1681. *November.* JOHN PEARSON *against* MR. JAMES WALWOOD.

No. 202.

Found that an act of curatory expede before the pupil was *pubes*, was null, and that there was place for a new election of curators; and here this nullity was proponed by the minor.

Harcarse, No. 968. *p.* 275.

1682. *January* 6. WILLIAM LOCKHART *against* MR. JOHN ELLIES.

No. 203.

Robert Lockhart having left a direction under his hand to his friends, to fill up after his death his children's provision, in a blank sheet of paper he had signed, and to fill up his testament in another blank signed sheet, and insert therein Mr. John Ellies, my Lord Leye, and Bailie Chiesly, as tutors testamentary substitute to his wife, in case of her death or marriage; and she being in a treaty of marriage after his decease, these persons subscribed an order to fill up the testament, and insert themselves tutors before the relict was actually married, and afterwards caused score the blank left to fill up the children's provisions in.

The Lords, upon a contentious debate, found these acts to be qualifications of acceptance of the tutory, and found the actors liable to count as tutors, although they had done no other deed of administration during the whole tutory.

Harcarse, No. 969. *p.* 275.

* Sir P. Home reports this case:

Robert Lockhart, merchant in Edinburgh, having a little before his decease granted a warrant to Mr. John Ellies of Ellieston, the Lord Lee and several other friends, whereof Mr. John and William Sandelands were to be *sine quibus non*, making mention, that he had left three blank papers therewith inclosed, to be filled up with them, in one of which he appoints his testament to be drawn up and formed legally, and his second son named executor, and his wife tutrix to her children, and his friends therein named to be overseers; and thereafter, by another paper, ratified the former warrant, and substituted Mr. John Ellies and the other friends to be tutors, in case her tutory did expire by marriage or otherwise; and the mother being shortly thereafter married to Monteith of Carribber, so that the substitution of the tutors did take place, William Lockhart, son to the said Robert, pursues Mr. John Ellies as one of the tutors for count and reckoning, as he who had accepted the office, in so far as after the decease he did fill up a formal testament in one of the blanks, containing a nomination of the relict to be tutrix, and in case of her decease or otherwise, substituting himself and the other persons to be tutors to the children; and after the relict was married to a second husband, he, with other two of the tutors, did order the two blanks to be scored by war-

No. 203. rants under their hands, written upon the blanks, upon the account that there was no necessity to fill them up, seeing they found the children were otherwise provided, and therefore thought fit to score them for preventing of inconveniencies; as also, his acceptation was farther evinced by several meetings of the tutors and sederunts, all written with John M'Donald his servant's hand. Answered, that the foresaid qualifications could not make the defender liable to count as tutor, unless he had accepted by some express writ under his hand, signifying his mind to accept and act as tutor; that the nomination and testament itself was null, being made up after his decease, it being inconsistent with the nature of a testament, which is the defunct's last will, to be made up after his death; and by the testament the relict being nominated tutrix in the first place, no act of acceptation of the tutory could make him liable as tutor, because, during the subsistence of her tutory, there could not be any other tutors; and the testament itself, as it is filled up, bears this quality in the substitution, that the persons named should be substituted tutors, failing of the relict by decease or otherwise, or any three of them accepting, so that the filling up of the testament could not be a deed of acceptance; and the defender subscribing a warrant, with other two of the persons substituted, for scoring the other two blanks, albeit after the relict's marriage, was no deed of acceptance, seeing they only subscribed that warrant as friends as they are designed in the defunct's warrant, but not as tutors. Replied, The warrant granted by the defunct for filling up of his testament in one of the blank papers by the persons therein named, not being designed to take effect until after his decease, the testament being thereafter filled up, was equivalent as if it had been filled up in the defunct's own life-time, and whosoever could quarrel the testament upon that ground, yet Mr. John Ellies could never quarrel it, who was filler up of the blank paper, and did actually fill it up himself as one of the tutors-substitute; and whatever might be pretended that every deed should not infer an acting as tutor, (albeit the Lords are in use to sustain very slender acts and qualifications to import an acceptation) yet where not only the act is a direct acceptation, but is such an act as does constitute the nomination, such as the filling up of the testament in one of the blank papers, such an act as that, by which he substituted himself tutor, is sufficient to make him liable without any other acts of acceptance; for however presumptive and consequential acts before the event of the condition and substitution might not infer an acceptance, yet a direct act such as this is sufficient to evince the defender's acceptance; for, as in the case the defunct had made his testament himself, bearing that substitution, if Mr. John Ellies had approved of the testament before the event of the condition, he would have been liable as tutor, and could not thereafter have resiled, much more in this case, where the deed done by him is the instituting of himself tutor, failing of the relict by decease or otherwise, especially seeing there being several meetings, minutes, and sederunts of the other persons substituted, whereof the said Mr. John was one, which albeit before the relict's marriage, yet being when the relict was in treaty of her second marriage, where the defender was a tryster and witness, is a farther evidence that he always designed

No. 203.

to accept of the office, in case the condition of substitution should exist; and the clause in the testament substituting the persons therein named, or any three accepting, whatever that might import as to the other persons named, that to make them liable, there behoved to be some express deed of acceptance; yet that cannot be pretended as to the defender, who was the person that filled up the testament, by which he himself, as named one of the tutors substitute, seeing there needed no other deed of acceptance as to him; for if he had not intended to accept, he would neither have filled up the testament, at least would not have substituted himself one of the tutors; and these words, "or any three of them accepting," were only adjected for constituting a quorum of the tutors, at least could only relate to those other persons named that had not subscribed the warrant for filling up of the testament, but cannot be understood of those that subscribed the warrant for that effect, whereof Mr. John Ellies was one, which very act was sufficient to import his acceptance as said is; and the several deeds done by him thereafter do farther evince his intention to accept, and particularly when he delivered the papers to the relict during her widowity, he did take a receipt in his own name, and in name of the other persons mentioned in the testament, in which they are designed tutors; and albeit in the warrant for scoring the other two blanks they are designed friends, yet that will not liberate him, seeing *fala designatio non nocet*; and especially it cannot operate any thing as to the defender, who by the testament substituted himself one of the tutors. The Lords found the foresaid deeds done by the defender an acceptation of the tutory, and ordained him to count and reckon, and allowed him to raise a process against the co-tutors, to concur with him to give an account how the pursuer's means and estate were managed.

Sir P. Home MS. v. 1. No. 138.

1682. *February.* TIRIAS and TARPIN *against* BALBEDY.

No. 204.

A merchant whose estate consisted of account-book and debts to the value of £.20,000, having left Balbedy tutor-testamentary, the Lords found this defence relevant to purge the tutor's negligence to pursue all the debtors in the account-books, viz. that he had employed the defunct's nephew, who had been his apprentice, to draw out a list of such of the debts as he thought were resting, which list was acquiesced to by the relict, who had a share of the free gear, and that he had pursued on the said list, and that many of the persons inserted therein as debtors had assoilzied themselves by their oaths, which was the only means of probation then competent, whereby the pupil saved much unnecessary expense that would have been laid out in pursuing more of the debtors, whom there was no probability to overtake.

Harcarse, No. 970. p. 275.