

granted *intuitu matrimonii*, was found ineffectual, the woman dying before marriage.

No 24.

Fol. Dic. v. 1. p. 426. Stair. Gosford.

* * * See this case, No 56. p. 4958.

1675. February 2.

SCRIMZEOUR against WEDDERBURN.

UMQUHILE Major Scrimzeour in his testament nominated three tutors testamantar to his bairns, whereof Alexander Wedderburn of Kingennie was one, to whom he left 5000 merks of legacy; and having been killed at Dunbar in anno 1650, in anno 1651 the tutors met with the relict, and took inventory of the defunct's writs, and the testament is the first writ in the inventory. In anno 1652, Kingennie confirmed himself executor legatar to the major, and confirmed 16000 pounds; but therein accepted not the office of tutory; but in Dec. 1653 he did accept the office. The legacy is left in these terms, That if the defunct's wife did bring forth a son, the legacy should not be due. There was no son, but two daughters.—The one being dead, Margaret Scrimzeour the only child pursues the said Alexander Wedderburn, who is the only accepting tutor, both for his intromission and his omission. Whereupon compt and reckoning having been appointed several years ago, and it having been debated, *a quo tempore* the tutor should be liable, whether from the time he knew of his nomination, or from his acceptance,

THE LORDS, by interlocutor the 19th of July 1670, found the tutor not liable for any diligence before his acceptance.

It was now farther *alleged*, That if the tutor had not at all accepted, he would have been free, but having accepted, he is liable, as if he had accepted *ab initio*, when he first knew, and is presumed to accept with that hazard; for *tutorem habenti non datur*; when tutors are nominated, there is no place for tutors of law, or datives, and therefore the tutors nominated should declare themselves, whether they accept or not; for if this shall be allowed, that tutors nominated forbear to accept, and accept thereafter, and be liable only from that time, it will destroy pupils, especially the bairns of merchants, whose estates consisting in moveables and accompts, will perish. *2do*, In this case there is this specialty, that there is a considerable legacy left to the tutor, which legacy he hath accepted, by confirming himself executor *qua legatar* in anno 1652, after which, before December 1653, when he accepted, much of the pupil's means perished; and it is consequent both from reason, and many cases in the civil law, that he who accepts a legacy left by a defunct in his testament, is thereby obliged to perform any thing else that he is ordered to do by the defunct's will; which being most favourable, is interpreted as every thing therein were as the cause or condition of the rest, and that the legatar

No 25.

A legacy being left in a testament to a nephew, named with two others to be tutors to the testator's children, he refusing to act as tutor, was found to have no right to the legacy.

No 25. in gratitude cannot claim the legacy, and neglect the other parts of the defunct's will; and especially he who by the defunct's will is nominated tutor, and hath a legacy, cannot accept the legacy and reject the tutory. *3tio*, This tutor having confirmed himself executor-legatar, *qua* executor is liable for diligence for what is in the inventory. It was *answered* for the defender, that a tutor can only be liable *ex lege, vel ex contractu, vel quasi contractu*. The Romans were liable to accept tutories, *ex lege*, and therefore so soon as they knew of their nomination, they were obliged to act, unless within fifty days they obtained themselves to be excused, upon the excuses allowed in the law. But by our law no person is obliged to be tutor, but by his own acceptance, and therefore cannot be liable for any thing lost before his acceptance, not being obliged to do diligence till he accepted: And as to the alteration arising from the legacy, it is of no moment; nor is the Roman law a rule to us further than our customs have allowed the same; so that tutors are not obliged to know or consider the Roman law, but the law of this kingdom; nor is the will of defuncts with us of such importance as with them, whereby the whole inheritance was disposeable; and with us ordinarily but a third of the free moveables. And even by the Roman law, a legacy left to a tutor, behoved to be for the executing of his office, if it bound him thereto, otherways he was only excluded from the legacy, as taken from him upon ingratitude, *ut ab indigno*; but here the legacy is neither expressly nor presumptively for execution of the office; for there are three tutors nominated, and a legacy only left to one; and there is a special motive presumeable, viz. That the tutor was the defunct's nephew, and the legacy is only left to him, if the defunct had not a son; neither hath the tutor obtained this legacy, but the Lords have refused to allow it him; and this is special in the case, that there being three tutors nominated, without mention of a quorum, or conjunctly and severally, it is a question whether this defender could have been tutor alone, without the rest; but however, time was always to be allowed him to endeavour the concurrence of the rest, and he was not in the condition as if he had been sole tutor; and even in that case there was nothing to oblige him to declare his mind, but the pupil's mother and relations might and ought to have served tutors of law, and cited the tutors testamentar, which would have excluded them if they had not accepted. As to the third, Of the obligation of the defender as executor-legatar for diligence, it is not *hujus loci*, this process being only a tutor's accompt. *2do*, Executors-creditors having always been understood only liable for their intromission, until the late act of *sederunt*, whereby the Lords from thenceforth have found them liable for diligence, as other executors; and legatars are creditors of the executor, though not of the defunct.

THE LORDS found the tutor only liable from his accepting and acting as tutor, in December 1653; and that his taking up inventory, or confirming executor-legatar, did not import accepting, or acting as tutor, and therefore found him not liable for any diligence before his acceptance, or for what was before

that time lost ; especially considering that there were three tutors nominated, and that this tutor was excluded from this legacy by the Lords ; but as to that point how far an executor-legatar was liable for diligence, the LORDS found it not competent in this process, but reserved the same in any process upon the executry ; but the tutor was excluded from the legacy, for not accepting when he first knew the nomination and legacy. See TUTOR AND PUPIL.

Fol. Dic. v. 1. p. 425. Stair, v. 2. p. 314.

* * * Dirleton reports the same case :

MAJOR SCRIMZEOUR having named in his testament, in *anno* 1650, Sir John Carnegie, and the tutor of Parie Fotheringham, and Alexander Wedderburn of Kingheny, to be tutors to his two daughters ; Margaret Scrimzeour, one of the said daughters, pursued the said Alexander Wedderburn for count and reckoning and payment ; and an auditor being appointed, and that question being started before him, viz. whether the tutor should be liable for negligence from the time that he accepted, or before that he knew that he was named tutor ; and, upon the auditor's report, it was found by the LORDS, that he should be liable only from the time of his accepting ; and yet, the pursuer having desired and got a hearing in the Inner-house, it was again urged for her, that the tutor should be liable after he knew that he was named, and did cease to do that diligence that was incumbent to him ; and diverse citations were adduced from the civil law, and the titles of the *Dig. & Cod. De tutela et tutoribus* ; and *De administratione et periculo tutorum*, which ought to militate in this case, especially in respect the said defender was not only named tutor, but was a legatar, a considerable sum being left to him by the said testament, which law presumes was left to him in contemplation of the burden of tutory put upon him ; so that, having accepted the said legacy, and having confirmed himself executor legatar, he could not decline the office, not to be liable as *tutor* or *ut protutor*. And it was farther urged, That, as executor legatar, he was liable to do diligence. To which it was answered, That the former interlocutor was opposed, being just, and upon relevant grounds of law, in respect the civil law is not received by us altogether in the case of tutors, the office of tutory by the civil law being *munus publicum et necessarium*, which no person can decline, unless he have and allege a just ground of excuse within the time limited by that law ; whereas, by our law and custom, when any person or persons are named tutors, they are at liberty to accept the said office or not ; so that a person named tutor, until he accept, neither is, nor is obliged to do the duty of a tutor. And albeit, by the civil law, a legacy being left to a tutor, is presumed to be left *eo intuitu*, and upon condition that he should accept to be tutor ; yet, by the civil law, if the person named tutor do not actually get the said legacy, *nisi consecutus sit*, which are the words of the said law, he is not obliged to accept the said office ; and it is not, nor can it be said, that the defender got the said legacy before he

No 25. did accept. And as to that other ground, that the defender being executor legatar, was obliged to do diligence, it was *answered*, That, by the late decisions, an executor creditor confirmed before the act of sederunt, is only liable to intromit, in order to his own satisfaction; and an executor *qua* legatar is in the same case as an executor creditor, seeing a legacy is a debt payable out of the executry, and the legatar has no interest to confirm but to the effect he may be paid of the same.

THE LORDS found, that a tutor is liable only from the time that he did accept; and that the leaving to him, and his accepting of a legacy, did not alter the case, unless, before his accepting of the said office, he not only had owned, but got the said legacy; and this pursuit being only *actio tutelæ*, and for count and reckoning against the defender as tutor, they did not determine the said question, How far an executor legatar should be liable? but reserved the same until the defender should be pursued as executor.

THE LORDS, in the debate amongst themselves, some of them did urge these arguments, that a tutor being liable only *ratione officii*, he cannot be liable before he accept the said office, it being inconsistent with law that he should be liable to the duty of an office before he have it, which would be *filius ante patrem*. 2do, In law, a tutory is *quasi contractus*; and as in all contracts, it is required that there should be the mutual deeds of both parties contractors; and the nomination (which is the deed of the defunct) did not bind the tutor, until he bind himself by accepting, which is his own deed. 3tio, That a tutor having a legacy should be obliged to accept it, is only provided by the civil law, which is the municipal law of the Romans, and is not of force with us, until it become our law, either by a statute, or custom authorising the same; and even by the civil law, *præsumitur* only that the legacy left to the tutor is upon the account foresaid, but that presumption is only in the case, where it cannot be thought that the defunct would have left the legacy upon another account, viz. of relation, or any other consideration; whereas, in this case, it cannot be thought that the said legacy was left to the defender, upon the account that he was tutor, in respect he being the last named of the three tutors, there were no legacy left to them; and he was nephew to the defunct who had a great kindness for him; and the said legacy was not left to him simply, but in case his wife, whom he thought to be with child, should not be brought to bed of a son. 4to, The defender could not accept the said office of tutor testamentar, because he and the other two tutors were named conjunctly, and the other two living, he could not be tutor alone.

Ag. Dalrymple.

Alt. Falconer.

Clerk, Monro.

Dirleton, No 233. p. III.

* * * Gosford also reports the same case :

No 25.

IN the action of count and reckoning at Margaret Scrimzeour's instance, against Easter-Purie, after litiscontestation and witnessess led, and the cause ready to be advised, it was desired that the tutor might be yet found liable, from the time of the defunct's decease, and not from the time of his acceptation only, which was long thereafter ; because, notwithstanding it was so found formerly by an interlocutor, yet now they have a new reason and ground of law, not formerly insisted on, viz. that in that same testament wherein he is nominated tutor, he hath a legacy left him by the defunct, which, by the civil law, binds upon him the office of tutory, and makes him liable to administrate, whereunto our law is altogether conform in matters of legacies. It was answered, *imo*, That *in hoc statu processus*, where the cause was concluded, that new alledgeance could not be now received, and albeit it were yet receivable, yet it is no ways relevant, *first* because our law is altogether different from the civil law, as to the acceptation of the office of tutory, where it is expressly provided that tutors nominated must declare publicly their unwillingness, and be excused from their acceptation upon just reasons, as is clear, *D. De excusationibus tutorum*, otherwise they are liable as if they had administrated, whereas by our law there is no such necessity of excuse, but it is sufficient that a tutor nominated, abstain from administration, whereby a tutor dative, or a tutor of law, may take upon them the office. *2do*, Even by the civil law, a tutor being legatar is not always obliged to accept of the office where he hath a lawful excuse, and the most that can be pretended is, that he should lose the benefit of his legacy, if he should refuse the office, and even in that case, *D. De his quibus ut indignis* the law do only provide that he should lose that benefit, *si eo nomine legatum sit ut officium suscipiat*, whereas there is no such thing in this testament, or legacy, the reason thereof being, that Easter Purie was the defunct's nephew and had been intrusted for him, for his advantage, when he was out of the country. *3tio*, By the civil law, the tutor is obliged where he hath got payment of his legacy, and so hath reaped benefit, whereas this tutor having been at great charges and expenses in confirming himself executor legatar, and having pursued for debts, and uplifted, having desired to have retention as executor legatar ; the LORDS did refuse the same, and ordained him to compt for his whole intromission. This case being much debated as a new title and never before decided, the LORDS notwithstanding of the state of the process, because the pursuer was a minor and a young gentlewoman, did resolve to give their interlocutor upon this point, and did find that the defender having abstained from administration as tutor until he confirmed the principal testament, albeit he was legatar as well as tutor nominated, yet that would not make him liable to count from the date of the nomination, because there

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 nomination 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-