

1742. June 16. DUNMORE, BAIRD, &c. against SOMERVILLE.

No. 273.

A person named his wife, brother, and several others, tutors and curators to his only child, appointing a certain *quorum*, and his wife, *sine qua non*, but declaring the tutory should not dissolve in case of her incapacity or death. She refused to accept. Found that the nomination did not thereby fall.

*Kilkerran.*

\* \* This case is No. 98. p. 14703. *voce* SOLIDUM ET PRO RATA.

1743. January.

DAVID SUTHERLAND in Knockarthur, against THOMAS GRANT of Auchoinanie.

No. 274.

David Sutherland took out a brieve for serving himself tutor of law to Thomas Sutherland of Pronsie, an infant, and his sisters, grand-nephew and nieces to the said David Sutherland, which was served with a summons, upon letters of supplement, upon Thomas Grant, &c. as nearest agnates to the infants, to compare before the Sheriff of Sutherland the 20th of May, 1742. Thomas Grant, &c. accordingly appeared on the said day, and objected to David Sutherland's capacity to manage the office he claimed, it being notourly known he was not even fit to manage his own affairs. But the raiser of the brieve did not appear; whereupon the Sheriff deserted the diet, and appointed the brieve to be of new served, before any further procedure be had thereupon.

If the diet of a brieve of tutory is once deserted, can the same brieve be, of new, executed to another diet?

Thomas Grant, &c. suspecting that David Sutherland might cause the brieve to be of new executed, and get a service huddled up, when they might not be present to object, advocated the cause, and pleaded, That the Sheriff had done wrong in supposing that the same brieve could be of new executed, which was a thing never practised, for the brieve is exhausted, and has its full effect, as well as a procuratory of resignation, or precept of sasine, by being once executed; and therefore the Sheriff ought to have deserted the diet *simpliciter*. And the reason is, because all brieves, whether pleadable or not, are in order to the trial of a fact by a jury; and in all trials by juries the diets are peremptory, that neither the members of inquest, nor parties concerned, may be vexed with unnecessary attendance. If indeed the pursuer had appeared, and had produced the brieve with the executions, the trial, upon cause shown, might have been adjourned, as happens frequently in brieves of mortancestry; but where there is a total discontinuance of the proceedings, as in this case, and the diet deserted, the instance totally falls; the brieve itself, which is a writ of summons, perishes, and cannot be revived, or be the warrant for a new execution; but if the thing be still competent that was