1678. *January* 9.

SIR WILLIAM HAMILTON of Preston *against* The LAIRD of LAMINGTON.

No 62.
Found in conformity with Macadam against Lag, No 49. p. 8938.

LAMINGTON suspends a bond on this reason, That it was granted by him, having creditors, without their consent.—*Answered*, He was not lesed, for it was for an onerous cause, a debt of his goodsir's, to whom he is now served heir.—*Replied*, He needs not say lesion, when the deed is *ipso jure* null; 2*do*, He was not then served heir, and so they had no ready execution.——THE LORDS found a minor, having creditors, might validly grant a bond without their consent, when he was not lesed; but assoilzied him from all annualrents of the land preceding his service; but the reason was, because the service here was not for many years after the grandfather's death.

Fol. Dic. v. 1. *p.* 576. *Fountainhall, MS.*

1680. *November* 30. STEVENSON *against* ALLANS.

No 63.
A minor having curators, may test without their consent, and may nominate his own curarors to be his executors.

UMQUHILE —— Allan having nominated William Stevenson his executor and universal legatar, he obtained decreet for a sum belonging to the defunct. Two Allans, the defunct's cousins-german, raise reduction of the testament and decreet upon this reason, That the nomination was by a minor, in favour of his own curator, who could not authorise him, and who was his step-father and master; and the minor having lain sick a fortnight, none of his relations were acquainted therewith; likeas he had also formerly nominated his nearest relations his executors and legatars, and therefore this testament had been unwarrantably elicited; likeas the defunct died a few hours after he signed the same; and albeit minors having curators might test without their consent, yet not in such circumstances as these; therefore most of the neighbouring nations have restricted the power of testing to 18 years of age; and if this be authorised, the portions of children, which are oft times wholly testable, may be carried away from their relations in favour of strangers, or any who happens to be about them the time of their death; and by the Roman law, heirs nominated were excluded, if it proceeded upon suggestion; and more must be presumed in this case, where the defunct had formerly preferred his friends.—It was *answered*, That none of all these grounds are relevant to reduce a testament, neither can any thing less than an act of Parliament restrict the power of testing after pupillarity; nor is there any reason for such a law in Scotland, where testing is so restricted by law, that it can reach no heritable rights, and that it can neither exclude the wife nor bairns' share; and though the Romans, who were zealous to have the power of testing to extend to the whole estate, excluded suggestion, and made many restrictions, yet our restrictions are more than them all; and if upon such pretences testaments could be reduced, then the nomination of wives, parents, children, and brothers, who all may have greater

No 63. influence than a curator, would bring most of testaments in question, and lay foundations for infinite pleas, to the exhausting of the defunct's means.

THE LORDS found, That the defunct might test, though having curators, without their consent, and might nominate their curators; and repelled all reasons of reduction, seeing neither incapacity of mind, force, nor fraud were alleged; but, if importunity had been alleged, by urging the defunct by reiterated desires, threats, or sharp words, to any particular way of disposal, by which defuncts might not be in tranquility to die in peace, but might be obnoxious to such importunity, the Lords might have enquired into the matter of fact; but this was not insisted on by the pursuers.

Fol. Dic. v. 1. *p.* 577. *Stair, v.* 2. *p.* 807.

1697. *January* 13.

GEORGE YORKSTON, Goldsmith, *against* AGNES BURN, and WILLIAM SHEILS, Her Husband.

No 64.
Found in conformity with the above.

PHILIPHAUGH reported George Yorkston, Goldsmith, against Agnes Burn and William Sheils, her husband, for reducing a testament made by the said Agnes's daughter when she was about 14; 1*mo*, Because she had curators, and they did not consent. The Lords found this not necessary. 2*do*, Because it contained special legacies in favours of her own curators, under whose influence she was when she died, and was a tender valetudinary child. The Lords also repelled this, unless they would condescend either on methods of persuasion or threatenings used to make the same. But the third reason stuck with the Lords, viz. That, by her father's assignation of the debts to her, there was a substitution of his own brothers and sisters (who were her nearest of kin *ab intestato*), in case of her decease before the age of 21. This was contended to be of the nature of a condition, and declaratory of the father's meaning, that she should have no power of disposal of the sums till her majority. It was *answered*, This substitution was no more but a pure destination, that if she died without disposal, then it should go to the substitutes named by him, and was not to retrench her natural power of testing, which is sufficiently restricted in other cases, and therefore should be left free where law impedes not.—*Replied*, The substitution could have no import that way; for, in case of her decease without disposal, these substitutes should succeed however.—*Duplied*, The substitution had still its effect, for it divided it unequally amongst them, some had more, some had less; whereas, by succeeding to her, they would all draw their equal shares. And, by the Roman law, a father was permitted *per substitutionem pupillarem* to make a testament for his children, while under pupillarity, but no longer unless they were furious.——THE LORDS all agreed, that as to the legacy of the bygone annualrents preceding her decease, the testament was valid, because