1567. *February* 12. LAIRD of BARNBUGIL *against* HAMILTON.

No 15.
A minor was restored against alienation of lands although he had given his oath never to come in the contrary.

IN the action against David Hamilton, for restitution *in integrum*, of certain lands anailzied by the foresaid Laird of Barnbugil, in his minority, to the said David; it was *alleged* by the said David, That the said Laird should not be restored, because he had sworn by his oath to observe and keep the said alienation, and never come in the contrary thereof. It was *alleged* by the said Laird, That he should be restored notwithstanding of the said oath, because the said oath was given in his minority, likeas when the said alienation was made he might have been circumvened and induced to make the same in his minority, sicklike he might have been induced to make the said oath; and also it has been the practice wherefore such oaths have been objected in diverse matters and repelled; which allegeance of the said Laird was admitted, in respect of diverse practicks of before, notwithstanding the allegeance of the said David.

Fol. Dic. v. 1. *p.* 575. *Maitland, MS. p.* 182.

1582. *June.* GORDON *against* EARL of ERROL.

No 16.
Found that a minor may be an arbiter.

THE Laird of Pitlurg, Gordon, pursued for letters conform to a decree-arbitral given between him and the Earl of Errol, and the said decree was given by the Earl of Huntly, being *minor annis*, unto whom the said parties compromitted by a blank. It was *alleged* by the said Earl, that no letters ought to be given, because the said submission and compromit, whereupon the said decree past, was null of itself, by reason the submission was made to the Earl of Huntly *minor annis*; nam de jure minor annis, arbiter esse non potest, cum L. 41. D. De recept. arbit. aut ullo modo judex, L. 57. D. De re judicata, ac etiam de jure nostro municipali, prout in L. 2, regia majestate L. servis autem. To this and to the laws was *answered*, That the parties had homologated the submission, and compromitted by submitting of a blank; and as to the laws they were understood except the parties had not consented *in predictum comitem*, by the subscribing of a blank, and also the laws appear to be understood, de arbitrio et non de arbitratore et amicabile compositore; and there is great difference inter arbitrium et arbitratorem, sivi amicabilem compositorem, ut notatur per Joannem Petr. de ferra, in forma libelli, de quo arg. ad pænam ex compromisso, nam arbiter procedit in specta forma judicii et tanquam judex ordinarius, arbitrator autem prætermisso juris ordine, et prout equum sibi visum fuerit; and into all their submissions which are made by blanks, he unto whom it is compromitted, and into whose hands they are put by reason of the great liberty that is given unto the filling of the same, he cannot be accounted arbiter, and restricted as *judex ordinarius*, but rather *arbitrator et amicabilis compositor*, having liberty as he pleases to fill the blank. To this was *answered*, of the practick of Scotland, Judges, arbi-

No 16. ters, and amicable compositors are all but one, and under one form and manner of proceeding, but as to the word 'arbitrator,' *non est de jure*, but *a commentatoribus excogitatum*, and as to the consent of parties, and their homologation unto the minor, they might not do that in prejudice of the law, *quia jus commune privatorum pactionibus tolli non potest.* After long reasoning and advising, it was pronounced by the President, by reason of the equality of voting among the rest of the Lords, the matter stood, that the foresaid submission was lawful, notwithstanding of the foresaid alleged laws.

Fol. Dic. v. 1. *p.* 576. *Colvil, MS. p.* 332.

1592. *January* 3. ELLIOT *against* ELLIOT.

No 17.
Dispensation with less age by the King, makes not a man habile to be a tutor; but the nearest of kin, of perfect age, must be served; and the minor arriving at that age, then will obtain his own place.

GILBERT ELLIOT of the Stobs pursued the Sheriff of Teviotdale and William Elliot his own brother's son, to hear and see the said Sheriff decerned to expede the service of the said Gilbert's brieves, as next and lawful tutor to Elliot, his brother's son and heir. It was *alleged* by the Sheriff, That he could not be decerned to expede to the said Gilbert's service, because the said William Elliot being father-brother to the pupil, and so nearer of kin to the said bairn than the said Gilbert, who was only goodsir-brother to him, and the said William having obtained his Majesty's dispensation of his less age, he behoved to serve the said William, and prefer him to the said Gilbert. It was *answered*, That albeit the dispensation of less age granted by his Majesty to the said William being within age, gave him a liberty to execute his own proper affairs, yet he could not make him able to be an administrator of other men's affairs; especially seeing the said William had raised a summons to the said Gilbert, because he had not summoned the said William's tutors and curators, and so had not confest himself to be William's heir. It was reasoned by some of the LORDS, that likeas the King might grant by his dispensation, power to a minor of 18 years of age, or above, to have free administration of his own goods, so may he by his dispensation give liberty to any man who had exceeded the age of 22, and was within three years or less of 25 years, to be tutor. THE LORDS resolved that the dispensation could not make him able to be tutor, while he were 25 years complete, and at that time the tutory of Gilbert would expire, and the said William would have place to acclaim his own place and right.

Fol. Dic. v. 1. *p.* 576. *Haddington, MS. No* 81.

No 18.
Found in conformity with the above.

1593. *February.* WALTER KEIR *against* L. of LUSS.

IN the action persewit be Walter Keir against the Laird of Luss, and the heirs female of the last Laird of Luss, it was found, that the King's dispensation