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.

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1743. *January.*

DAVID SUTHERLAND in Knockarthur, *against* THOMAS GRANT of Auchoinanie.

No. 274.

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

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 compear 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.

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

No. 274. intended by it, a fresh brieve must be taken out of the Chancery for the same purpose.

The Lords remitted to the Lord Ordinary to advocate the cause.

*C. Home, No. 226. p. 368.*

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No. 275. A man in appointing tutors to his infant heir, may also name a factor for levying the rents.

1743. *February* 11. TUTORS of STRAITON *against* WILLIAM GRAY.

Alexander Johnston of Straiton died 10th of March, 1742, leaving a land-estate of 7,000 merks yearly rent to his eldest son, an infant, and moderate provisions to his two other children. Upon the 26th of February preceding, he executed a nomination of certain persons to be tutors and curators to his children, of whom William Gray writer was one, with the usual powers of appointing factors with a salary, for whom they should be answerable. The very day before his death, labouring under the disease of which he died, he granted a factory to the said William Gray for levying the rents of his estate, during the pupillarity and minority of his heir, with a yearly salary of £.15 Sterling; taking him bound to account to the tutors and curators.

The tutors judging themselves not bound by this nomination, named a factor of their own, and the matter came to be tried in a multiple-poinding raised by the tenants. And, in behalf of the factor named by the tutors, it was pleaded, That a man may indeed leave his estate to his heir in any terms he pleases; but if the absolute property be settled upon the heir, it belongs to him *qua* proprietor to have the management of his own estate. It is therefore a stretch beyond the common law, to support a man's nomination of tutors to his children. The *patria potestas* among the Romans introduced this power, which utility moved us to adopt; and now it is become as it were a branch of the common law, But then, as this power is established by practice, it is limited by the same authority; a mother has no such power, nor a grandfather; it was confined within the years of pupillarity, till it was enlarged by the statute 1696, impowering fathers to name curators to their children, provided the nomination be made *in liege poustie*. And from these premises it was inferred, that though custom originally, and now a statute, authorises a man to name tutors to his children, there is no custom nor authority impowering him to name a factor to his children. It was pleaded in the *second* place, That Straiton's nomination of a factor being on death-bed, whatever effect it may have during pupillarity, it can never be longer effectual; for if a man cannot name a curator to his heir upon death-bed, as little can he name a factor.

To the *first* it was answered, That the nomination of a tutor, far from being contrary to the common law, is, in reality, a duty imposed upon fathers by the law of nature. No person disputes it to be the duty of parents to take care of their children till they arrive at the years of discretion; and, if the father be prevented