1775. *June* . SCOTT of BROTHERTON and OTHERS *against* SCOTT of ROSSIE.

IT has been held, in general, to be a clear point, that, where a quorum or a *sine qua non* is established in a nomination of tutors, the failure either of the quorum or of the *sine qua non* puts an end to the nomination, and makes way for the tutor-in-law.

This doctrine is laid down by Stair, by Bankton, and by Erskine; and although the more ancient decisions are not all at one about it, yet, in the case observed by Lord Kilkerran, *voce* Tutors, No. 6, *Lord Drummore* against *Mrs Isobella Sommerville*, "the Lords," says the learned collector, "unanimously considered it as clear law, notwithstanding of certain decisions to the contrary, that the failing of the quorum or of the *sine qua non sopites*, the nomination."

At the same time, the favour of a father's nomination is so great, that, unless the words are express and clear, the Court are disposed to the contrary doctrine, and to find, that notwithstanding of the failure of the quorum or *sine qua non*, that the deed still subsists in the person of the other tutors. A case therefore omitted *per incuriam* will not have the effect to void the nomination; and this was the foundation of the decision in the case of Lord Drummore. "The Court went upon the *voluntas* of the testator, to prefer all and each of the tutors nominate, to the tutor-in-law, and that the omitting the case of non-acceptance proceeded *per incuriam*."

These are Lord Kilkerran's words on the margin of one of the papers.

The Lords seem to have proceeded on the same principle, in the case of Scott of Brotherton and Others *against* Scott of Rossie. In this case the defunct had provided against the predecease or non-acceptance of the *sine qua non*, but had omitted the case of the supervening incapacity by marriage, and said nothing about it: and this having happened, "the Lords, notwithstanding her subsequent marriage, found that the tutory had not fallen."

They found the contrary, 1st March 1775, but now they altered.

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

A FATHER appointed Helen Ramsay, his wife, and five other persons, to be tutors and curators to his son; the major part accepting, and being in life, to be a quorum, the said Helen Ramsay being always one, and *sine qua non*. The whole tutors nominate, except the wife, declined to accept; on which the tutor-of-law took out brieves for serving, which were advocate. The Lord Newhall, Ordinary, found the tutory void, and remitted the brieves for service of the tutor-in-law in common form. And, on advising a reclaiming petition and answers, the Lords adhered.