looked upon as tutor by thoſe who did accept and undertake the management.

The letters or miſſive, produced by the appellant, was not probative againſt the reſpondent's father, being neither holograph nor ſubſcribed before witneſſes, and ſo was void by the ſaid act 1681, c. 5. It was alſo plainly vitiated in the date, and ſo by the law of Scotland could be no proof; neither did it appear at what time it was ſubſcribed by the reſpondent's father.

After hearing counſel, *It is ordered and adjudged, that the ſaid petition and appeal be diſmiſſed, and that the ſaid interlocutory ſentences or decrees therein complained of be affirmed; and it is farther ordered, that the ſaid appellant do pay or cauſe to be paid to the ſaid reſpondent the ſum of* 30*l. for his coſts in this Houſe.* Judgment, 13 July 1715.

For Appellant, *Spencer Cowper. Rob. Raymond.*
For Reſpondent, *J. Jekyll. David Dalrymple.*

The judgment of the Court in that part of the cauſe, previous to the ſubject of the preſent appeal, by which it was found, that a tutor was not to have the benefit of a clauſe, that he ſhould not be accountable for omiſſions, but only for actual intromiſſions, where the will was not made in *Leige Pouſtie*, is worthy of notice, though by the ſubſequent judgment of the Court, the effect of this was ſet aſide.

Charles Menzies Eſq; of Kinmundie, Writer to his Majeſty's Signet, Uncle of the Reſpondents, - - - - *Appellant;*

Helen, Barbara, and Jean Menzies, Siſters to the deceaſed Thomas Menzies of Kinmundie, and Robert Muir Merchant in Aberdeen, Huſband to the ſaid Barbara, and as their Aſſignee for his Intereſt, - *Reſpondents.*

Caſe 34. Fountainhall, 21 June 1712.

25th *July* 1715.

Sale —A perſon who had purchaſed lands at a public ſale, at 20 years purchaſe of a proved rental, afterwards claims deductions: 1ſt, Becauſe the teinds were held by a tack from the College of Aberdeen then near expired; 2d, Becauſe, as he alleged, the rental was too highly ſtated by one Chalder; 3d, Becauſe he was kept out of his purchaſe for ſix years, during which time the perſon in poſſeſſion only accounted for the rents, which were leſs than the intereſt of the price; 4th, A deduction of certain expences he had been put to, in adjuſting the debts due by the eſtate and in the perſon of the laſt poſſeſſor thereof. The Court having refuſed theſe deductions, and allowed the ſellers 30*l.* of expences, the judgment is affirmed.

In this caſe the purchaſer had been employed as agent to conduct the ſale, proof of rental, &c.

THOMAS Menzies, late of Kinmundie, left one ſon, and the reſpondents his daughters, all under age, to whom he had appointed John Hamilton, his brother-in law, tutor and curator. The

The tutor, finding there were ſeveral conſiderable debts due by the ſaid Thomas Menzies, which would exhauſt the eſtate if not ſold, applied to the Court of Seſſion, ſetting forth the ſeveral debts due by the deceaſed, with a rental of the eſtate of Kinmundie, and praying leave, notwithſtanding the heir's minority, to ſell the lands to the higheſt offerer.

The appellant, the brother of the deceaſed and uncle of the reſpondents, was employed by the tutor in his profeſſion to take the proper methods for proving the ſaid debts and rental. A commiſſion was taken out accordingly, and the tenants and ſeveral other perſons were examined upon oath as to the rental of the lands; upon report of which, and upon comparing a liſt of the debts with the then conſtituted rental, amounting to 1124*l.* 7*s.* 6*d.* Scots, after all deductions, the Court, in July 1701, granted liberty to the tutor to bring the ſaid eſtate to a ſale, either in whole or in part, for the beſt price that could be got.

The lands were accordingly advertiſed for public ſale, and at the day appointed, the appellant offered 20 years purchaſe of the free rental, or 2000 merks for each chalder, or 100 merks of yearly rent. Alex. Gordon of Pitlurg, however, who was outbid by him at the ſale, entered into a poſterior agreement to give more than the price offered by the appellant: and, accordingly, on the 19th of January 1702, the tutor executed a diſpoſition of the eſtate in favour of Mr. Gordon as the higheſt offerer Soon after the brother of the reſpondents died.

The appellant brought an action before the Court of Seſſion againſt the ſaid John Hamilton the tutor, Mr. Gordon of Pitlurg, and alſo againſt the reſpondents the daughters, as repreſenting their brother, to have it found that he was the true purchaſer of the ſaid lands of Kinmundie. After various proceedings in this action, the Court in 1703 found "that the practices "and contrivances of the tutor and Alexander Gordon were illegal, and that the ſaid Alexander Gordon having offered at the "ſale, and being then overbid was *in mala fide* to enter into any "after-articles with the ſaid tutor, in avoidance of the aforeſaid "ſale; and found that the appellant had the ſole right and title "to the ſaid lands of Kinmundie, by virtue of the articles of "ſale; and ordained the defenders to diveſt themſelves of any "right, title, or intereſt, they had to the ſaid lands, in favour of "the appellant, and ordained him to enter into a bond with ſe-"curity for the purchaſe-money of the ſaid lands, according to "the terms of the articles of ſale, and that within 40 days after "date of the decree of preference."

According to this decree, the bond was drawn and ſettled at ſight, and by the direction of the court; and thereby the purchaſe money, rated according to the then conſtituted rental, was payable by the appellant to the creditors upon the eſtate, in particular to the ſaid Alexander Gordon, who had paid part of the price, and had purchaſed in the rights of ſeveral creditors, and afterwards the overplus, if any ſhould be, was to be paid to the reſpondents. The appellant, after this, had an action with Mr. Gordon,

Gordon, to ſettle the amount of the claims of the latter, which depended for ſeveral years; but afterwards in 1707, the appellant having cleared with Mr. Gordon, entered into the poſſeſſion of the ſaid lands.

The price at which the appellant purchaſed was 22,486*l.* 13*s.* 4*d.* Scots; the mother of the reſpondents had an annuity paid to her yearly of the ſum of 333*l.* 6*s.* 8*d.* being the intereſt of 6,700*l.* Scots; and the debts amounted at the time of the ſale to 13,023*l.* 19*s.* 8*d.* ſo that the balance immediately to be paid to the reſpondents was only 2762*l.* 13*s.* 8*d.* Scots. Differences ariſing between the appellants and the reſpondents, after the marriage of Barbara, the reſpondents commenced an action of count and reckoning againſt the appellant before the Court of Seſſion, to compel payment to them of the balance of the ſaid price. In this action the appellant gave in a ſtated account of charge and diſcharge, wherein he charged himſelf with the full price of the ſaid lands, according to the bond entered into by him, and diſcharged himſelf by nine articles, five of which being for debts paid by him according to the tenor of the bond, were not controverted: the other four form the ſubject of the preſent appeal.

The 1ſt of theſe was a deduction from the price upon account of the teinds of the lands being made part of the rental, with the deduction of a yearly tack duty payable to the College of Aberdeen, from which they were held by two tacks nearly expired. After anſwers for the reſpondents, the Court at firſt decided in favour of the appellants' claim, but on the 22d of July 1712, "found that the appellant ſhould have no deduction of "the price, on account of any defect in the rights to the "teinds."

The appellant, 2dly, claimed a deduction from the purchaſe money, to compenſate an alleged deficiency in the rental, as being too highly ſtated by one Chalder. Upon this point a proof was taken for both parties, and the court, upon the 27th day of June 1713, "found that the appellant could have no deduction upon "the account of any ſhortcoming in the rental."

The third deduction claimed by the appellant was, that Mr. Gordon being poſſeſſed of theſe lands for ſix years, when the appellant entered to poſſeſſion, Mr. Gordon accounted to the appellant only for the rents of the lands; but that being leſs than the intereſt of the price paid by the appellant, and for which he was accountable, and the difference being about 840*l.* he claimed deduction thereof accordingly. Upon this point the Court, on the 19th of December 1712, "found that the appellant could have "no deduction upon account of the difference, between the rents "of the lands and the intereſt of the price."

The fourth deduction claimed by the appellant was the ſum of 1000*l.* Scots, as the coſts he had been at in adjuſting the debts claimed by Mr. Gordon, the benefit of which accrued to the reſpondents. The Court, on the 16th of December 1712, "found "that the appellant could have no deduction upon account of

"his

" his expences in his action againſt Mr. Gordon." And to this interlocutor the court adhered upon the 17th of January and 5th of February thereafter.

The reſpondents afterwards petitioned the court to allow them their expences, and an account thereof was given in. On the 29th of July 1713, the Court found " that the appellant was " liable to the expences, and modified the ſame to 30*l.* ſterling."

Entered, 29 April 1715.

The appeal was brought from " ſeveral interlocutors of the " Lords of Council and Seſſion, made on the behalf of the re- " ſpondents."

Heads of the Argument.

The appellant again ſet out his claims on the four points before ſtated.

The reſpondents anſwered on the 1ſt. Point. That the appellant was the only perſon employed in the buſineſs of proving the rental and value of the eſtate; and when it was ſold, he knew all its circumſtances, the real value of the lands and what title there was to the teinds. When the eſtate was ſold, all that was agreed upon was, that the rental then was ſo much free rent *after deduction* of feu-duties, miniſter's ſtipends, and *teind tack duties*; and at that price it was bought *per averſionem*, without any diſtinction between teinds or any other part of the eſtate. Since the appellant knew what the reſpondents had, the obligation on their part muſt only be underſtood to extend to make what they had good; and nothing is conveyed to the appellant but the lands and theſe tacks of the teinds; and therefore the appellant can claim no more than what was conveyed to him.

On the 2*d Point.* The rental had been proved by the depoſitions of the tenants and others before the ſale, and the Court, upon adviſing theſe depoſitions, and the account of the true rental given in by the appellant himſelf, as agent for conducting the proof thereof, found the rental proved to be 1124*l.* 7*s.* 6*d.* Scots. At the rental ſo proved was the eſtate ſold to Mr. Gordon; at that rental Mr. Gordon accounted to the appellant for the ſix years he was in poſſeſſion, and the appellant had a conveyance from Mr. Gordon as he poſſeſſed it. The appellant, in his account againſt the reſpondents for this buſineſs, not only charges all his particular expences, but adds this article, " For the appellant's own pains in " ordering this proceſs of ſale, making up inventories of debts, " rentals, &c. and carrying on the whole buſineſs thereof from " beginning to end, 100*l.* Scots." So that undoubtedly he knew what was the real value of theſe lands, and having bought the lands at that value, he ought to be concluded.

When a new probation was afterwards granted it was limited to the value of one or two particular farms. The appellant accordingly examined ſeveral witneſſes; but when the proof came to be adviſed, there did not appear the leaſt foundation for the deductions claimed. What was proved by him was only a ſmall encourage-

ment given for two years to a tenant after a great ſcarcity; and that the rental proved at the ſale was the conſtant rental ever before the ſaid ſale.

On the 3*d Point.* The appellant ſuffered no loſs by Mr. Gordon's poſſeſſion; for had the appellant been in poſſeſſion himſelf, he could only have had the whole rent, and would have been accountable for intereſt. Beſides, it was the appellant's own fault, that Mr. Gordon continued ſo long in poſſeſſion, ſince he had judgment againſt Gordon to convey to him in 1703, which was two years after the ſale. Mr. Gordon required the appellant ſoon after, by way of inſtrument, to take poſſeſſion of the eſtate, but this the appellant declined; and at laſt Mr. Gordon was obliged to bring an action againſt the appellant to compel him to take the eſtate.

On the *4th Point.* What the appellant did in the action with Mr. Gordon was for his own ſafety, becauſe he could only pay ſuch debts as were mentioned in the decree of ſale: and whatever expence was incurred in this matter was not occaſioned by the reſpondents, who were no parties to the action. And after all what the appellant pretends to have profited the reſpondents in, is not near half of what he claims as expences.

The reſpondents having been thus put to very great expence, they petitioned the court to have their expences allowed them, and gave in a bill, amounting to about 300*l.* ſterling, which they were ready to make oath they had really expended. The appellant made great oppoſition to this, and the Court allowed the reſpondents 30*l.* of expences, which ſum was all they got for the expences of the whole action.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the ſeveral interlocutors therein complained of be affirmed.* Judgment, 25 July 1715.

For Appellant, *N. Lechmere.* *John Cumyn.*
For Reſpondents, *Rob. Raymond.* *Will. Hamilton.*