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. No. 93.

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.

No. 94.
Fonnd in conformity with the above.

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 tutelæ*, 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.

No. 95.
A tutory found null, for want of the *sine quo non*.

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. 95. being legally authorised by tutors, in so far as their father's nomination is dissolved and expired, for he had named three or four tutors, and Dame Sarah Sharp, his lady, *sine qua non*, and declared any two a *quorum*, she always being one; and so it is, her right of tutory ceases by her being re-married. Answered, This incapacity is no more than if she had never accepted; in which case the tutory would have subsisted in the person of any other two of the tutors nominated, which the father had declared a *quorum*. 2*do*, Her being appointed *sine qua non*, hindered them to act, without her consent, so long as she continued a widow; but how soon she married again the first *quorum* did subsist and reconvalesce; and that the Lords found so in the case of the Marquis of Montrose's tutory, No. 92. p. 14697. when his mother re-married; and certainly the father confided in the friends he entrusted, whether in conjunction with his relict or not. The Lords having read the terms of the nomination, and that she was in all events made *sine qua non*, they found the tutory null, and that Adolphus could not safely pay till the children were authorized, either by the nearest agnate serving tutor of law, or by some person taking a gift of tutory-dative. This could have been prevented, by declaring, that the tutory should subsist even after the death, incapacity, or non-acceptance of the *sine qua non*; but this was omitted.

Fol. Dic. v. 2. *p.* 384. *Fountainhall, v.* 2. *p.* 184.

1735. *February* 14. BLAIR *against* RAMSAY.

No. 96.

A MAN settling his effects upon his eldest son, an infant, did, in the same deed, appoint his wife and six other persons to be his son's tutors and curators, "the major part of the fore-named persons accepting, and being in life, to be a *quorum*, his said spouse being always one and *sine qua non*, and intrusted with the person of his said son during his minority, with power to her allenarly to nominate a factor, who shall have the sole intromission. The whole tutors, save the wife, refused to accept. Upon which head it was found, That the said nomination of the tutors was void, and that there was access for the service of a tutor of law. See APPENDIX.

Fol. Dic. v. 2. *p.* 385.

1733. *December.*

The EARL of WEMYSS *against* The TUTORS of MR. FRANCIS CHARTERIS.

No. 97.

A WOMAN *vestita viro* being named tutrix *sine qua non*, of which office she is incapable while her husband is alive, the question occurred, If this behoved to suspend the whole operation of the tutory, or if the rest, in the mean time, could act without her? Debated, but not determined. See APPENDIX.

Fol. Dic. v. 2. *p.* 385.