

1712. January 26. CARRUTHERS against SINCLAIR.

THE deceased Alexander Sinclair of Roslin, nominated James Sinclair, clerk in the bill-chamber, and William Carruthers, to be tutors and curators testamentary to his son, in the terms of the act 1696; but they falling to differ in their way of administration, and counteracting one another, Carruthers gave in a bill to the Lords, complaining of Sinclair's malversations, and craved he might be summarily removed, being a member of the house; which the LORDS refused, this trust noways relating to his office as a clerk; but he was to be considered *tanquam quilibet*. Whereon Carruthers raises a process, in his own name and the pupil's, against Mr Sinclair, to be removed as suspect, in so far as he had acted these five or six years bygone, without making inventories, contrary to the 2d act 1672, declaring tutors, omitting *that*, to be removeable from their office; likeas he clandestinely removed all the writs out of the house of Roslin, and brought them to Edinburgh, without acquainting the co-tutor, wherein some of his own back-bonds were lying; so the pupil's danger is evident by his making himself master of the whole writs, which he can abstract and embezzle at pleasure.—*Answered*, What Mr Sinclair acted was by the special advice and approbation of the pupil's nearest friends and relations, who found his business left in such confusion and disorder, and his circumstances so low, that they advised him, for the pupil's good, to forbear the exposing his fortune by inventory, till it were in some better order; and which he has now done; so the pupil is at no loss. And Carruthers can never pursue this invidious action, seeing he is equally guilty and culpable himself, he never having made inventories to this hour; which excludes him *personali objectione*; and it were both incongruous and *contra bonos mores* to allow a tutor, who has not made inventories, to remove his co-tutor on the same account; and though the pupil's name be in the summons, yet it is only borrowed as a cover to palliate his unjust malice and resentment, because he has been restrained *a grassando in rebus pupilli*. *Replied*, You can never retort my not making inventories, being occasioned by your fault and obstinacy. I required you by way of instrument to furnish me the writs; but you unreasonably refused, till I was forced to pursue you for them in an exhibition, which you maliciously suspended; and *esto* I could not insist *qua* tutor, yet it is *actio popularis*, and the Lords would authorise one to concur with the pupil to remove you as suspect; and the meanness of fortune is no excuse, for it is both false and irrelevant, he having L. 100 Sterling of land-rent yearly, and a moveable estate of 20,000 merks and more, if well managed and sought in. The making an inventory now, after so long a time, can never satisfy the act of Parliament, nor secure minors. It would be an ill defence for a vicious intromitter, or an apparent heir, to say, though I did not confirm or enter heir *cum beneficio ante litem motam*, yet now I have confirmed and served heir. This would be repelled after citation, as contrary to law, even as much as a thief's excuse would

No 14.

A summary complaint was given by one of two tutors against the other, craving, that he being an under Clerk of Session, might be removed from the office of tutory for his malversations. The Lords refused, in regard as that his trust noways related to his office, as clerk; so that he was to be considered *tanquam quilibet*.

No 14.

be, if he offered to restore the stolen goods, and make up the damage. And the making up inventories, after you are quarrelled in a process, neither answers the act of Parliament, not the pupil's interest.—THE LORDS considered that tutors taking the liberty to dispense with that excellent law, and arbitrarily to frame their inventories when they pleased, was of the utmost consequence to pupils; and thought they had both grossly malversed, and by the contradicting one another, the pupil could not but suffer; and being nominate in a testament, they were not obliged to find caution; whereas, if both their offices were vacated, there would be room to get a tutor-dative from the Exchequer, who behoved to find sufficient caution to the pupil's advantage. There were only two difficulties stood in the way, the first was, that the pupil's affairs might suffer in the *interim*, till that were obtained. But for this it was *answered*, the Lords could authorise one to act *medio tempore*. The second was, that Carruthers could not be removed summarily, without a formal process being raised against him; but it was suggested, the friends had raised a summons against him as suspect, which the LORDS allowed to be taken in *incidenter*, in Mr Carruthers' process against Sinclair, and remitted to the Ordinary in the cause to hear him, why he should not be removed from the office, as well as Mr Sinclair, he being *in pari casu*; and the LORDS resolved religiously to observe the tenor of that good law. Some thought this threatening to lay them both aside, might have an effect not very advantageous to the pupil, to make them pack up their differences and agree, and so drop both their complaints, unless the friends of the family prevent it. See TUTOR and PUPIL. PROCESS.

Fol. Dic. v. 1. p. 152. Fountainhall, v. 2. p. 711.

1779. June 16. ANGUS CHRISTIAN *against* JOHN SYME.

No 15.
The Lords found, that a member of the College of Justice, residing in Canongate, was not entitled to an immunity from payment of the annuity for support of a minister, on the score of the privileges of the College of Justice.

THE Magistrates of the Canongate are entitled, by an act of Parliament in 1663, to exact an annuity for the maintenance of a minister from the possessors within that burgh. John Syme, writer to the signet, possessor of a house in the Canongate, having refused to submit to this exaction, the collector of the fund pursued him before the Bailies of the Canongate for payment of the annuity.

In defence, Mr Syme *contended*, That he was excoemed from this taxation by his privilege as a member of the College of Justice. The Bailie pronounced the following interlocutor: 'Having considered the libel and defence, with the act of Parliament imposing the annuity in question, in respect the said act imposes the said annuity, without exception of any person or persons, of whatever degree, quality or place, upon pretence of any privilege or pretext whatever, repell the defence, and decern.' The defender afterwards brought the cause into this Court by advocacy, and