

**No 420.** sertation of the clerk of Forfar, consequently the decret ought to be turned into a libel;

THE LORDS sustained the decret on the said probation, the decret not being for a debt, but having proceeded upon a complaint against the defender for abusing the Provost, adhered to and owned by the defender in face of the Court, as the decret bore; but the LORDS assoilzied from that part of the sentence taking away his burghess-ship, and decerned for the L. 40.

*Fol. Dic. v. 2. p. 247. Harcarse, (PROBATION.) No. 782. p. 221.*

**No 421.** 1684. November. FALCONER against KENNEIR.

IN the reduction of a decret of declarator of extinction of an apprising, upon this ground, That some of the witnesses adduced in the probation were not purged, others had not closed their depositions with the assertive clause, "that it was true," and some had not signed, nor sworn that they could not write; so that in effect the witnesses were *injurati*, though the commission bore they were solemnly sworn, which is but the judge's assertion;

THE LORDS, in respect the decret was *in foro*, and extracted several years ago, would not review the probation.

*Fol. Dic. v. 2. p. 249. Harcarse, (DECREETS.) No 405. p. 109.*

\* \* Fountainhall's report of this case is No 46. p. 1766. *voce* BONA FIDE CONSUMPTION.

**No 422.** 1686. December —. HAMILTON of Aikenhead against PORTERFIELD of Haplant.

A SHERIFF clerk's assertion, that a person judicially accepted the office of curator, found not sufficient without his (the party's) signing the act of curatory.

*Fol. Dic. v. 2. p. 248. Harcarse, (TUTORS & CURATORS.) No 992. p. 280.*

\* \* Sir P. Home reports this case :

GABRIEL PORTERFIELD of Haplant, having pursued James Hamilton of Aikenhead, as curator to the deceased Alexander Porterfield his brother, for the price of his brother's stock and plenishing, sold by Aikenhead to the Laird of Ralstoun, and for instructing that Aikenhead was a curator, produced an extract of the act of curatory out of the Commissary Court books of Glasgow, bearing, that the said Alexander Porterfield, the pursuer's brother, did compare, and elect Aikenhead one of the curators, and that he did compare and

accept of the office, and gave his oath *de fidei administratione*, and for instructing that Aikenhead did act as curator, produced a contract betwixt him and Ralstoun, whereby he dispoſed to him the foresaid stock and plenishing; *alleged* for the defender, That the warrant of the act of curatory not being subscribed by the defender, the extract could not instruct his acceptance of the office, especially being but the assertion of a clerk of an Inferior Court; and the contract betwixt Ralstoun and the defender, by which he dispoſes to Ralstoun the stock and plenishing, cannot prove that he accepted of the office, or acted as a curator; seeing it appear only, that he as having a factory from the minor and curator, did enter into the contract, and dispoſed the stock to Ralstoun, and the defender is not obliged to produce the factory; but seeing the pursuer makes use of that contract, to instruct the defender's intromission, which bears only that he acted as factor, and not as a curator, the pursuer cannot controvert it, seeing *quod approbat non reprobat*, and it could not be imagined that the defender had granted a disposition as curator, seeing he could not dispoſe as curator, but only consent to the minor's disposition, so that the disposition behaved to have been granted as factor, and the curator having counted to the pursuer, and obtained a discharge, the defender as factor could not be further liable;—the LORDS sustained the allegiance proponed for the defender against the act of curatory, as not being subscribed by Aikenhead, and likewise sustained the other allegiance, bearing, that by the contract, it appears Aikenhead acted as having a commission and factory from the minor and his curator, and found no necessity for Aikenhead to produce the factory.

*Sir P. Home, MS. v. 2. No 880.*

1693. December 1.

MARY BROWN *against* HENDERSON of Brignies, and his Tutor.

MARY BROWN *against* Henderson of Brignies, and his tutor; the LORDS found, in the general, that a clerk of an inferior court's assertion, that a party or his procurator consented to do such a thing, was not binding nor obligatory on them, unless their consent were otherwise instructed, and that they had subscribed it, and that the Judges subscribing the decreets now with the clerk, by the act 3d, of Parliament 1686, did not alter the case; yet here, in this circumstantiate affair, the LORDS found the decret probative of their consent to a roup of the land the next year, seeing she had passed from her two defences, on this concession, viz. that the minor was not infett, and the tutor had not made inventory, which she would not otherwise have done, and that they had homologated the decret; for though in extraneous points, the acts of clerks of Courts are not to make faith, yet *in actibus officii et processus credendum est clerico*; as if a party or his procurator declare he passes from such a conclusion of his libel, and insists only for the remanent *hoc loco*, such declarations and

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The clerk of an inferior court's assertion of an alleged consent of a party or his procurator, extraneous to the ordinary steps of process, not probative.