No 25. were several other tutors nominated with him, who did altogether refuse to accept, and that his legacy was not expressly qualified with any such condition, that he should accept, as likewise that he had never received benefit by that legacy, which was sufficient ground by the civil law not to make them liable, and were of a public concernment to find it otherwise, there never having been any practice for the same.

Gosford, MS. No 743. *p.* 456.

No 26.
Found in conformity to the above.

1675. *June* 16.

THOMSON and HALYBURTON *against* OGILVIE and WATSON.

DAVID THOMSON having by his testament nominated his wife executrix and tutrix; and having left a legacy to his son of L. 5000, and ordained his relict to employ the same upon annualrent, in so far as he ordained him to be educated upon the annualrent of the same; in a pursuit for the said legacy, and the annualrent of the same, it was *alleged*, that the executrix could not be liable for annualrent: And it being *replied*, that she was also tutrix, and tutors are liable after the first term that they embrace the office, for annualrent of the pupil's means; and that having confirmed the testament, by the no mination foresaid of her to be tutrix, she hath accepted the office of tutory; and the point at interlocutor being, whether by confirming of the testament, she had accepted of the office of tutory; some of the LORDS, viz.

Were of the opinion, that by confirming of the testament, she did not accept of the office: But it was found by the LORDS, that having confirmed without protestation that she did not accept of the office, *eo ipso* she did accept of the same: And though she had emitted such a protestation, it could not be allowed, seeing she was not only named executrix, but had a legacy left her; and she could not accept the office of executry and legacy foresaid, and repudiate the office of tutory of her own child.

THE LORDS (in the case foresaid) thought, that if the relict were able to make appear, that having used all possible diligence, she had not recovered payment of the defunct's means, she could not be liable for annualrent, but from the time that she recovered the same.

Reporter *Castlehill.* Clerk, *Monro.*

Fol. Dic. v. 1. *p.* 425. *Dirleton, No* 266. *p.* 128.

*** Gosford reports the same case:

IN a pursuit at Cecil Thomson's instance, against Grizel Ogilvie, for payment of four thousand pounds, with the annualrent thereof upon that ground, that the said Grizel, her mother, was not only left executor by David Thom-

son the pursuer's father, but likewise nominated tutrix to her and the rest of the children during her widowhood, and having confirmed the said testament as executor, and intromitted with the whole inventory, or else being obliged to intromit as tutor, she ought to be liable for the foresaid sum, which was the pursuer's portion, with annualrent after year and day, after which she ought to have done diligence. It was *alleged* for the defender, that she could only be liable as executrix to count and reckon, and to instruct diligence, but no ways as tutrix, seeing she never acted as tutrix, and a naked confirmation of the testament wherein she was executrix, could not oblige her to be liable as tutrix. THE LORDS did find that the defender having confirmed the testament wherein she was nominated tutrix without any protestation, that she should be free of the office of tutory, and should be accountable only as executrix to the creditors, that in law she was liable as tutrix, and she not having declared her mind, that there might have been a tutor dative, or a tutor of law served, she ought to compt for the said portion, with the annualrent of what she had intromitted with. No 26.

Gosford, MS. No 756. p. 469.

1678. *July* 26. WEIR *against* The EARL of CALLENDER.

No 27.

THE EARL of CALLENDER having granted a pension to Mr William Weir, for services done and to be done, as the narrative bears, and the endurance being, during his life, whereupon the Earl being charged, suspends on these reasons; 1*mo*, That the pension being for the services to be done, which is *causa finalis*, importing a condition, which not being purified, the pension can have no effect; 2*do*, This pension being a *gratuitous* constitution, as all other donations are, it is revocable *propter ingratitudinem* which Mr William has incurred, 1*mo*, by defaming the Earl, 2*do*, by taking assignations against and charging him with horning, and pursuing him unjustly, where he was assoilzied.

THE LORDS found, that the pension granted for services done and to be done, during life, was valid, unless Mr William refused the service as an advocate, or had served against the Earl, but not upon processes or charges, at his own instance *ex justa*, or *probabili causa*, though the Earl was assoilzied; and for the defamation, they would not sustain it in general, but ordained the Earl to condescend. See No 22. p. 6355.

Fol. Dic. v. 1. p. 426. Stair, p. 643.

*** Fountainhall reports the same case:

MR WILLIAM WEIR, advocate, pursuing the Earl of Callender upon a letter of pension during his lifetime, the defence was, that Mr William *ex capite*