to the said provision; and whether Mr William Trent was presented by any of the parties, or how he came in.

Upon this both parties took out diligences, and led witnesses. See the informations beside me, and the practique of Dr Reid's heirs their right of presenting the bibliothecar at Aberdeen; and how far the *jus patronatus* is *individuum*, that he who presents the first, must, by necessary consequence, have also the second, if another minister be judged necessary at that place. Some thought the rights of all parties so obscure, that it might be reputed a waiff patronage, and as caduce devolve to the King, none of the pretenders having a clear title thereto.

Advocates' MS. No. 658, *folio* 308.

[See the subsequent parts of the report of this Case, Dictionary, p. 9903.]

1677. *November* 21. MINISTER of Tillycoutry *against* NICOLSON of Tillicultrie.

THE minister of Tillycoutry pursues Nicolson of Tillicultrie, before the commission for plantation of kirks, for an augmentation of his stipend. Against which it was offered to be proven, by the minister's oath, that he had promised to his parishioners faithfully never to seek an augmentation; and he confessed the promise judicially at the bar. Yet the Bishops of St Androis and Galloway forced the commission to decern an augmentation, on this pretence, that the promise was *super re turpi vel illicita*, and granted through ignorance and simplicity; and that it was their part, though he were not seeking it, to provide churches with competent stipends. It was not denied but they might augment, to take commencement after his incumbency, and that his promise was only personal, and could not prejudge his successor, they being but administrators of the benefice; but it was *inauditum et contra bonos mores* that it should not tie himself, and he coming against his promise *exceptione doli mali repelli et summoveri poterat; et in omnibus grave est fidem fallere, multo magis* in a churchman, who ought to be patterns of faithfulness and all other virtues. What if he had sworn not to seek an augmentation? It is like the bishops would have absolved him, as they did dispense themselves from the oath of the Covenant. See a case somewhat like it, in my Summary of the Commission Books. *Advocates' MS. No.* 659, *folio* 308.

1677. *November* 23. AGNES CRAWFURD, and her CHILDREN, *against* ALEXANDER KENNOWAY.

ALEXANDER KENNOWAY had become cautioner in a contract of marriage, for the husband's obligements in favours of Agnes Crawfurd, the wife, and the heirs and bairns to be procreated of that marriage. There are children; and the father dying, Alexander is charged to fulfil. As to the wife's liferent, he cannot evite the securing her in that; and if the other part of the obligement had only mentioned *bairns*, without adjecting the word *heirs*, there would have been as little doubt but he would have been liable to the bairns likewise. But his defence against them

was, Ye cannot have right to this provision till ye be served heirs; and, *qua* heirs to your father, you are obliged to relieve me, who was only cautioner for your father; and so *confusione tollitur obligatio: et quem de evictione tenet actio eundem agentem repellit exceptio; et frustra petis quod mox es restituturus.*

This allegeance the Lords sustained, that ere they could seek implement, they behoved to be served heirs, and then they would be obliged to relieve: and therefore assoilyied from the pursuit.

This evacuates all cautionaries for provisions to heirs in contracts matrimonial; but it is only done to discourage such inept conceptions of these clauses. The title *Codice, Ne fidejussores dotium dentur*, aims elsewhere. Mr David Dinmuire, advocate, was just engaged in the parallel case to this. *Vide* this case argued *supra*, No. 555, § 6, [*February*, 1677.] *Advocates' MS. No.* 661, *folio* 308.

1677. *January* 10, *June* 16, and *November* 27. STEWART of Castlemilk *against* The DUKE OF HAMILTON and SIR JOHN WHYTFORD of Milneton.

January 10.—DUKE HAMILTON and Sir John Whytford of Milneton's defences against Stewart of Castlemilk's reduction *ex capite metus* being this day advised, the Lords allowed a conjunct probation as to the spontaniety of the deed; yet upon the matter they rendered Duke Hamilton's probation ineffectual, by declaring they would not admit those same witnesses whom the pursuer should make use of to prove the compulsion, fear, and force, to prove his being at liberty, but the Duke behoved to use others; whereas there was no others that knew ought of it save whom the pursuer intended to make use of. They took Castlemilk ere the caption came; they carried him not to a prison, but two or three days, one after another, to private houses, which was *carcer privatus;* and instead of taking from him an obligement to fulfil the will of the horning and caption, they presented him a disposition of his estate, and undertook to pay debts for him, and constrained him to sign it. In this cause it was, that the Lords debated if the Duke should be permitted to come within the bar, and sit with his hat on; *item, de alienatione litis in potentiorem;* which see in the observes anent Session emergents, on the 19th of December, 1676. *Vide supra*, No. 278 and 279, in December, 1671, *Spalding* and *M'Intosh.*

On the 16*th of June*, 1677, the Lords advising the probation led, found the reason of force clearly proven, and therefore reduced the disposition; for it is the interest of every private man to be compelled to do nothing but according to law. Yet if a man be owing me money, and I by threats compel him to pay me, as was in this case, there will be no *repetitio* or *condictio* of what is paid. Yet *vide* l. 7. C. *Unde vi.* *Advocates' MS. No.* 532, *folio* 272.

1677, *November* 27.—Duke Hamilton's action and Castlemilk's was this day advised. The Lords decerned Duke Hamilton to cede the possession to Castlemilk: albeit the commencement and entry of his possession was not by that disposition they had reduced, but by a gift of liferent escheat, and by an assignation to a lady's liferent, which was now extinct by her death; *et resoluto jure dantis, re-*