Case 33. James Watſon of Saughton Eſq; - - *Appellant;*
Robert Watſon of Muirhouſe Eſq; - - *Reſpondent.*

13th *July* 1715.

Tutor and Pupil.—Acceptance of the office of tutory found not proved by tutorial inventories, which were not judicially ſigned, and wanted writer's name and witneſſes, unleſs poſterior acts of adminiſtration were inſtructed; nor by a miſſive letter not holograph, and without ſolemnities, conſenting to lend the pupil's money.

Certain acts of adminiſtration not ſufficient to infer the acceptance of the office.

An affirmance with 30*l.* coſts.

JAMES Watſon of Saughton, the appellant's father, by his laſt will and teſtament bearing date the 6th of March 1703, appointed the appellant his executor, and nominated Sir James Foulis, Sir Alexander Dalmahoy, Robert Watſon of Muirhouſe, the reſpondent's father, John Watſon, the teſtator's brother, and William Watſon, writer in Edinburgh, his couſin, to be tutors and curators to the appellant during his nonage, the ſaid William Watſon being always *ſine quo non*; and he is alſo appointed by the teſtator to be manager and receiver of the whole eſtate, real and perſonal, that ſhould belong to the appellant as heir or executor to the teſtator, with an allowance of 50*l.* of yearly ſalary, beſides his charges; and he is ordained to make up his accounts yearly, at leaſt once in two years, at the ſight of the other tutors, John Watſon, the teſtator's brother, being always one: The will further "declares, that none of the tutors and curators accepting the "office, ſhall be accountable or liable for any omiſſion, but only "for their actual intromiſſions." A few days after executing this will the appellant's father died.

After his death, the ſeveral perſons appointed by him, cauſed an inventory of all his real and perſonal eſtate to be made; and on the 27th of Auguſt 1703, three duplicates of this inventory were ſubſcribed by them, and by three other perſons who were neareſt of kin to the appellant. Theſe duplicates were exhibited by a procurator before the ſheriff of Edinburgh, who, together with his clerk, ſigned the ſame. None of theſe duplicates had the writer's name inſerted in them, nor were there any ſubſcribing witneſſes to them. The reſpondent's father died before the appellant had attained the age of 14 years; and about a year afterwards William Watſon, the tutor *ſine quo non*, died alſo.

After the appellant arrived at 21 years of age, he brought an action before the Court of Seſſion againſt his ſurviving tutors and curators, and againſt the reſpondent as heir to his father, concluding that they ſhould conjunctly and ſeverally be decreed to be accountable in ſolidum to the appellant for the whole rents and profits of his lands, and all goods and effects received by them, contained in the aforeſaid inventory; and he alſo inſiſted, that

though

though the teſtator by his will had declared that no tutor or curator accepting the office ſhould be accountable for omiſſions, but for actual intromiſſions only, agreeably to the act of parliament 1696. c. 8. empowering fathers to name tutors and curators with that quality; yet that ſuch power was only given to fathers in *Leige Pouſtie*, whereas the appellant's father was on his death-bed when the will was executed. 1696, c. 8.

To prove the reſpondent's father's acceptance of the office, and intromiſſions with the appellant's eſtate, the latter produced one of the duplicates of the inventory before mentioned; and alſo two miſſive letters written upon one paper, directed to the ſaid William Watſon, wherein Sir James Foulis, one of the tutors, adviſes him that he was to pay ſome money he owed the appellant, and gives it as his opinion that the ſame ſhould be lent to Mr. Foulis of Ratho; the other from Sir Alexander Dalmahoy, giving alſo his opinion that the pupil's money could not be better ſecured, to which laſt letter theſe words, "*Robert Watſon conſents*," are ſubjoined.

The reſpondent anſwered, that though his father had been appointed tutor to the appellant, yet he had never taken upon himſelf the office, by concurring with the other tutors in any acts of adminiſtration, nor intromitted with the appellant's eſtate; that the ſubſcribing of the inventory (done out of friendſhip to the appellant, that he might know at his full age what eſtate his father had left) would not fix him in the acceptance of the office of tutor, becauſe it was only a preparatory act required by the ſtatute before entering upon the office, and the rule by which a tutor was accountable to his pupil when he intromits with the ſubject of that inventory. That the act 1696. c. 8. did not provide, that where a nomination of tutors, with ſuch qualities as in the preſent caſe is made, though on death-bed, that the nomination ſhould ſubſiſt, and yet the qualities be void. That the appellant, therefore, could not ſeparate the qualities from the nomination, but ought either to hold the nomination void, and inſiſt againſt the tutors as intromitters with his eſtate, in which caſe the reſpondent's father could not be affected; or if he held the nomination by the teſtator to be good, then the quality of being accountable only for intromiſſions would be a good defence for the reſpondent. For ſuppoſing the reſpondent's father had accepted of the office, (as he contended he never did) his acceptation being upon the faith of the quality expreſſed in the teſtator's will, he being at London when the nomination was made, could not know it was done on death-bed: Even ſuppoſing the nomination had been without any ſuch quality, yet by the expreſs directions in the will, William Watſon was appointed ſole factor, and tutor *ſine quo non*, and the teſtator's brother *ſine quo non* to the making up of the factor's accounts, ſo that the other tutors teſtamentary could never be accountable for the adminiſtration of William the factor, ſince he was not nominated by them, nor had they power to remove him.

The appellant, in reply, contended that the tutors having accepted their office, and made inventories of the eſtate, they were certainly liable in ſolidum; for it imported not that William Watſon was tutor *ſine quo non*, and factor and manager by the teſtator's nomination, ſince his intromiſſions as factor, in the conſtruction of law, were the intromiſſions of the other tutors for whom he was factor, and ſubjected them in the ſame way and manner as if they themſelves had intromitted. Nor did it alter the caſe that he was named factor by the teſtator, ſince he was ſtill factor for the other tutors, and was ordained to account with them yearly, or at leaſt once in two years; and it was their fault that he did not ſo account with them.

Theſe matters in debate being reported to and conſidered by the Court, their Lordſhips, by three interlocuters on the 25th of November 1713, 28th January and 8th December 1714, "Found that the ſaid Robert Watſon, the reſpondent's father's "ſigning the inventories, and judicially producing them by a "procurator, did ſufficiently infer his acceptance of the tutory, "and that he could not have the benefit of the quality in the "nomination from the act of parliament 1696, unleſs the will "had been made in *Leige Pouſtie*."

So far the interlocutors of the Court were not appealed from.

The reſpondent afterwards recurred to a new defence, namely, that his father's ſigning the inventories was no proof of his acceptance of the tutory, for the ſigning thereof was neither done judicially in Court, nor atteſted by ſubſcribing witneſſes, nor the name and deſignation of the writer of the inventory inſerted
1681, c 5. therein, and, therefore, that by the act 1681, which requires theſe qualities in all writings, it was abſolutely null and void. For ſuſtaining this allegation the reſpondent gave in a declaration or certificate of the clerks to the Sheriff Court, Commiſſary Court, and Town Court of Edinburgh, of the uſual form and manner of receiving inventories from tutors and curators, wherein the writer thereof was either deſigned with witneſſes ſubſcribing to the execution by the tutors; or otherwiſe, they had been produced by the tutors and curators themſelves in Court, and ſigned there judicially by them and by the judge.

The appellant made anſwers, and the Court on the 27th of January 1715, "ſuſtained the defence, that the inventories are "null and void, not being judicially ſigned, and wanting writer's "name and witneſſes, and therefore found the ſame not ſufficient "to infer the tutor's acceptance, unleſs there be poſterior deeds "of adminiſtration inſtructed." The appellant reclaimed, and after anſwers for the reſpondent, the Court, on the 17th of February 1715, "adhered to their former interlocutor." The appellant having inſiſted that the letter formerly produced by him, in which the reſpondent's father conſented to the lending out of his money was a ſufficient poſterior act of adminiſtration; after a debate on this point the Court on the 18th of February 1715, "found that the ſaid letter is not probative, nor an act of admi-

"niſtration

" niſtration liable to make the reſpondent account as if he had " been tutor." And the cauſe being called before the Lord Ordinary on the 19th of February, his Lordſhip " aſſoilzied the " reſpondent from the ſaid proceſs."

The appellant prevented a further petition to the court wherein he inſtanced ſome other acts of the reſpondent's father's adminiſtration, viz. his giving directions about the appellant's buildings, employing workmen therein and paying them, his putting the appellant to ſchool, and ordering his ſtay and maintenance there, and he prayed that he might be allowed a commiſſion for proving theſe and other acts of adminiſtration. After anſwers for the reſpondent, the Court, on the 26th of February 1715, " found the " preſent acts of adminiſtration condeſcended on, with the former, " are neither ſeparately nor jointly relevant, and therefore aſſoil- " zied the reſpondent."

The appeal was brought from " ſeveral interlocutory ſentences " or decrees of the Lords of Seſſion of the 27th January, and " the 17th, 18th, 19th, and 26th of February 1715." Entered 11th May 1715.

Heads of the Appellant's Argument.

The act of parliament 1681. c. 5. on which the reſpondent's objection to the inventories was founded, related only to private deeds; but it did not reſpect inventories which are of another nature, given in judicially to the court upon citation of the pupil's neareſt of kin, purſuant to the act of parliament 1672. c. 2. Among the ſolemnities preſcribed by that act, theſe, of ſubſcribing witneſſes and deſignation of the writer are not to be found; and in the inventories in the preſent caſe, all that was preſcribed in that act was obſerved, viz. the ſubſcribing of the appellant's tutors and neareſt of kin, and of the judge and clerk in court. 1672, c. 2.

Thoſe inventories were alſo ſigned by three of the appellant's neareſt relations, who were indeed the moſt proper witneſſes, and were called as atteſters thereof; and three copies made of the ſame.

If there had been any formality wanting, yet no tutor ought to take advantage againſt his pupil of his own informal deed, to which he is bound *ratione officii:* for, if it ſhould be otherwiſe, tutors may ſeem to act according to law, and at the ſame time may lay a foundation for their own diſcharge by their own acts, made with a deſign that they may not be evidence againſt them; for the poor pupils cannot be a check, but the law muſt be a check upon them.

One of the copies which had been ſigned by the reſpondent's father, and by the ſaid other tutors, and by the judge and clerk, as aforeſaid, was produced by the reſpondent himſelf; and it was never in the leaſt pretended by him, that his father's name thereto, or to either of the other copies, was not of his father's own proper hand-writing.

The declarations or certificates produced by the reſpondent were not made by the ſaid clerks upon any order of reference to them from the Court of Seſſion, but were voluntarily made by them

them at the reſpondent's inſtance. Nor do they give any account of the general practice of the nation in ſuch caſes, but only of thoſe courts in Edinburgh, which do not contain a ſixth part of the inſtances of the kingdom; and yet even in theſe declarations there is one inventory mentioned to be exhibited as the inventories in the preſent caſe were, without the writer's name or deſignation, or atteſting witneſſes; nor was there any precedent either produced or quoted of any inventory being rejected or annulled for want thereof. And if the inventories in queſtion were any way defective, the judge ought not to have received them or granted adminiſtration thereon.

Though it was contended that the letter before-mentioned was no evidence, as wanting writer's name and witneſſes alſo, yet it was never denied that the reſpondent's father's name, as conſenting to the lending of the ſaid money, was of his father's own proper hand-writing, and the appellant offered to prove the ſame by witneſſes.

Heads of the Reſpondents' Argument.

Though the act 1672, c. 2., ordaining tutors to make up an inventory, does not ſtatute, that theſe inventories ſhould be ſigned before witneſſes; yet it provides that theſe inventories ſhould be judicially produced before the judge, and an act made thereon; and nothing is ſaid to be produced judicially, but what is acknowledged and ſubſcribed before the judge, which this was not; and the act 1681, c. 5. is general, and provides, that all writings to be ſubſcribed by any party, wherein the writer and witneſſes are not named and deſigned, ſhall be null. Since the date of that act no inventory without writer's name and witneſſes, or not ſubſcribed judicially, was ever exhibited or pleaded in judgment, as appears from the certificate of the proper officers where inventories are commonly recorded.

A tutor once accepting might be bound to make his own deeds formal, but ſince the reſpondent's father did not accept, neither can he be bound to complete the deed, from which his acceptance is to be inferred.

The acts condeſcended upon by the appellant were no acts of adminiſtration as tutor, but only acts of humanity and friendſhip. They were, that the reſpondent's father concurred with the other tutors in giving directions to repair a fence that had been made for defending the appellant's lands againſt the overflowing of the water; and that he employed workmen for that end; and that he had given his advice reſpecting the proper methods to be followed for the appellant's education. But it was never by law intended, that the adviſing with tutors made the adviſer himſelf accountable as a tutor. On the contrary, the reſpondent's father having never concurred with the other tutors in diſpoſing of the goods and effects of the appellant, nor in the letting, ſelling, or ordering of his lands, nor ſuffered himſelf to be inſerted in any act as preſent at any ſederunt or meeting of the other tutors, are plain proofs that he never accepted of the office of tutor, nor was looked

looked upon as tutor by thoſe who did accept and undertake the management.

The letters or miſſive, produced by the appellant, was not probative againſt the reſpondent's father, being neither holograph nor ſubſcribed before witneſſes, and ſo was void by the ſaid act 1681, c. 5. It was alſo plainly vitiated in the date, and ſo by the law of Scotland could be no proof; neither did it appear at what time it was ſubſcribed by the reſpondent's father.

After hearing counſel, *It is ordered and adjudged, that the ſaid petition and appeal be diſmiſſed, and that the ſaid interlocutory ſentences or decrees therein complained of be affirmed; and it is farther ordered, that the ſaid appellant do pay or cauſe to be paid to the ſaid reſpondent the ſum of* 30*l. for his coſts in this Houſe.* Judgment, 13 July 1715.

For Appellant, *Spencer Cowper. Rob. Raymond.*
For Reſpondent, *J. Jekyll. David Dalrymple.*

The judgment of the Court in that part of the cauſe, previous to the ſubject of the preſent appeal, by which it was found, that a tutor was not to have the benefit of a clauſe, that he ſhould not be accountable for omiſſions, but only for actual intromiſſions, where the will was not made in *Leige Pouſtie*, is worthy of notice, though by the ſubſequent judgment of the Court, the effect of this was ſet aſide.

Charles Menzies Eſq; of Kinmundie, Writer to his Majeſty's Signet, Uncle of the Reſpondents, - - - - *Appellant;*

Helen, Barbara, and Jean Menzies, Siſters to the deceaſed Thomas Menzies of Kinmundie, and Robert Muir Merchant in Aberdeen, Huſband to the ſaid Barbara, and as their Aſſignee for his Intereſt, - *Reſpondents.*

Caſe 34. Fountainhall, 21 June 1712.

25th *July* 1715.

Sale —A perſon who had purchaſed lands at a public ſale, at 20 years purchaſe of a proved rental, afterwards claims deductions: 1ſt, Becauſe the teinds were held by a tack from the College of Aberdeen then near expired; 2d, Becauſe, as he alleged, the rental was too highly ſtated by one Chalder; 3d, Becauſe he was kept out of his purchaſe for ſix years, during which time the perſon in poſſeſſion only accounted for the rents, which were leſs than the intereſt of the price; 4th, A deduction of certain expences he had been put to, in adjuſting the debts due by the eſtate and in the perſon of the laſt poſſeſſor thereof. The Court having refuſed theſe deductions, and allowed the ſellers 30*l.* of expences, the judgment is affirmed.

In this caſe the purchaſer had been employed as agent to conduct the ſale, proof of rental, &c.

THOMAS Menzies, late of Kinmundie, left one ſon, and the reſpondents his daughters, all under age, to whom he had appointed John Hamilton, his brother-in law, tutor and curator. The