no gift of tutory, thought, though a bond had been taken, the cautioners would not have been liable; and therefore we assoilzied the clerk.

No. 21. 1748, Dec. 7. ROBERT LECKIE *against* DAVID RENNIE.

IN May 1728, James Rennie disponed his effects to his nephew James Rennie in life-rent, and his son David the defender in fee, excluding the father's power of administration; and named six tutors to David, whereof one was Andrew Leckie, notary-public; and left several legacies, and among others 100 merks to Andrew Leckie. After James Rennie's death, the tutors met and inspected the settlement, and adjourned their meeting in July 1728, and Andrew Leckie does not appear to have again met with them. The other tutors appointed one of their number, William Danskine, factor, without finding caution, who managed very ill, and the effects were embezzled or perished, and the debts not paid. In July 1729, Andrew Leckie required the other tutors to remove Danskine from the factory, and call him to account, and appoint another factor with a cautioner, and in that case declared himself willing to join with them, otherwise protested that his not joining with them might not deprive him of his legacy. One of the tutors declared his willingness to remove Danskine, and Danskine himself declared his willingness to give up the factory, and to account, but no more followed upon it. August 1729 Leckie obtained a decreet of the Sheriff of Stirling for his legacy, which was suspended in 1732, and came before me to be discussed, in the name of Robert Leckie, son of Andrew Leckie. The question was, if the Roman law takes place with us in this point, and whether in this case Leckie had a good excuse for not accepting. The Lords pretty unanimously found the legacy not due, and thought that the bad management of the other tutors made it rather the more necessary for him to interpose.

No. 22. 1749, July 18. MR CHARTERIS'S CLAIM ON LORD ELCHO'S ESTATE.

THE Lords dismissed the claim, 4th July. 18th July, Adhered, and refused a reclaiming bill without answers.

No. 23. 1751, Feb. 19. JOHNSTON *against* CRAWFURD and OTHERS.

THE deceased Johnston of Straiton, by a deed *in liege poustie*, appointed certain persons tutors and curators to his children, three to be a *quorum*, but his wife *sine qua non*. The words were, "with power to them, or any two of them, with the said mother, to exerce the officer." He thereafter on death-bed made another nomination of tutors and curators, leaving out one of the first named, and adding other four, and made three a *quorum*, without any mention of the *sine qua non*, and with power to those first named to accept either on the first or last nomination. After the pupillarity was expired, the widow wanting to get free of these tutors and curators, renounced the office of curatory, and the eldest son raised an edict for chusing curators, which was opposed by those named, and advocated to this Court. The minor alleged that the first nomination was fallen by his mother's renunciation, and that the nomination on death-bed could not bar him from

chusing curators. Answered: The nomination of a *sine qua non* does not determine or void the nomination; 2dly, that a nomination being once made *in liege poustie*, the father might effectually vary or qualify that nomination on death-bed. This last we did not much regard; and upon answers to the defenders' petition, we repelled both, and adhered to Minto's interlocutor; though several said they were chiefly moved by other matters in the answers, that the defenders had not taken any concern in the minor's affairs while pupil; but I confess I made no doubt that the first nomination was fallen.

ULTIMUS HÆRES.

No. 1. 1749, Feb. 2. FERGUSON *against* THE OFFICERS OF STATE.

A MAN, Ferguson, pursued the Crown and Officers of State to cognosce certain debts due to him by a defunct, to whom the Crown is left heir; and as to many particulars of horses, cows, &c. proved a sale, and we gave decreet; but as to others, he proved his own poinding the goods from some of his tenants, and their being delivered to the defender, but did not prove whether in sale, or whether for ready money, or in trust, or in payment of debt; and therefore we found that part of the libel not proven, agreeably to Stair's opinion, (B. 4. T. 30. § 9.) and the decision Scot of Gorrinberry, (DICT. No. 624. p. 12,727.)

No. 2. 1753, July 1. MR JOHN GOLDIE *against* MURRAY'S TRUSTEES.

See Note of No. 25, *voce* PROCESS.

USURY.

No. 1. 1741, July 15. HAMILTON *against* CAPTAIN CLELAND.

A creditor in 300 merks granting a discharge, as dated in January 1734, bearing receipt of full payment of the annualrent till Lammas 1734; and after his death his heir suing for payment,—the defence was an allegeance of usury proved by that receipt. Answered: That the date must have been a mistake instead of 1735, which mistake is common in writs granted in the first month of a year; 2dly, *de minimis non curat prætor*, and the usury in this case could not exceed three-halfpence. At advising, we doubted whether by our Scots acts of 15 and 23 Parl. James VI. this was proponable against the heir after the usurer's death; and two judgments in 1706 * and 1709, † were observed,

* DICT. No. 62. p. 524. † DICT. No. 65. p. 16,420.