No. 92. that the rest of the tutors could not act, unless one of the *sine quibus non* were present; and consequently, one of the *sine quibus non* being married, by which her office of tutory expires, and the other being deceased, it must be the presumed will of the defunct, that the nomination becomes null; and the *quorum* of the tutors not being filled up *pro non adjecto habetur*, and is equivalent as if there had been no mention at all of a *quorum*. Answered, That the nomination ought to subsist, and the rest of the tutors ought to act, and manage the pupil's affairs, albeit one of the *sine quibus non* is married, and the other deceased; because *ex natura rei* every tutor is liable *in solidum*, and therefore is tutor *in solidum;* so that, albeit where there are more tutors named *concursu faciunt partes*, yet, when any one of them or more are deceased, the office of tutory belongs to the rest, *jure accrescendi*, as in the case where more persons are named conjunctly executors, the office does not expire by the decease of one of the executors, but accresceth to the rest who survive; and albeit, in the common law, there were tutors *sine quibus non*, Leg. 47. D. De administratione tutor, yet there is no mention at all in the civil law, as one of the causes of expiring of tutory, that the tutor *sine quo non* is deceased, or otherwise rendered incapable to act; and seeing the design of a father nominating tutors to his children, is understood to be done in order to exclude tutors of law, and tutors-dative, so long as there are any of the tutors in life to exercise the office, it is the presumed will of the defunct, that the office ought to subsist in the person, rather than to give place to the tutor in law or dative, whom, by the nomination, the defunct designed to exclude; and the not-acceptance of one or more of the tutors named will not annul the nomination; and consequently the death of any one of them should not annul the same, as was decided the 11th February, 1676, Turnbull against Rutherford, No. 23. p. 9162. when the Lords found, that a tutor accepting was sufficient to make a deed valid, albeit there were more nominated, with a *quorum*, and the rest refused to accept. The Lords found, That the tutory-testamentar does not subsist, in regard of the death of the one, and the incapacity of the other person, who were appointed to be tutors *sine quibus non;* and therefore assoilzied from the declarator.

Sir P. Home MS. v. 3.

1692. *December* 10. Watts *against* Mr. David Scrymgeour.

No. 93.
A tutory sustained, although the number named as a *quorum* failed.

The question was, Whether a tutory subsisted, where a *quorum* was named by the father, and all refused to accept, but one. Upon the one hand, the Lords, on the 11th February, 1676, Turnbull, No. 23. p. 9162. *voce* Mutual Contract, found it valid, upon the presumed will of the defunct, preferring any one of these, before a tutor-dative. On the other side, the Lords, in the case of the Tutors of the Marquis of Montrose, No. 92. p. 14697. had found such a nomination null; and though that was a late decision, to get the Marquis' education into Popish hands, yet the Lords would not rashly alter it without a new hearing in presence.

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