

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 adjoined 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.*

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1682. February. TRIAS and TARPIN against BALBEDY.

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.*