords found, that, in respect of the tenor of the tutory, bearing to two in conjunction, the death of the one evacuated the office; and the proper import of the appointing a tutor or curator *sine quo non*, is, that nothing can be done without his consent; and the substituting of one *sine quo non* in place of another, is an evidence that the testator considered the case of decease or inability of the first *sine quo non* named; so that it being the will of the defunct,

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that the rest of the tutors could not act, unless one of the *sine quibus non* were present; and consequently, one of the *sine quibus non* being married, by which her office of tutory expires, and the other being deceased, it must be the presumed will of the defunct, that the nomination becomes null; and the *quorum* of the tutors not being filled up *pro non adjecto habetur*, and is equivalent as if there had been no mention at all of a *quorum*. Answered, That the nomination ought to subsist, and the rest of the tutors ought to act, and manage the pupil's affairs, albeit one of the *sine quibus non* is married, and the other deceased; because *ex natura rei* every tutor is liable *in solidum*, and therefore is tutor *in solidum;* so that, albeit where there are more tutors named *concursu faciunt partes*, yet, when any one of them or more are deceased, the office of tutory belongs to the rest, *jure accrescendi*, as in the case where more persons are named conjunctly executors, the office does not expire by the decease of one of the executors, but accresceth to the rest who survive; and albeit, in the common law, there were tutors *sine quibus non*, Leg. 47. D. De administratione tutor, yet there is no mention at all in the civil law, as one of the causes of expiring of tutory, that the tutor *sine quo non* is deceased, or otherwise rendered incapable to act; and seeing the design of a father nominating tutors to his children, is understood to be done in order to exclude tutors of law, and tutors-dative, so long as there are any of the tutors in life to exercise the office, it is the presumed will of the defunct, that the office ought to subsist in the person, rather than to give place to the tutor in law or dative, whom, by the nomination, the defunct designed to exclude; and the not-acceptance of one or more of the tutors named will not annul the nomination; and consequently the death of any one of them should not annul the same, as was decided the 11th February, 1676, Turnbull against Rutherford, No. 23. p. 9162. when the Lords found, that a tutor accepting was sufficient to make a deed valid, albeit there were more nominated, with a *quorum*, and the rest refused to accept. The Lords found, That the tutory-testamentar does not subsist, in regard of the death of the one, and the incapacity of the other person, who were appointed to be tutors *sine quibus non;* and therefore assoilzied from the declarator.

Sir P. Home MS. v. 3.

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A tutory sustained, although the number named as a *quorum* failed.

1692. *December* 10. Watts *against* Mr. David Scrymgeour.

The question was, Whether a tutory subsisted, where a *quorum* was named by the father, and all refused to accept, but one. Upon the one hand, the Lords, on the 11th February, 1676, Turnbull, No. 23. p. 9162. *voce* Mutual Contract, found it valid, upon the presumed will of the defunct, preferring any one of these, before a tutor-dative. On the other side, the Lords, in the case of the Tutors of the Marquis of Montrose, No. 92. p. 14697. had found such a nomination null; and though that was a late decision, to get the Marquis' education into Popish hands, yet the Lords would not rashly alter it without a new hearing in presence.