

No. 299. powers to the said tutors and curators, or any three of them who shall so accept, as aforesaid, to appoint factors," &c.

Both the sets of tutors nominated by these deeds did accept of their offices, one set acting for the eldest daughter, and the other for the second, except that three of the nominees in the last mentioned deed declined accepting, and accordingly never acted; but, by the death of the second daughter, which happened soon after, this last nomination fell to the ground.

Mrs. Wallace Scott, the mother of the other pupil Isabella, and who was appointed one of the *quorum*, and *sine qua non*, having entered into a second marriage, Patrick Scott of Rossie, the nearest male agnate, took out brieves from the Chancery, directed to the Sheriff of Edinburgh, for obtaining himself served tutor of law to the said Isabella Scott; of which a bill of advocacy was offered, in name of the other tutors nominated; and the Lord Ordinary having taken the case to report, memorials were given in; after advising which, the following interlocutor was pronounced: "The Lord Ordinary, after advising with the Lords, refuses this bill.

In support of the nomination, in a reclaiming petition it was

Pleaded: It is very evident that the testator himself never had any view to the tutory's being at an end in the event which has happened; but, on the contrary, meant that it should subsist whether his widow was in a capacity to be one of the tutors or not.

After advising the bill and answers, the Court "sustained the nomination;" not that they changed their opinion as to the general point of law upon which the former judgment went, but in respect of the specialties of the case, which rendered it a *quæstio voluntatis*, like that of Lord Drummore and others against Somerville, No. 273. p. 16347.; and, in particular, moved by the strong evidence of the testator's intention, arising from his nomination of the other persons, besides his wife, to be tutors not only to the children of that marriage, but to the children of any subsequent marriage.

Act. *M^cQueen.*

Alt. *Ilay Campbell & Rae.*

Clerk, *Pringle.*

Fac. Coll. No. 172. p. 86.

No. 300.

1775. December 15. WITHERSPOONS, Petitioners.

In an action to account, on the statute 1696, tutors and curators who were in embarrassed circumstances, having failed to find caution *de fideli*, the Lords removed them as suspect.

When tutors and curators are removed as suspect, the Lords appoint a factor *loco tutoris* in their stead.

Fol. Dic. v. 4. p. 391. T. MS.

* * * See No. 172. p. 7450. *voce* JURISDICTION.