

1777. *February 21.* SINCLAIR *against* SUTHERLAND.

IN the case of the children of Sir John Sinclair of Mey, all the tutors nominate declined, except the widow and her brother, Captain James Sutherland, who accepted. Soon after, the widow married, whereby the Captain was left sole tutor. The nomination was to the persons named, or a major part of them who should accept, and the survivor or survivors of them; the widow, during her viduity, being always one, *et sine qua non*. The Lords found that the tutory subsisted in the Captain.

Tutors nominate are the favourites of the law; and, in this case, it appeared to be the intention of the father, that the tutory should subsist not only in one survivor, but in one acceptor: The reason is the same. It would have been different, had it appeared to have been the father's intention that at least two should act, as in the case observed by Bruce, 17th February 1715.

1778. *March 10.* WELSH *against* WELSH.

Actio suspecti tutoris, by the civil law, was *actio popularis*; but, by the Scotch law, it is *actio popularis* only to any of the blood relations, but no farther. See Fount. 29th March 1682, Trotter; see also Lord Stair, B. 1, tit. 6, § 26; Bank. B. 1, tit. 7, § 34.

James Cornfoot died, leaving a beneficial tack, which had 40 years to run, to his only child, Nathan, who, after pupillarity, chose his mother and her second husband, James Welsh, as his curators,* and John Welsh, brother to James, was taken as cautioner.

But James's affairs having gone into disorder, and he having become a no-tour bankrupt, John, libelling on this, and on the mismanagement of the curators, brought an action to have it found that he was free of his caution, not only in time coming but from the date of a protest he had taken against the minor and his nearest of kin, requiring them to bring an action for removing the curators; which action he now brought, and libelled accordingly. The nearest of kin lying by, and declining to meddle, compearance was made before the Lord Hailes, Ordinary, both for the curators and minors;† they consented to the first, but denied the competency of the last: and his Lordship having taken the point to report, they failed to give in any information; so the Lords took it up *ex parte*. In the first place, they unanimously freed the cautioner from his caution, from the date of the protest, and, in respect thereof, they ordained the curators to find new caution within ten days, with certification, otherways that they would remove them.

* This was plainly irregular: no person, under *cura*, can be curator to another.

† It is thought, that where a minor in any action appears incidentally to be in danger, the Lords may, and ought to interpose for his defence.