

REPLIED for Sir Andrew,—That he cannot plead the benefit of his minority, seeing he does not represent his father, but, being charged, has renounced to be heir to him; and, upon an adjudication so led, he bruiks the lands, and so he must be reputed as a stranger; and it should be the adjudger's minority, and not his. And, as to the interruption by the liferent, he was still *valens agere*, seeing a fiar may pursue a declarator of right, though he be not actually in possession.

The Lords repelled Sir Andrew's defences; and declared in favours of the pursuer, conform to his decret-arbitral. *Vol. II. Page 100.*

1700. July 3. MAXWELL of FRIERCARSE *against* MAXWELL of GARNSALLOCH and MAXWELL of COWHILL.

MAXWELL of Friercarse pursues Maxwells of Garnsalloch and Cowhill, and others, for count and reckoning of his estate during his minority, they or their father having accepted to be his curators; and, for proving thereof, produces a precept for choosing his curators in 1672, with an execution thereon against his nearest of kin, and a minute bearing his nomination and election of them to be his curators, and their acceptance, and making faith and subscription.

ALLEGED,—The paper is not obligatory nor complete, unless the pursuer instruct there was a judicial act of curatory passed thereon, or that they acted and intromitted; seeing all his charge is made up of a vast sum of pretended omissions now after twenty-seven years.

ANSWERED,—Their acceptance is proven by their subscription under their own hand; and *non refert* whether they entered to the administration or not, or extracted an act, that being their own fault in neglecting their duty.

The Lords thought the case new, and ordained it to be argued in their own presence. *Vol. II. Page 101.*

1700. July 6. THOMAS BARCLAY of HILTON *against* AGNES BERVY and DOCTOR HAMILTON.

ARNISTON reported Thomas Barclay of Hilton against Agnes Bervy, relict of Provost Boswal in Kirkaldie, and Doctor Hamilton. Barclay charges her on a bond for 1000 merks. She suspends on this reason, That it was the result of a transaction; for he having married her eldest daughter, and portions being settled on the younger by their father when on death-bed, this bond was given for a ratification, by the said Barclay and his wife, of these provisions; but Barclay having got a sight of the ratification, he lacerated and tore the same; and there was a decret of Privy-Council against him, decerning him to renew it.

ANSWERED, *1mo.* It is denied it was for the ratification; *2do.* *Esto* it were, this is not a clear compensation, seeing the bond is for a liquid sum, and the fact decerned for is illiquid; *3tio.* The decret of Privy-Council stands suspended.

The Lords found, by a discharge produced, That the bond and ratification were the mutual causes one of the other; but Barclay's wife being now dead, it was *factum impræstabile* to renew the ratification, and therefore *loco rei succedit*