

decreet before the Lords; seeing Cleland was noways *in mora*, but only retarded by the course of the roll; and repel that allegiance, that, before Cleland's citation, Pitlever had presented a signature to the Exchequer, in respect the signature was on a voluntary right, and not in a course of diligence, by apprising or adjudication; and that, in voluntary rights, it is arbitrary to his Majesty, as it is to other superiors, to receive or not receive a vassal; yea, he may compeone and take money, and might retard the other's signature. Pitlever gave in a bill against this; but it was refused.

No. 40.

*Fol. Dic. v. 2. p. 408. Fountainhall, v. 1. p. 344.*

1709. July 8.

DAVID SPALDING of Ashintully, against NAPIER of Kilmahew, *alias* MAXWELL of New-wark, and COCHRAN of Kilmarnock.

Ashintully having purchased the lands of Balmacreuchy from Maxwell of New-wark, and, by his lying out unentered, the Earl of Nithsdale, his superior, pursues a declarator of non-entry, and obtains a decreet; whereupon Kilmahew raises a reduction, on these two reasons, *1mo*, That he offered to prove he was then minor, and his tutors and curators not called; *2do*, New-wark is pursued to enter heir to his father, as he who died last vest and seised, whereas it appears, by the probation, it was his grandfather. Answered to the *first*, That though tutors are omitted in the narrative of the summons, yet they are mentioned in the conclusion and decerniture; to the *second*, "Father," in construction of law, is a general word, comprehending all our ancestors; L. 201. D. De verb. significat. Patris nomine avus quoque demonstrari intelligitur. Replied, The mention of tutors is not applied to Kilmahew in particular, but runs against all the defenders, if they any have; and the extension of a "father" to a "grandfather," however it may take place *in materia favorabili*, yet it can never support an odious casuality of non-entry. Ashintully having transacted with the Duke of Athole, who had purchased this superiority from my Lord Nithsdale, raised a process of relief and damages against Kilmahew, for not infesting himself, to stop the non-entry; but the Lords, by plurality, found the decreet of declarator of non-entry, whereon he founded his distress, null, on the two nullities foresaid, viz. the not mentioning the tutors, and the wrong designing the father, instead of the grandfather; and although Ashintully had pursued New-wark to enter, and obtained a decreet of tinsel of the superiority, for not obeying the charge, yet they found the 57th act, 1474, related only to the apparent heirs of vassals, charging their over Lords to enter, and not to singular successors, as Ashintully was; though, if he had adjudged, then he could have compelled Nithsdale to have received him.

No. 41.

The act 57. Parl. 1474, respecting tinsel of superiority, relates to apparent heirs of vassals, not to singular successors.

*Fol. Dic. v. 2. p. 408. Fountainhall, v. 2. p. 512.*