omitted in a decreet *in foro*, wherein Mr John Lauder compeared for the suspender, and proponed defences.—It was *replied*, That Mr John was willing to depone that he had no warrant, and appeared only at the desire of another advocate.—It was *duplied*, That if the testimony of advocates be sufficent to take away decreets compearing, there can be no security by them.

No 14. without producing a mandate; should he even appear without authority, the decree is good, though he may be liable in the parties damage.

THE LORDS repelled the allegeance of the advocate's offer to depone that he compeared without warrant, which, though it might make him liable for the party's damage, yet could not weaken the decreet *in foro*.

*Fol. Dic. v.* 1. *p.* 24. *Stair, v.* 2. *p.* 474.

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1677. *February* 14.

DUKE and DUCHESS of MONMOUTH *against* the EARL of TWEEDALE.

No 15. A decreet arbitral being challenged by reduction, as to the *enorm lesion* of a minor, party in the submission; it was not sustained as homologation, that the pursuers procurators, in an action, upon the decree arbitral against third parties, had made some judicial steps, unless there had been a *special* mandate for the compearance.

IN a reduction, raised at the instance of the Duke and Duchess of Monmouth, of a decreet arbitral pronounced by his Majesty, in anno 1667; whereby his Majesty taking burden for the Duke and Duchess, did decern that they should discharge the Earl of Tweedale of their relief and re-payment of the sum of L. 44,000 Scots, paid by Francis Earl of Buccleugh, as cautioner for the said Earl, and for his relief and payment had got a wadset from the Earl of Tweedale of his lands of Meggetland, wherein the Countess of Buccleugh was infeft as heir to her father, and this Duchess as heir to the Countess her sister; and, by which decreet, both parties were ordained, and accordingly did discharge others, of all clags and claims which either of them could lay to others charges. Upon this reason, that the Duke and Duchess were then minors when they did submit, and granted a discharge of their interest, and being enormly hurt and leased thereby, and by the decreet arbitral it was null in law and ought to be reduced, and they ought to be reponed against the same, and put in the same condition they were in before the submission. The LORDS having appointed that the pursuers procurators should condescend upon the particular points of the lesion; they did *allege*, That before they were obliged to insist upon a particular condescendence, they ought first to have the Lords interlocutor upon this point, that the Duke and Duchess having a clear and absolute right for their relief of cautionry, and that by transaction and submission the same being *funditus* taken away, and nothing given in place thereof, but a right to the lands of Hassendean, whereof the Earl of Tweedale was not in possession, but the same was only debateable in law, and controverted by many persons who had a right to these lands, and were still in possession thereof; as likewise, that the Earl of Tweedale's claim was only for pretences due to his Lady for a part of her father's executry, and of her brother David's and Lady Mary's her sister, which could not be done in law, and was never so decerned, but were naked pretences; and therefore, they craved, that upon that general ground, the Lords would repone them against the submission and decreet. It was *answered* for the Earl

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of Tweedale, That he having juſt reaſon, and being well founded in law, to give in his claim as creditor upon the foreſaid ground, which were all tranſmitted to Scotland and adviſed by the Duke and Ducheſs' lawyers; as likewiſe, by their lawyers in England; and, after report made by them, the King having given his decreet arbitral, the ſame ought not to be *funditus* taken away until all the particulars tranſacted were fully conſidered, and an *enorm leſion* found qualified and proven. The Lords having conſidered this debate, did refuſe to give ſentence upon the general ground; and did ordain the advocates for both parties, to inſiſt upon the particular condeſcendence, that it being laid in the balance what was truly given and diſcharged by the Earl of Tweedale, in contemplation of that diſcharge of reverſion granted by the Duke and Ducheſs, it might then more clearly appear, what would be the enorm hurt and leſion.

It was then *alleged* for the Earl of Tweedale abſolvitor from the reduction, becauſe the purſuers, after majority, had homologated the decreet arbitral by two deeds, viz. one, in requiring the money decerned, to be paid; and another, by making uſe of the diſpoſition of the lands of Haſſendean, made by the Earl to them, in a judicial proceſs for recovering the rights of that eſtate. It was *replied*, that no reſpect ought to be had to the firſt, becauſe they never received any payment nor offer thereof, and a naked requiſition being only to try the Earl's mind, if he would obey the decreet, cannot be obtruded as a ratification. It was *replied* to the ſecond, That the making uſe of the rights of Haſſendean in a proceſs, depending at the inſtance of third parties, being only a deed of advocates, and never any benefit recovered thereby, it can be no homologation.

Interlocutor.

The Lords did repell theſe defences, and found, that a naked requiſition not taking effect, and a compearance made by procurators, without a ſpecial command of the parties themſelves, for whom they compeared, could be no homologation, the compearance being *contra tertium*. It was farther *alleged*, That the decreet arbitral could not be reduced, becauſe there was a decreet *in foro* obtained before the Lords of Seſſion, decerning the greateſt part of Tweedale's whole claim to be juſt and due in law. It was *replied*, That the decreet was pronounced againſt the purſuers when they were minors, and cannot be called a decreet *in foro*, their procurators never having made any debate; but, on the contrary, the ſaids proceſſes were only contended of conſent, and by order of the arbiters, to fortify the decreet arbitral. This allegeance was likewiſe repelled; and it was found, that ſuch a decreet could not hinder minors to reduce any deed of theirs, upon enorm hurt and leſion, or to propone all that might have been alleged in law, *in ſecunda inſtantia*. It was farther *alleged*, That this decreet arbitral being pronounced by the King's Majeſty, as taking burden for the Duke and Ducheſs, it could not be quarrelled by them, ſeeing the King was undoubtedly liable, albeit the minors ſhould prevail in their reduction. It was *anſwered*, That the allegeance ought to be repelled, becauſe the King having given his decreet upon wrong information, *et ſuppreſſa veritate*, as no grants are valid, which are ſo made by the King, neither ought this decreet; and whatſoever might be decided in that caſe, cannot hinder the minors themſelves. The

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Lords did repell the defence, wherein all agreed as to the minors interefts; but, as to the King's taking burden, it was the opinion of feveral with myfelf, that it fhould be continued to be decided until firft the whole condefcendence of hurt and lefion might be cleared.

It was thereafter *alleged*, That there was juft ground for the decreet arbitral to make the Duke and Duchefs difcharge the Earl of Tweedale of a juft debt, in confideration that the Lady Tweedale, as executrix to her brother David, had right to his full part of the father's inventar of the teftament, which extended to a great fum, there being only a tripartite divifion. It was *anfwered*, That David being provided by his father to a confiderable eftate of land in his own time; and, making no mention of him in his teftament, it ought to be prefumed in law, that it was in fatisfaction of all bairns part of gear, or portion natural; and at moft, he ought to have made offer to collate with the reft of the bairns, whatfomever eftate he got from his father, that they might all come in *pari paffu*, both as to his right and what fell to them all by difpofition or bairns's part. It was *replied*, That any lands difponed to David, not being in fatisfaction of all portion natural, cannot take away his right of fucceffion with the reft, and as one of the children, neither needed he to offer to collate, which is only where the difpofitions are fo affected, and granted in fatisfaction of all portion natural. The Lords did find, That any lands difponed to David, being to him as a fecond fon, and not of any great value, confidering his father's great eftate, and not being burdened with any condition, that it could not be in fatisfaction of his legitim and juft part of the executry, whereof he could not be prejudged; and, that the fame did belong in law to the Countefs of Tweedale, as executrix to the faid David. It was farther *alleged*, That the Countefs of Tweedale, as executrix to David, had right to a fourth part of Lady Mary's legitim, which was a fourth of the whole, there being one brother and three fifters; and, albeit David was never confirmed executor to Lady Mary, yet his intereft, as neareft of kin, is founded in law and tranfmiffible as a relict's third and legacies, and is fo ftatute by the act of Parliament 1617; as likewife, by an act of Parliament King James the Fifth, and was fo decided in the cafe of Bell and Wilkie*; and, feeing the Countefs of Tweedale may yet be confirmed executrix, decreet ought to be given upon her confirmation. It was *anfwered*, That the pretence had no foundation in law, 1*mo*, Becaufe David was never confirmed executor to Lady Mary, and fo dying without confirmation, the Countefs of Tweedale, as executrix to David, can have no right, becaufe it was *hereditas non addita*; which, by our law is not tranfmiffible, and puts no difference betwixt heritable and moveable rights. And as to the faid acts of Parliament, they gave only right to the neareft of kin to purfue the executors, nominate and dative, after their confirmations; but, if any of the neareft of kin never purfue, nor obtain decreet by dying inteftate, none reprefenting them can have right, they having none in their own perfon without confirmation, or obtaining a fen-

* 12th February 1662; Stair, v. 1. p. 96. *See* Nearest in Kin.

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tence; and, as to the case of Bell and Wilkie, it was only found, that one of the bairns being confirmed, and so was in the case *hereditas addita*, and she dying, her nearest of kin, had right to her whole part; and the only question was, there being an omission and her whole part not fully given up, their nearest of kin, by a dative, would have right; and so it was found by the Lords, that the universal title being settled by a confirmation, the same was transmissible to the nearest of kin, who might conform themselves *ad omissa* which had fallen out by ignorance, and so have a title to pursue the executor nominate, who was in *mala fide* not to give up the whole inventar, and yet this was a new decision; and, before that, the case of *hereditas non addita* was never so far extended. 2*do*, Albeit the Countess of Tweedale were confirmed executrix to Lady Mary, she could have no right either to David's part or her's; because, by a contract of marriage, she had fully renounced and discharged whatsoever could fall to her by the death of her father, and so had no right to any thing which belonged to David, or Lady Mary, as bairns part of gear through their father's decease. The LORDS did assoilzie the Duke and Duchess from that part of the claim; 1*mo*, Because David was never confirmed executor to Lady Mary, and so could not have a right to a fourth part of what belonged to her, as one of the bairns, which was not otherwise transmissible, and so that part was *adhuc ob non additam hereditatem*. 2*do*, They found, that albeit the Countess were confirmed executrix to Lady Mary, yet she could not crave any thing that fell to her through her father's decease, in respect she had given a full and absolute discharge in her contract of marriage, in contemplation of the tocher provided to her with the Earl of Tweedale. It was likewise thereafter insisted on, upon this point, That when the decreet arbitral was given, it was upon great misinformation, as if the whole inventar of Walter Earl of Buccleugh's testament did fall equally to the children besides the heir; whereas, the defunct's part which was the half, was legate and bestowed upon his eldest son Earl Francis, by the latter will and testament, in so far as not only he had nominate him his sole executor, but likewise universal intromitter with his whole goods, and gear, and debts, which he ordained the tutors testamentars to apply for relief of his burden and debts, that did affect his estate, which must be presumed to be the whole rents and stock of plenished rooms which were then in his possession, and not to any rents and goods that would fall to his heir after his death. It was *answered*, That the testament was opponed wherein Earl Francis was left executor and universal intromitter, which did belong to the office of executry, albeit it had not been exprest, and was only insert *ex stylo*. But, by our law, it was never extended nor gave right to an universal legacy, unless the testament bear expresly, that such a person is nominate executor and universal legator; and as to the disposal of the whole goods and plenishing, it being only an advice and direction subjoined to the nomination of tutors testamentars, it can only relate to the management of the pupils estate during their factory, but can never be extended to a legacy in favour of the executors. The LORDS did differ amongst themselves as to this point; but at last, by a plurality of votes, it was carried, that it was an universal legacy in favours of the eldest son and heir, as executor. To which they were

moved upon these grounds, that of old, by the style of testaments, universal intromitters and legators were *pares termini in jure et homonyma*, as likewise, that the defunct had provided all the rest of his children to reasonable portions, so that having great debt upon his estate, he could not in reason, but dispone of that which was his own to relieve the great distresses it lay under; but some others, whereof I myself was one, was of another opinion, that there being no express universal legacy, which was so great an interest of the whole moveable estate of the Earl of Buccleugh, and his testament being drawn by Mr Francis Hay, one of the ablest writers of his time, and advised by the ablest lawyers, there is no doubt if it had been so intended, they would have expressed universal legator, which was as easy as universal intromitter, knowing that long before that time, that interpretation of universal intromitter was obsolete, and out of doors by practice and custom. *2do*, The provisions made to David were not very considerable, he being the only younger son, and the portions given to the daughters were at most but reasonable, and not exceeding what was given to other ladies who were not near of so rich families, and by none of them any were secluded from their portion natural, nor were they given in contentation.

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*Fol. Dic. v.* 1. *p.* 24. *Gosford, MS. No* 959.

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1680. *July* 15. EARL of NORTHESK *against* GEORGE CHEYN.

No 16.
An advocate not obliged to divulge his client's secrets.

THE LORDS, in a declarator that a bond was merely in trust, ordained Mr Patrick Home, the defender's advocate, to be examined as a witness, in so far as he knew the conveyance by information of other persons than his client; but refused to examine him on the information of his client, because an advocate is not obliged to discover his client's secrets.

*Fol. Dic. v.* 1. *p.* 26. *Fountainhall, MS.*

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1681. *February* 3. ——. *against* STUART of Archattan.

No 17.
An advocate cannot appear for parties out of the kingdom, without a written mandate.

ONE —— pursues Stuart of Archattan, which being called, compearance was made for Stuart of Archattan, who craved to see.—It was *answered*, Archattan being a residenter in Ireland, no advocate could compear for him without a mandate; for though the trust of advocates presumes a mandate, as to those residing in the kingdom, that was never extended to residenters out of the kingdom.—It was *answered*, That though a warrant be requisite for foreigners, yet Archattan is a Scotsman residing in Ireland, and hath an estate in Scotland.

THE LORDS found, That there could be no compearance for Archattan, he residing in Ireland, without a warrant in writ; and therefore refused a sight, and ordained the decreet in absence to be given out.

*Fol. Dic. v.* 1. *p.* 25. *Stair, v.* 2. *p.* 853.