

No. 294.

“ The Lords found, that, as the bankers were carrying on business, and in good credit when the defender put the pupil's money into their hands, in February 1766, on their bill, payable one day after date, that their failing afterwards, and stopping payment in November thereafter, does not make the defender liable to the pursuer for the said money.”

Act. Lockhart.

Alt. Maclaurin.

G. F.

Fac. Coll. No 83. p. 332.

1770. December 21.

DAVID, ADAM, and JOHN DONALDSONS, Brothers of the deceased William Donaldson, Petitioners.

No. 295.

The Court refused to authorise tutors to act upon the failure of a *sine qua non*, but appointed a factor *loco tutoris*.

William Donaldson in 1769, leaving a daughter Mary, and a natural son Robert, both under puberty ; by a settlement of his affairs, he appointed Sarah Russel his spouse and the petitioners to be tutors and curators to his said children ; “ declaring any two of them to be a quorum, my wife being always one.” The tutors accepted, and continued to act for some time ; but Sarah Russel having entered into a second marriage, became unqualified ; and as she was named *sine qua non*, the remaining tutors were apprehensive of the consequences of their acting, unless authorised by the Court.

They accordingly applied by petition, stating the fact, and suggested it was part of the *nobile officium* of the Court to supply omissions in the deeds of private parties : That there was an obvious omission in the deed in question ; for when it named the widow tutrix *sine qua non*, it ought to have provided for the nomination falling either by her subsequent marriage or death. In a case observed by Forbes and Fountainhall, similar to the present, relief had been given ; 3d July 1711, Tutors of Niddry, supplicants, No. 149. p. 7431. It was farther observed, that though the nearest agnates might serve tutors of law to the daughter, no such measure could be followed as to the son, who had no agnate.

The Judges were clearly of opinion they had no power to grant this application ; but, upon a second petition, they pronounced the following interlocutor :

“ Having resumed consideration of this petition, and no objection being given in thereto, nominate and appoint the petitioner Adam Donaldson factor *loco tutoris* to Mary and Robert Donaldsons ; with the usual powers, the said Robert Donaldson, before extract, finding caution in terms of the act of sederunt.”

For the Petitioners, G. Ferguson.

Fac. Coll. No. 63. p. 290