

1742, February 24. and June 16. 1742.

LORD DRUMORE, SIR JOHN BAIRD, and SIR JAMES DALRYMPLE, against Mrs.
ISABELLA SOMERVIL.

WHERE one had named his spouse, his brother, and several others, tutors and curators to his only child, and appointed the major part of those who should accept, and failing any of them by decease, the major part of the survivors to be a quorum, his said spouse being always one of the quorum, and *sine qua non*, and after her death or incapacity, his brother being always one of the quorum and *sine quo non*; and in case of the death or incapacity of his spouse or brother, declared that the tutory and curatory should not dissolve, but should continue with the other tutors and curators so long as any of them were in life, the Lady refused to accept: The Lords at first "Found the nomination had thereby fallen;" but upon advising petition and answers, one or two of the Lords having altered their opinion, it was by plurality of voices found, "That the nomination did not fall by the Lady's refusal to accept."

The Lords 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*, opposes the nomination; and the case would be the same of the failure of one of more tutors or curators named jointly. The reason in all these cases is the same, that the father seems to have put no trust in the rest without the quorum, or without the *sine qua non*, or in any one or more, of tutors named jointly, without the whole. But as that reason did not apply in this case, where the father, upon the failure of both the *sine quibus non*, had declared that the tutory and curatory should not dissolve, but continue with the rest so long as any of them were on life, the majority of the Lords came to be of opinion, that this gave sufficient evidence, that the father intended to trust any of the persons named; and that the omitting to provide for the case of the Lady's not accepting, as he had done for the cases of death or incapacity, had only happened *per incuriam*, and from his having taken it for granted, that she was not to decline accepting. See TUTOR and PUBL.

Fol. Dic. v. 4. p. 297. Kilkerran, No. 6. p. 585.

1752. June 26.

CAMPBELL against LORD MONZIE, CAMPBELL of Achalader, and Others, Trustees
for Campbell.

THE deceased Mr. Archibald Campbell, minister of Weem, executed a deed, in the year 1736, whereby, on the narrative of the schoolmaster of Weem, not being sufficiently provided, and the great use more schools in the parish might be of, he disposed all debts and sums of money that should be resting to him at his death, in favour of Lord Monzie, Sir R. Menzies, Lady Menzies his mother, Mr John Stewart of Birny, and the deceased John Campbell of Achalader, their heirs and

No. 98.

Effect of the failure of a *sine qua non*.

No. 99.

Effect of the failure of a quorum of Trustees in a mortification.