The Lords found the tack expired, and preferred the last; but yet thought the first sufficient to purge the spuilyie, and restricted to the value.

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1695. *February* 22. THOMAS MACINTOSH *against* ALEXANDER DUNCANSON.

MERSINGTON reported Thomas Macintosh against Alexander Duncanson, craving to be reponed against a decreet *in foro* :—1*mo*. Because the messenger declared, under his hand, that he was not cited, and he had only sent into Edinburgh a blank execution, subscribed, which they had filled up. 2*do*. The advocate was content to disclaim his compearance. 3*tio*. That he produced several receipts of this debt.

The Lords demurred much if he should be reponed. *Vol. I. Page* 672.

1695. *February* 22. JAMES OLIPHANT *against* JOSEPH ORMISTON.

HALCRAIG reported James Oliphant against Joseph Ormiston, Whether he was obliged to stand to a division that was made of his debtor's effects and debts, and the executor was therein exonered: For, where an executor is convened within the year, not having got time to discuss and ingather the inventory of the testament, and not being liable *ultra vires inventarii*, he is only obliged to assign; and this was equivalent.

The Lords referred it to the Ordinary, to try if Ormiston was cited or not; his factor's appearance not being sufficient without a special mandate, as he lived without the kingdom then. *Vol. I. Page* 672.

1694 *and* 1695. LORD MERSINGTON, &c. *against* MR HARY FLETCHER.

1694. *July* 3.—THE Lords considered the bill given in by my Lord Mersington, and the other friends, on the mother's side, to Fletcher of Aberlady, against Mr Hary Fletcher his tutor, that he was remiss in pursuing the reduction of a decreet obtained against the minor by his brother curators,—*viz*. Blackbarony, Salton, and Sir Patrick Murray, in buying the Lady Aberlady's jointure; and, therefore, craved that a curator *ad hanc litem* might be named, and a sum modified for carrying on the process.

The Lords thought this equivalent to an action for removing him from the tutory as suspect, in regard Salton, his brother, was one of the defenders, and he not being a member of the house, he could not be summarily proceeded against; therefore, they would not receive it *hoc ordine*, seeing *tutorem habenti tutor dari nequit*; but ordained him to insist with all diligence in that action,

with certification if he did not, they would remove him: and declared, that, whether he, or any, debursed the expenses in the cause, they should be allowed in their accounts. And, as to his renewing his caution; in regard his former cautioner was dead, they waved that; seeing he, as tutor-dative, had found the said caution to the Lords of Exchequer, and so they were the properest judges, whether he should find new caution again or not. *Vol. I. Page* 625.

1695. *February* 26.—The Lords decided the competition for the tutory of Fletcher of Aberlady, between Mr Henry Fletcher, the former tutor, mentioned 3d July 1694, and Cumming of Culter, the tutor-dative, now nominated by the Exchequer, who had assigned diets from time to time, to Mr Henry to find new caution, as his former cautioner was dead, and had no representatives; and he having failed, the Exchequer removed him, and gave the tutory to Culter, who found sufficient caution. The debate arose, If the Exchequer were competent judges to the deprivation of tutors, that being a point of civil right; for, though they give tutors, yet they cannot remove them. *Actio suspectæ tutelæ*, (whatever summary dispatch it requires, *ut res pupilli salva sit*,) yet is always pursued before the Lords. But, seeing Mr Henry had not his new cautioners ready, and those he offered were already bound to the minor, and had not yet cleared their former accounts,—(*viz.* Salton and Sir Patrick Murray:)

The Lords found the Exchequer's decreet *res judicata*, and would not make the two judicatories interfere, but preferred Culter; though some of the Lords inclined first to have the custom tried, what was the Exchequer's practice in removing tutors. *Vol. I. Page* 672.

1695. *February* 26. Ranking of Hay of Monkton's Creditors.

The Lords advised the probation led in the sale of Hay of Monkton's lands; and found, by the writs and diligences produced, compared with the proven rental of the lands, extending to 2800 merks, (all deductions allowed,) that they sufficiently instructed he was bankrupt; and valued the house, yards, and parks, at 300 merks yearly, and the lands, including the coal thereon, (which lately paid £250 sterling a-year,) to 20 years' purchase. And, in respect of the Lady's consent to the sale (which she was not obliged to do, by the Act of Parliament, unless she pleased,) of her liferent infeftment of £100 sterling, out of these lands, which was preferable to all the creditors, save those named in her husband's disposition, and with whom he was burdened; they valued it to seven years' purchase, both in regard it was an annuity, free of all public burdens, and she was a young woman, within thirty years of age. And, seeing there was no right, nor standing tack of the teinds, they modified the kindly right thereof to five years' purchase; seeing heritors, by law, can force the titular to sell them at nine; and allowed the Lady 1200 merks for her bygones, as a present subsistence, seeing it would take some time ere the roup were perfected, and before the price of her jointure would fall due; and ordained the buyer to be liable to her for the annualrent of the price, from the term it fell due. Then the Lords nominated the six adjacent parish kirks, and the citation for the creditors, with the time of the roup, and two of their number to be overseers and directors of it. *Vol. I. Page* 673.