No 22. party suspending, that the pension bears, ' to be given to the Doctor, for serv-
' the cure of that kirk ;' and he being now transported to another charge, and that kirk served with another minister, the pension should cease, especially seeing there is an express clause in the pension, whereby the defender accepts the same in satisfaction of all that he can crave of the Lo. Couper for his service ; the Lords found not this reason relevant; but found that the Lord Couper was debtor to the Doctor in the pension so long as he lived, albeit he served not the cure at that kirk, seeing the pension bearing, to be given as said is, for pains to be taken *in futuro*, which now ceased, was now found not to be the final cause, whereby the failzie would make it to cease, but was an impulsive cause only, which, although it held not, yet thereby the pension was not restricted to the time of his service, but was given expressly during his lifetime, and ought not to cease so long as he lived ; and so a pension given to a pensioner for his lifetime, for services done and to be done, ceased not by not doing of service thereafter continually.

Act. *Nicolson et Neilson.* Alt. ——. Clerk, *Gibson.*

*Fol. Dic. v.* 1. *p.* 426. *Durie, p.* 441.

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1661. *December* 3. Marjory Jamieson *against* Roderick M'Leod.

No 23. Marjory Jamieson, relict of umquhile Mr John Alexander advocate, pursues Roderick M'Leod, for payment of a bond of pension, of 200 merks yearly, granted to her husband, bearing, ' for service done and to be done.' The defender *alleged* the libel is not relevant, unless it were alleged that Mr John had done service constantly after granting of the pension, which the Lords repelled. The defender *alleged* further, That he offered him to prove, that Mr John did desist from his employment as advocate after the pension, and became town clerk of Aberdeen ; and the pension being granted to him who exercised the office of an advocate at that time, must be presumed for his service as advocate.

' The Lords repelled this defence, in respect of the bond of pension, bearing, ' for services done and to be done,' generally.

*Fol. Dic. v.* 1. *p.* 426. *Stair, v.* 1. *p.* 63.

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1669. *February* 18. Trench *against* Watson.

No 24. A curator having contracted a young woman his minor to a near relation of his own, binding himself to pay a tocher with her, and of the same date, taking a disposition to her whole effects ; this disposition, presumed to be

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.

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1675. *February 2.* SCRIMZEOUR *against* WEDDERBURN.

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.

UMQUHILE Major Scrimzeour in his testament nominated three tutors testamentar 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. 2*do*, 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