

1775. March 11.

PATRICK SCOTT of Rossie *against* JAMES SCOTT of Brotherton, and Others.

Upon the decease of Robert Scott of Benholm, in 1771, leaving two daughters, Isabella, the eldest, succeeded to the estate of Benholm, and Robina, the other daughter, to the estate of Hedderwick, by virtue of two different deeds of settlement executed by him, in December, 1770.

Robert Scott, of the same date with these settlements, executed two different deeds of nomination of tutors and curators for his children. One of these, the subject of the present question, bears: “ I considering that, in the event of my having children procreated either of the marriage presently subsisting between me and Mrs. Wallace Scott, my spouse, or of any subsequent marriage; who may happen to be minors at the time of my decease, it is just and reasonable to provide for the proper conduct and management of the persons and estates of my said minor children in such event, I do hereby nominate and appoint the said Mrs. Wallace Scott, my spouse, in the event of her surviving me, Sir Alexander Ramsay of Balmain, Baronet,” (here follow the names of seven other persons) “ to be tutors and curators to my said children, or to such of them as shall happen to be minors at the time of my decease foresaid, excepting such younger child of my present, or any other marriage, who may happen to succeed to my lands and estate of Hedderwick, and others, in virtue of my settlements thereof; to whom I have, by a deed of nomination, of the date hereof, nominated and appointed certain other tutors and curators in the event foresaid; with power to the said tutors and curators, or any three of them, who are hereby declared to be a *quorum*, the said Mrs. Wallace Scott being always of the said *quorum*, and tutrix *sine qua non*, not only to conduct the education of my said children in such way as they shall think fit, but also to manage their estates, real and personal, &c. and with full power to the tutors and curators foresaid, or any three of them who shall accept, as aforesaid, to appoint factors, &c.; declaring hereby, that the said tutors and curators, or such of them as shall so accept, shall not be liable for omissions, &c.”

The other nomination proceeds upon a similar narrative, as to any younger child of that or of any subsequent marriage who should succeed to the estate of Hedderwick, and appoints a different set of tutors, viz. “ the said Mrs. Wallace Scott, my spouse, in the event of her surviving me, John Erskine of Dun,” &c. (here seven other persons are named, of whom Patrick Scott of Rossie is one, but not included in the first nomination) “ to be tutors and curators to my said younger child succeeding to the said estate of Hedderwick, as aforesaid, and happening to be minor at the time of my decease, with power to the said tutors and curators, or any three of them who shall accept, who are hereby declared to be a *quorum*, the said Mrs. Wallace Scott being always one of the said *quorum*, and tutrix *sine qua non*, not only to conduct the education,” &c. as above; “ with full

No. 299.

Whether the father's nomination hath fallen by the supervening incapacity of the mother, whom he appointed one of the *quorum*, and *sine qua non*, so as to make way for the service of the tutor of law?

No. 299. powers to the said tutors and curators, or any three of them who shall so accept, as aforesaid, to appoint factors," &c.

Both the sets of tutors nominated by these deeds did accept of their offices, one set acting for the eldest daughter, and the other for the second, except that three of the nominees in the last mentioned deed declined accepting, and accordingly never acted; but, by the death of the second daughter, which happened soon after, this last nomination fell to the ground.

Mrs. Wallace Scott, the mother of the other pupil Isabella, and who was appointed one of the *quorum*, and *sine qua non*, having entered into a second marriage, Patrick Scott of Rossie, the nearest male agnate, took out briefes from the Chancery, directed to the Sheriff of Edinburgh, for obtaining himself served tutor of law to the said Isabella Scott; of which a bill of advocacy was offered, in name of the other tutors nominated; and the Lord Ordinary having taken the case to report, memorials were given in; after advising which, the following interlocutor was pronounced: "The Lord Ordinary, after advising with the Lords, refuses this bill.

In support of the nomination, in a reclaiming petition it was

Pleaded: It is very evident that the testator himself never had any view to the tutory's being at an end in the event which has happened; but, on the contrary, meant that it should subsist whether his widow was in a capacity to be one of the tutors or not.

After advising the bill and answers, the Court "sustained the nomination;" not that they changed their opinion as to the general point of law upon which the former judgment went, but in respect of the specialties of the case, which rendered it a *quæstio voluntatis*, like that of Lord Drummore and others against Somerville, No. 273. p. 16347.; and, in particular, moved by the strong evidence of the testator's intention, arising from his nomination of the other persons, besides his wife, to be tutors not only to the children of that marriage, but to the children of any subsequent marriage.

Act. *M^cQueen.*

Alt. *Ilay Campbell & Rae.*

Clerk, *Pringle.*

Fac. Coll. No. 172. p. 86.

No. 300.

1775. December 15. WITHERSPOONS, Petitioners.

In an action to account, on the statute 1696, tutors and curators who were in embarrassed circumstances, having failed to find caution *de fideli*, the Lords removed them as suspect.

When tutors and curators are removed as suspect, the Lords appoint a factor *loco tutoris* in their stead.

Fol. Dic. v. 4. p. 391. T. MS.

* * * See No. 172. p. 7450. *voce* JURISDICTION.