

(FORMALITIES OF THE DILIGENCE.)

That, by this maxim, an execution should be presumed, which does not appear ever to have had a being. As to the argument drawn from the clause in the decret, referring to the letters and executions thereof, it was *answered*, There is nothing more common than to speak of executions, although there is but one; surely the overly mentioning thereof, in a relative clause of a decret, does not prove that a party was called, who is not once said to be called through the whole of it. The fact being then fixed, that the special charge was not executed against the tutors, the effect must be the same as if it had not been executed at all; for an execution against a minor is good for nothing, if his tutors are not cited, as, in that case, he cannot deliberate whether to enter or not; of course, a decret, which is liable to such defects, must be null and void.

THE LORDS found the objection, That it does not appear the said letters were executed against the tutors and curators, but only against the minor, not relevant to reduce the adjudication *in toto*, but only to restrict the same to a security for principal sum, annualrents, and necessary expences.

*Fol. Dic. v. 3. p. 7. C. Home, No 69. p. 118.*

1741. July 3.

ANDREW HUNTER of Lochrinny against ELIZABETH and MARGARET HUNTERS.

IN the process of declarator of expiry of the legal of three adjudications, pursued at the instance of Lochrinny against the defenders, it was *objected*, That the special charge, whereon one of them was founded, is blank in the lands, and consequently null, the defenders father not being infeft at the time.

*Answered*, That although the defenders in that adjudication, were only in a state of apparenacy the time of leading thereof; yet, as he was afterwards infeft in the lands of Greenan, one of the three parcels adjudged, his posterior infeftment must accresce, and validate the adjudication as to that parcel.

*Replied*, That an adjudication, only taking the right out of the person of their father, such as he had it at the time of the adjudication, which, in this case, was none at all but a mere right of apparenacy; his posterior infeftment can never accresce, no more than an adjudication could be made to carry an estate, purchased after the date thereof.

*Duplied* for the pursuer, The simile, though just, does not apply: For here the lands of Greenan were a part of the heritage that belonged to the common debtor, and which fell under his right of apparenacy to his father; and, it being instructed that he was infeft in these lands, though after the date of the adjudication, such infeftment must accresce to the adjudger. And as to the objection, that the lands are not filled up in the special charge, it is believed, he cannot be in a worse situation, than if no such charge had been produced, the decret nar-

No 7.

No 8.

An adjudication, of which the special charge was blank in the lands restricted; and the question reserved, whether it ought not to be annulled *in toto*?

(FORMALITIES of the DILIGENCE.)

No 8. rating it to be produced, and so a complete diligence by itself; and the pursuer is not obliged, *post tantum temporis*, to produce the letters of special charge.

THE LORDS sustained the nullity, in so far as to void the adjudication as to the accumulations and expiry of the legal, reserving to be heard, whether it is void *in toto*.

*Fol. Dic. v. 3. p. 7. C. Home, No 174. p. 290.*

1743. February 4.

MAXWELL against MAXWELL.

No 9.

A bond is granted to a person, and the heirs of his body, whom failing, to his sister. An adjudication led by her, without a service to ascertain that her brother had left no heirs of his body, is restricted.

MAXWELL of Friarscarfe, granted bond to Stephen Irvine, and the heirs of his body; whom failing, to Margaret, his eldest sister. She, upon the death of her brother, assigned the bond to one Bentruck; Bentruck conveyed it to Maxwell of Barncleuch, son to the said Margaret. Maxwell of Barncleuch, led an adjudication upon this bond, against the lands of Friarscarfe. It was *objected*, in an after question concerning the rights of these lands, that the adjudication was null, *imo*, because it bore date 21st January 1693, and yet interest was accumulated at Candlemas 1693; *2do*, That no service appeared of Margaret to her brother to ascertain the failure of issue of his body.

THE LORDS restricted the adjudication to a security for principal, interest, and necessary expences.

*Fol. Dic. v. 3. p. 8. from MS.*

1751. December 10.

Sir THOMAS MAXWELL against JAMES PATERSON.

No 10.

A party obtained decree for two bonds. In a special charge, he narrated the bonds, and not the decree. Adjudication notwithstanding sustained; the decree having been prior to the charge.

JAMES PATERSON of Whiteside, pursued Alexander Murray of Drumstochall, for two bonds granted by his predecessor, for which he obtained decret before the steward of Kirkcudbright; and charged him to enter heir in special, narrating in the letters the bonds, but omitting to mention the decret: And afterwards led an adjudication, founding on the decret and special charge.

*Objected* for Sir Thomas Maxwell of Orchardtoun, a postponed adjudger, the adjudication is null; the special charge, which was the ground of it, proceeding only on the bonds, and not on the decret, whereby the defender became liable therein: It is not enough a person have in him proper titles to support his diligence, if he do not found it upon them.

The Lord Ordinary, 26th November, 'Having considered the objection, together with the letters of special charge objected against, and the decret of constitution; repelled the objection, that the said decret of constitution was not narrated in the letters of special charge, in respect that the same was obtained prior to the date of the said letters.

And the LORDS refused a bill, and adhered.

*Pct. A. Pringle.*

*Fol. Dic. v. 3. p. 7. D. Falconer, v. 2. No 246. p. 301.*