

1699. *November 8.* SIR ALEXANDER CUMMING OF COULTER, TUTOR TO ANDREW FLETCHER OF ABERLADY, Petitioner.

SIR Alexander Cumming of Coulter, Tutor to Andrew Fletcher of Aberlady, gives in a petition, representing, that, by the bad seasons, his tenants were broken, and had given over their rouns, so that there were fourteen chalders of victual lying waste, and he could get none to take it without a considerable ease and abatement; and therefore craved the Lords would authorise him to set a tack for three or four years, though with a diminution of the former rent, which is better for the pupil than to get no rent at all: or, *2do*. To allow the Tutor to labour it himself, and buy a stock of goods, seed, and other necessaries, which will require £200 or £300 sterling: or, *3tio*. Either to take trial themselves, or appoint the Sheriff of the shire to examine witnesses on the true value of the lands, at which they may be set; and that he had raised a process to that effect, but a year's rent or labouring would be lost if he got not a present warrant.

The Lords considered the Tutor could be only liable in diligence to set his pupil's lands by emission of placards and intimations at the neighbouring parish kirk-doors; and that it was hard for the Lords to intermeddle and interpose in all such cases: and when they have granted warrants of that kind, it is but *periculo petentis*, and the Tutor still runs the hazard; though it is a great severity that minors, and their tutors and curators, shall be reduced to that dilemma, either to give down the rent, or else their lands to lie waste; and that our law should be so defective as to provide no remedy for it. Sundry of the Lords inclined to leave the Tutor to follow his own method the best way he could; but the plurality, (though they refused the bill as it was conceived,) thought it reasonable to allow the Tutor to expose the lands to a roup, to be set to any who should bid most, at the sight of one of their number, not exceeding two years; one being within his pupillarity, he being now thirteen years old, and the other being the first year of his curatory; though all confessed it was little worth, the Lords seldom regarding these warrants given *parte inaudita*, when they come to be quarrelled by minors in a reduction. But I find this has been granted by the Lords formerly; as *5th February 1670, Tutor of Kennedy of Colzear*; and lately to the *Laird of Knox, Tutor to the Viscount of Arbuthnot*, for setting his mains, &c.

*Vol. II. Page 66.*

---

1699. *November 10.* KATHARINE TREELAND *against* PATRICK THOMSON.

KATHARINE Treeland, relict of William Thomson, merchant in Glasgow, pursues reduction of a testament made by him, a few days before his death, in favour of Patrick Thomson, his chirurgeon, who furnished him medicines and drugs during his sickness, to the prejudice of a prior testament he had made in favour of his wife, they having no children alive. Their reasons were, That he was imposed on to make this last testament, leaving all to one who had no manner of relation to him, save only the name; and that he was upwards of eighty; and that ministers, writers, physicians, and chirurgeons, had great opportunities

of influencing dying people, and abusing their trust, and deserved no encouragement. *2do.* The said Patrick, by a back-bond and declaration, the day subsequent to the testament, had acknowledged his getting an assignation to sundry debts from the said William, the testator, and obliged himself to be countable for the same, his expenses being allowed him, and a gratuity for his pains; which was a plain revocation of the testament; and his granting the back-bond was a passing from his being executor nominated therein.

To the *first* it was ANSWERED,—There was neither law nor custom declaring chirurgeons incapable of legacies in a testament; and testators are not to be restrained in the free disposal of their goods, flowing from the sense of gratitude, and good offices done him, especially where he has no children. To the *second*, The assignation seems not to have been to the whole, but only to some particular debts that required present diligence to be done for recovery thereof; neither was this incompatible with the testament, nor any derogation thereto, seeing he might be both executor and assignee under back-bond.

The Lords considered, if his declaration had made him only countable to the defunct himself, in his own lifetime, then it might very well consist with the testament; but it bearing to hold trust to him and his heirs, it resolved itself into a trust, and was incompatible. However, the Lords, having suspicion of the case, ordained the assignation to be produced; and, before answer, allowed either party to adduce what further adminicles or probation either of them had, to fortify or impugn the testament; and ordained the witnesses inserted to be examined for expiscating the true matter of fact.

*Vol. II. Page 66.*

---

1698 and 1699. HIS MAJESTY'S ADVOCATE, and HENRY DOUGLAS, *against* The BISHOPS' VASSALS.

[See the first part of the Report of this Case, Dictionary, page 6666.]

1698. *December 28.*—MERSINGTON reported his Majesty's Advocate, and Henry Douglas, against several vassals and tacksmen to the late Bishops, (as mentioned 19th January 1698.) By the abolition of Episcopacy, the King became superior to their lands, and titular of the teinds belonging to them; and out of this fund he gives the late Secretary Johnston £4000 sterling, who, in the name of his Majesty, and Henry Douglas, his trustee, pursues the foresaid heritors and tacksmen; for whom it was ALLEGED, *1mo*, That so universal a reduction and improbation cannot be pursued without a special warrant from his Majesty; and his gifting a sum out of these casualties cannot support the action; for at this rate he may open all the charter-chests in Scotland, and propale their writs; which is of most dangerous consequence; and when the King's advocate attempted this in 1633, it created much trouble: and that private donatars should have the benefit of the King's causes has been refused; as to the *Earl of Southesk* against *Melgum and Others*, about Montreumont in 1680; and to the *Lord Stormont* against *his Feuars*, in 1696. *2do.* Seeing he pursues in right of the Bishops, he must instruct their right to the superiority or teinds acclaimed;