1700. *June* 26. The LAIRD of INNES *against* The DUKE of GORDON.

THE Laird of Innes pursues the Duke of Gordon for exhibition of some writs belonging to Mr Harry Buchan; and whereunto Innes has right by progress:

Against which it was ALLEGED, 1*mo*. No process till wakened; the process neither having a *partibus* nor any judicial act marked upon it within the year, and so is sleeping. 2*do*. No process on the confirmed testament, because the sum, being heritable, was not confirmable.

ANSWERED to the *first*,—That there is an out-giving by Innes, the pursuer's advocate, to the Duke's, marked on the process, which is eight days within the year and day; and though, by their keeping it up longer than six days, its return is without the year, yet the out-giving is a sufficient interruption to stop the annual prescription and sleeping; *et non debet lucrari ex proprio dolo et culpa*. To the *second*, It is *jus tertii* to the defender; 2*do*. The assignation makes it moveable; 3*tio*. The bygone annualrents are moveable and confirmable; and so his title and interest in these is sufficient to sustain the exhibition, reserving all defences against delivery.

REPLIED,—Where there is no judicial signature, (as here,) the instance must perish; and was so found in the reduction upon an inhibition pursued by *Cockburn* against *Sir George Hamilton*: And, as to the *second*, The confirmation can no more be a title here than it would be if he were pursuing for exhibition of the rights of lands.

The Lords repelled both the dilators. *Vol. II. Page* 99.

1700. *July* 2. DAVID OGILVIE of POPILHALL *against* SIR ANDREW RAMSAY.

MR David Ogilvie of Popilhall pursues Sir Andrew Ramsay in a declarator and molestation, for encroaching on a piece of ground and haugh adjacent to his mill; and, for his active title, he produces, besides his general infeftment, a decreet-arbitral, pronounced on a submission between John Hepburn of Waughton, then heritor of Pophill, and the pursuer's father in 1647, adjudging that ground to him.

ALLEGED for Sir Andrew, That, since the date of that decreet, he has prescribed a right of commonty and pasturage, by forty years' possession; which he offers to prove. 2*do*. A decreet-arbitral is but a personal right, and can only militate against the party-submitter and his heirs; but Sir Andrew is a singular successor to Waughton by apprisings, and so the decreet cannot meet him.

ANSWERED to the *first*, There can be no prescription in this case, 1*mo*. Because the pursuer offers to prove he was minor many of these years, which must be discounted; 2*do*. His mother liferented the lands till of late, which must also be deduced from the prescription. And, as to the *second*, If Sir Andrew instructed property by tilling, or other such deeds, there must be some pretence that the decreet-arbitral could not exclude him; but all he claims is only a commonty and servitude of pasturage, as to which the decreet-arbitral is sufficient against him.

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 decreet-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 decreet of Privy-Council against him, decerning him to renew it.

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