

The Lords did think the whole conjectural and divinary ; yet, by plurality of votes, found the trust proven by the testimonies and writs produced, and so reduced the bond as it stood in Grange's person, and assoilyied.

Against this interlocutor the pursuer gave in a protest and appeal to the Parliament.

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1711. *January 23.* ROBERT M'BRIAR of NETHERWOOD *against* CHARLES MAITLAND of ECCLES.

THE deceased John Maitland of Eccles having been one of the curators to Robert Macbriar of Netherwood, he pursues Doctor Charles Maitland, now of Eccles, as representing his father on the passive titles ; who denying that ever his father accepted the curatory, Netherwood, for proving thereof, produced an extract of the act of curatory, under the Sheriff-clerk of Dumfries his hand, bearing, That, on the 1st February 1672, Robert Macbriar compeared before the Sheriff, and gave in a list of curators, and that they personally present accepted of the office, and became cautioners for one another ; in which nomination and acceptance Eccles was one. But this being *in re tam antiqua*, to overtake a gentleman's heirs after thirty years and more, they burdened Netherwood to produce the grounds and warrants of the said act of curatory ; and the clerks having omitted to insert a diligence in the act against the Sheriff-clerk, for producing and lending them up, Netherwood was forced to find caution to the clerk for reproducing them before he would part with them. Against which, it was objected by Eccles, that this clandestine way of procuring them was most dangerous and suspect ; seeing, at this rate, one may easily forge and make warrants, if the clerk, to whose trust they belong, do not, upon oath, exhibit them. But then, as they are, they appear to be most defective, unformal and null ; for the minor's nomination has neither date nor witnesses ; the precept for summoning the nearest of kin on both sides does not design the witnesses ; and the name of the officer-executor is scored, and vitiated. Next, the signature authorising the curators is neither signed by judge nor clerk ; and though this be prior to the Act of Parliament 1686, ordaining all judges' interlocutors to be signed, yet this is of a different nature from those *in jurisdictione contentiosa* ; but is rather an *actus legitimus* in face of court, where both judge and clerk are *contestes*. And further, the curators' acceptance and binding for one another wants witnesses, and so is absolutely null : besides, they produced a testificate of his age, that he was born in 1659, and so, at the electing of his curators, he was only thirteen years old ; which is a plain nullity, being then incapable of naming curators. And to bring such a vast exorbitant sum as his claim, extending to 100,000 merks and upwards, on his heirs, after so long silence, is a most unreasonable thing. And, if he can prove actual intromission against their father, they are willing to repay it *cum omni causa* ; but he never meddled with a groat of Netherwood's estate. And to bind them to pretended omissions were most unfavourable.

ANSWERED,—He opponed the act of curatory bearing his father's acceptance ; so that the pretended defects in executing the precept, or in the list, are all purged, and fully supplied by his personal compearance before the Sheriff, ac-

cepting the office, making faith *de fidei administratione*, and becoming mutual cautioner with the rest; and takes off any anterior informality, if there were any. And, in fortification of the Act, he produces further, a letter of bailiary and factory, signed by him as curator; and these judicial acts do not require the subscription of witnesses thereto. And, as to the testificate, it is noways his age; for it does not design his father of "Netherwood," which it would certainly have done, if it had been he; so it has been another person. And to clear it, his father died in 1657, eighteen months before the date of this baptism; and so it cannot be his age. And, as to the borrowing up the warrants, he was necessitated to that course by the clerk's forgetting to give him a diligence. He acknowledges his claim is very large and extensive, consisting of two branches; one of debts and effects, owing to his father,—and the other, the rents of his lands for several years; the extent whereof he must prove, and they must count for it, seeing his curator, by his duty, either did intromit, or ought and should; though now, by the Act of Parliament 1696, they may be exonerated of omissions. But the law went otherwise before that; and he craved only an account how the same was employed, either in paying debts, alimending him and the family, and other rational depursements.

The Lords found the documents produced sufficiently instructed that Eccles accepted to be curator, and therefore repelled the objection; and ordained them to count and reckon for the estate he shall prove his father left behind him; the Act of Parliament 1672, ordaining tutors to make inventories, being posterior to this act of curatory.

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1711. *January 27.*

JAMES RIDDEL, Petitioner.

JAMES Riddel, writer in Edinburgh, presented a petition to the Lords, bearing, That John Adam, macer, being lately deceased, and who had been admitted conform to a charter of Moncrieff of Reidie, giving him the presentation *unius clavigeri*; which the Lords, by their decret, had explained to be one of the four ordinary macers before the Lords of Session; and that he had got a commission from the tutors of the present Laird of Reidie, being a minor: Therefore, craved the Lords would admit him to the said office, and the fees and emoluments belonging thereto; which the Lords granted, and ministered to him the oaths, seeing none appeared for the Queen and Secretaries' interest to oppose it.

It was thought by some, there might be ground to question Reidie's right, and that the clause in his predecessor's charter might be as reasonably applied to quite another thing: for Reidie dwelling near the palace of Falkland, where our kings of old choosed often to reside, they have had the office of porter and mace-bearer to the King when he staid there: and it is not so probable that the Session-macers were understood by that clause. And, *esto* it had, it was doubted if he behoved to serve *in propria persona*, or if he might put in a depute; but there was no opposition made at this time.

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