

tive, if decreets of the sovereign Judge *in actione tutela et rationum reddendarum* could not secure tutors. THE LORDS repelled this allegiance, and ordained the pursuer yet to be heard, to allege what he may say justly against the fore-said counts, given in by his tutor, and so ordained them to meet before one of their number, whom the LORDS nominated to be their auditor, and to give in the articles of the counts, and answers thereto, notwithstanding of the prior sentence.

Act. *Lawrence Oliphant.*

Alt. *Hobo.*

Clerk, *Gibson.*

Fol. Dic. v. 1. p. 583. Durie, p. 863.

No 138.

1666. December 15.

HARTSHAW against HARTWOODBURN.

Scot of Hartshaw pursued a declarator of property within the bounds libelled, and that he had been in possession by pasturing, and doing other deeds of property, and debaring the defender Hartwoodburn and his predecessor. In this process there was an act of litiscontestation; whereof a reduction was intended, upon that ground, that the defender was absent, and was minor and *indefensus*, wanting tutors and curators for the time, his tutor, being dead; and that he had a defence *minor non tenetur placitare*.

THE LORDS found, if the summons had concluded the possessory of molestation, and if that had been libelled, that the pursuer, the time of the intending the pursuit, was in possession, they would have repelled the defence (that *non tenetur*) against the molestation; but because a declarator of right was only libelled, they reponed the minor, and found that *non tenetur placitare*.

For Hartwoodburn, *Longformacus.*

For Hartshaw, *Sir George M^cKenzie.*

Fol. Dic. v. 1. p. 583. Dirleton, No 64. p. 27.

No 139.

1672. February 9. COCKBURN of Piltoun against HALYBURTON and BURNET.

COCKBURN of Piltoun as assignee by William Tours, who was infest in an annualrent in the estate of Inverleith for his portion, being 8000 merks, obtained a decret of poinding of the ground against Halyburton who had bought the land; which now being suspended, and reduction raised, it was *alleged*, That Halyburton was minor, and that a relevant defence was either omitted, or not clearly and fully debated, which if it had been done, or were now to do, the LORDS would surely sustain the same; but being overly proponed, the same was repelled upon a report. It was *answered*, That albeit minors may be restored against decreets *in foro*, where they have omitted any point in fact, yet they have no privilege to quarrel the Lords' interlocutor upon injustice and inconsideration, and therefore cannot pretend that their allegiance might have

No 140.

Competent, and omitted, is not a proponable objection against a minor. The Court in this case avoided deciding the question, whether a minor can be restored against proponed and repelled.

No 140. been more fully debated, in which they are in the same case with majors. *2do*, The minor did homologate the decret, by payment of annualrent conform, after his majority. It was *replied*, That albeit the LORDS' decreets and sentences cannot be questioned upon iniquity, by parties compearing, yet libels of special natures, though advised by the LORDS, as to the relevancy, in absence of the defenders, if in a reduction or suspension they appear and dispute the relevancy of the same points without any other defence *in facto*, but only arguments against the relevancy, as the LORDS will recall their former sentence, as passing cursorily, without advertance, so they may do the same in relation to a minor, though compearing; and as to the homologation, payment of the annualrent being *actus necessarius*, to save the tenants from being poided, cannot import approbation of the sentence; *3tio*, The minor here propones further, viz. That the clause whereon his defence was founded being dubious, he offers to prove by the writer and witnesses inserted, that it was so expressly communed and agreed, as would be evidently relevant for him.

THE LORDS inclined not to determine the question, whether or not a minor could be restored, where there was no new matter of fact, but repelled the allegiance founded upon homologation; and ordained, before answer, the writer and witnesses inserted to be examined, what was the communing and meaning of parties, anent the dubious clause in the contract, whereon the minor's defence was founded; and which allegiance of declaring the meaning of the clause, was not proponed by the minor in the former decret against him.

Fol. Dic. v. 1. 582. Stair, v. 2. p. 67.

. Gosford reports this case :

February 10.—IN a reduction of a decret of poiding the ground obtained at Pilton's instance, as being infest in an annualrent effeiring to 8000 merks out of the lands of Inverleith, upon this reason, that the decret was given against Halyburton, who was minor, and not able to inform, who might have added to the defence omitted, that the bond granted by Halyburton's father, whereupon infestment followed, was affected with this condition, that the principal sum should not be payable, until a real right upon the said lands, in the person of one Simpson, who was creditor to Inverleith, should be first paid and satisfied; whereas it might have been, and is now farther *alleged*, and that it is now offered to be proved by the comuners and writers of the new bond, that it was *vere actum inter partes*, that no annualrent should be paid, in case Simpson prevailed; likeas he hath now prevailed, by obtaining decret upon his real right; so that if the bond should be interpreted otherwise, the lands would be doubly burdened, which would be against the intention of the parties. It was *answered* for the defender, That the said heritable bond granted by Halyburton, to which the defender was assigned in place of a former infestment of an annualrent, out of the said lands, granted by the Laird of Inver-

leith to his brother, who was content to accept of this new security, which bears nothing but a continuation to pay the principal until Simpson's real right should be purged by the common debtor, but bears an express obligation to pay annualrent in the mean time; in respect whereof the LORDS gave their decret of pointing of the ground; which being just upon the matter, that decret can never be reduced upon minority and lesion; there being no difference betwixt minors and majors, where decreets are given upon a point of law controverted; and for any new allegiance, it cannot be now received, seeing the deposition of writers and comuners cannot take away a clear bond wherein there is no ambiguity or unclearness.

No 140.

THE LORDS, notwithstanding, ordained the writers and witnesses to be examined, *ex officio*, which was very hard, seeing the father who bought the estate of Inverleith was burdened with the former bond of provision made by the old Laird to his brother, and which was preferable to Simpson's right, so that both these rights being known to the buyers, it could not be presumed in common sense that it should have been intended that if Simpson obtained a decret, that Inverleith's brother, or Pilton his assignee, should take their whole right.

Gosford, MS. No 470. p. 242.

* * A similar decision was pronounced 15th June 1680, Gordbn against the Earl of Queensberry, No 3. p. 8235. *voce* LETTERS OF SUPPLEMENT.

1679. December 20.

EARL OF ANNANDALE and COWHERD *against* JOHNSTON of Breakenside.

MINOR *non tenetur placitare*, not even in a question of meiths and marches, seeing that may cut off some of his inheritance. Here it was repelled, because proponed *post conclusum in causa, et minor lite se obtulit*; and they found the last Earl had intruded.

No 141.

Fol. Dic. v. 1. p. 582. Fountainhall, MS.

1683. November.

LADY BALLEGERNO *against* LADY ROSS.

A MINOR and her curator having intented *actionem tutelæ* against her tutor, and he having extracted a decret, she raised reduction thereof upon minority, as being lesed by some articles in the count and reckoning, and the term assigned for proving the lesion being circumduced; the minor was again restored against the circumduction; though it was *alleged*, that persons were put to greater expenses in defending against minors than against others; and that the circumduction of terms concerns the method and order of process, against which minors should have no privilege.

No 142.

Fol. Dic. v. 1. p. 583. Harcarise, (MINORITY.) No 709. p. 201.