

1692. *December 22.*—The Lords advised the case, mentioned 10th current, Watts against Scrymgeour, and found, That the failing of the *sine quo non*, and much less the failing of the *quorum*, did not annul the whole tutory, as long as there was any of the persons nominated alive, and ready to accept and act; for they thought the defunct-testator trusted any of those he had named, more than the tutors of law. Yet sundry of the Lords dissented from this, and urged, that a parent might nominate a writer or servant in conjunction with others whom he trusted more, that the said servant might do the servile part; yet, if it had not been in contemplation of the rest, their check and oversight, he would not have given him the tutory alone, if the rest should either die, or abstain from accepting; and that in a nomination of two or more tutors jointly, though there were neither a *quorum* nor *sine quibus non* named, yet it seemed to be the defunct's conjectured meaning, that except they all embraced none could act. But the plurality of the Lords sustained the tutory.

*Fol. Dic. v. 2. p. 384. Fountainhall, v. 1. p. 531, 536.*

1693. *February 23.*

The COUNTESS of CALLENDAR *against* The EARL of LINLITHGOW and Others.

THE Lords advised the complaint at the Countess of Callendar's instance against the Earl of Linlithgow and others, for not accepting to be tutors to her children, conform to her husband's nomination, and that she and the Earl of Home, though not a *quorum*, might be authorized to act; as was found, *supra*, in the cases of Watts and Scrymgeour, and in Stair, 11th February, 1676, Turnbull, No. 23. p. 9162. *voce* MUTUAL CONTRACT; and it being alleged, That the nomination was null, through the non-acceptance of a *quorum*; and that the foresaid cases held, where tutors had entered and accepted, and were in possession, and not *in suspiciendo onere tutela*, as here; the plurality of Lords found there was no material difference betwixt these two cases, and therefore sustained the nomination, and those who offered to accept; but, in respect of the circumstances, burdened them with the finding caution; which was urged might not only be *rem pupilli salvam fore*, but also for relief of the other co-tutors; though *regulariter* testamentary tutors are not put to find caution, unless there be a suspicion of their malversation, *vel si vergant ad inopiam*. See TUTOR AND PUPIL.

*Fol. Dic. v. 2. p. 384. Fountainhall, v. 1. p. 564.*

1703. *June 24.*

AIKENHEADS *against* DURHAM.

ADOLPHUS DURHAM being debtor to umquhile Sir Patrick Aikenhead by bond, and charged, he suspends, on this reason, That as he is most willing to pay, so he must have a valid discharge, which the bairns cannot give him, not

No. 93.

No. 94.

Found in conformity with the above.

No. 95.

A tutory found null, for want of the *sine quo non*.