

No. 231. The Lords repelled the first reasons of advocacy, but sustained the second; and found, that the tutors testamentary accepting before the brieves of tutor of law were served, though not within a year of the defunct's death, when they might have accepted, did exclude the service, and that Sir John might yet accept as tutor testamentary.

Harcarse, No. 1001. p. 282.

No. 232. 1693. February 16. CATHCART of Carleton against BROWN of Colston.
Tutors neglecting to form inventories, are liable to forfeit all their expenses.
Fountainhall.

* * * This case is No. 45. p. 3509. *voce* DILIGENCE.

No. 233. 1693. February 22.
COUNTESS of CALLENDAR against The EARL of LINLITHGOW.
A nomination of tutors to an infant heir does not fall, though a *quorum* do not accept; but in such a case the Lords obliged the acceptors to find caution, though regularly testamentary tutors are not put to find caution, unless there be a suspicion of their malversation, *vel si vergant ad inopiam*.
Fountainhall.

* * * This case is No. 94. p. 14701. *voce* SOLIDUM ET PRO RATA.

No. 234. 1693. January 11. DOUGLAS against CARMICHAEL and LOCKHART.
What tutors ought to find caution?
The relict and children of Lieutenant Douglas against the Lord Carmichael and Sir William Lockhart. The Lords sustained the two accepting tutors, in respect the nomination bore a clause, that, failing of the rest, any one of them should have liberty to act, and that the word "failing" was not only by death after acceptation, but signified failing any way; and therefore found the letters orderly proceeded; but superseded extract for 15 days, that, in that space, they might exhibit the papers on oath; but would not let them be delivered up to the factors, but to lie in the Clerks' hands, till the tutors shall come home, so as the factors might have inspection of them, in order to prepare and form the inventories, conform to the act of Parliament 1672. Some proposed to have them sealed up till the tutors returned and discharged; but seeing these differences were also nominated

in the testament, and did not accept, the Lords thought there were more humour than reason in their keeping up the papers. No. 234.

1693. *November 23.*—The action, Lieutenant-General Douglas' Lady and brother, as tutors to his children, against the Laird of Carmichael, and others, was again debated in presence. The Lady reclaimed against the interlocutor burdening her with caution, seeing she was a testamentary tutor; and that Callander's case *toto caelo* differed, in regard that nomination bore not, if any of them failed, then the rest to administrate, as this did. Though the law is plain in excoeming such tutors from caution, yet L. 17. D. De tutel. testament. and the whole title De confirmando Tutore shew, that this rule wants not exceptions, and that the Prætor may sometimes over-rule the *scriptura testamenti*. Some of the Lords thought, that she and her brother (though a soldier, who *jure Romano* were not to be tutors) could not be subjected to find caution; others were of opinion, that, in her circumstances, it was both just and safest to require caution; but the plurality were for liberating her, unless they could condescend upon some ground of malversation to render her suspected; which the friends offered to do.

1693. *November 24.*—The foresaid case was again heard; and the malversations condescended on, viz. that they had not made inventory of the sums lying in England. But it was made appear she had given up inventories there. The next was, that they had granted a factory to Robert Colvil to make inventories. The Lords found this no malversation. Then alleged, They had intromitted with sums of money before the inventory. The Lords would not receive what must abide probation *hoc ordine* by way of exception; but reserved their action for removing them as suspected; and decerned in the exhibition of writs to them, without burdening them with caution.

Fountainhall, v. 1. p. 544. & 571.

1694. *July 24.*

DR. CRAWFURD and JAMES INGLIS *against* The INCORPORATION of the
CORDINERS of the CANONGATE.

This was a competition for a sum in that Trade's hands, between the Doctor, as assignee by James Inglis' father, and the said James Inglis, to whose behoof it was declared the bond was granted. The Lords found the father, as administrator to his son, a minor, could not assign this bond; though it was offered to be proved, that the onerous cause of the assignation was the Doctor's advancing necessaries to aliment the son, but that the money belonged to the boy, conform to the conception of the bond. But, on a bill, refused to let it be uplifted, without caution to re-employ it to the same heirs as it now stands. No. 235.

Fountainhall, v. 1. p. 637.