debt, and therefore found the provision of the fee of 10,000 merks to be exorbitant, and to be revoked as a donation. In the same libel, there was a reduction against James Short his nieces, by another sister called Brown, of the disposition of a tenement in Stirling, failing heirs of his body, on this reason, that albeit it was subscribed before his sickness, yet the persons names were left blank, and were not filled up till he took the sickness, whereof he died; so that on death-bed he could not prejudge his heirs; and it being *alleged*, that before his sickness he had not only subscribed the writ, but had delivered it to the writer, to the use of his nieces, and had given him direction to fill up their names; and that albeit the writer had not done it till his sickness, yet the subscription and warrant before, to fill up the blank, was sufficient to fill up the heir;—it was *answered*, That this warrant at most was but a mandate, which ceased so soon as the constituent was become incapable to dispone. No 58.

THE LORDS having ordained the writer and witnesses insert to be examined, the writer, out of whose hand the writ was recovered, did depone, that it was subscribed before the defunct's sickness, but a blank left for the names, and that the defunct, after his sickness, had ordered his nieces, the Browns', names to be insert in the blanks, without any mention that before his sickness he had given warrant to fill up their names, or delivered the writ to their behoof. Whereupon the LORDS reduced the right, in so far as it might concern the Browns; but the question came not to be determined in case the warrant had been given before sickness to fill up the names, and they had only been filled up *in lecto*.

Fol. Dic. v. 1. *p.* 217. *Stair, v.* 2. *p.* 624.

1687. *January* 18. PENNYCOOK *against* THOMSON.

No 59.
Found as above.

THE reduction pursued by James Pennycook, as assignee by Adam Scot, against Janet Thomson, of her disposition from Adam Scot *ex capite lecti*, is advised. *Alleged*, 1*mo*, Adam Scot passed by his son for his horrid ingratitude, in following him with a whinger to stab him; which is *exhæredatio cum elogio*. 2*do*, Though it was signed blank, and not filled up with her name till he was on death-bed; yet the witnesses deponed, that at the signing (when he was in *liege poustie*) he declared that disposition was for Janet Thomson; so it was all one as if it had depended on an anterior onerous cause; but the LORDS reduced it, and did not regard this, because he might alter his purpose and resolution.

Fol. Dic. v. 1. *p.* 217. *Fountainhall, v.* 1. *p.* 441.

*** Harcarse reports the same case:

FOUND that the filling up of one Thomson's name on death-bed in a disposition, signed by Adam Scot in favours of ——— in *liege poustie*, was quar-

No 59. rellable *ex capite lecti*, at the instance of the granter's heir; though it was *alleged*, that at the time of subscribing, the disponer declared he intended the disposition in favours of the person whose name was therein filled up in the blank; and that this was equivalent to a reservation to do it *in lecto*.

Harcarse, (Lectus Ægritudinis.) *No* 658. *p.* 184.

1714. *January* 28.

James Watson of Saughton *against* Robert Watson of Muirhouse, and Others.

No 60.
A tutor named in a testament, with this quality, that he should only be liable for actual intromission, was not found to have the benefit of this quality, from the act 1696, unless the testament was made in *liege poustie*.

In an action of count and reckoning at the instance of James Watson of Saughtoun against Robert Watson of Muirhouse, as representing his father, alleged to have been one of the tutors nominate to the pursuer, upon this ground, that he had accepted the office, by signing the inventories of the pupil's estate, and judicially producing them by a procurator;

Answered for the defender; His father's signing the inventories cannot import his acceptance, Scrimzeour *contra* Wedderburn, *voce* Tutor and Pupil, that being only a preliminary step to discover the pupil's condition, and hazard of the office, before the tutors submit to the burden thereof, and no deed of administration; as making inventories by an executor, without a subsequent confirmation, doth not make him liable *qua talis*. Muirhouse might have signed those inventories, with a protestation, that his so doing should not import his acceptance, *ergo e contra* his signing should not bind him unless he had thereupon accepted. Again, the act of Parliament 1696 enjoins the acceptance of tutory, in the terms thereof, after the making of inventories. Farther, if an heir's making up and signing inventories, in order to enter *cum beneficio*, is not reckoned a sufficient indication of his *animus adeundi*, nor doth infer a behaviour; much less will a tutor's signing of inventories be constructed an act of administration. 2*do*, The tutors, by a clause in the father's nomination, are declared liable only for their actual intromissions, and not for omissions, in the terms of the act 1696; now the defender's father had no intromissions, and therefore he the defender ought to be assoilzied.

Replied for the pursuer; A tutor accepting, if he would act legally, and shun the penalties of law, must indeed make inventories, in the terms of the act of Parliament 1672; but his making inventories, according to that statute, is one of the best evidences that can be given of his voluntary acceptance. For when law finds a tutor doing what it requires specially of him in that character, it concludes that he acts as such. The case of Scrimzeour and Wedderburn is perfectly different; for there *non constat* that inventories were signed or judicially exhibited, and it was before the act of Parliament 1672 appointing judicial inventories. As to the parallel betwixt inventories which heirs are allowed