

* * * Dirleton reports this case

In a pursuit against a minor, it was *alleged*, *Quod non tenetur placitare*, because minor; whereupon there did arise two questions, viz. *1mo*, Whether the said exception, being a dilator, ought to be verified *instanter*? As to which, it was found by the LORDS, That minority being in fact, could not be verified *instanter*; *2do*, It being *replied*, That the defender was major, which was offered to be proved; and a conjunct probation being desired by the defender; it was nevertheless found by the LORDS, That the allegiance of minority being elided by the said reply of majority, which only was admitted, the pursuer ought to be allowed to prove his reply, without conjunct probation to the contrary. *In præsentia*.

Act. Sir David Falconer.

Alt. ———.

Clerk, Hamilton.

Dirleton, No 349. p. 166.

1693. December 6.

Messrs JAMES and JOHN KEITHS, against Mr ROBERT BURNET, Minister.

It was a reduction at their instance as adjudgers of some lands, calling for a voluntary right acquired thereon by Burnet; who *alleged*, he would not take a term in the reduction, because the pursuer's adjudication was null, being on a charge to enter heir to a wrong person, seeing they offered to prove there was a nearer heir then living at the time of the charge, and who went off the country, and is presumed to be yet alive, unless they offer to prove, that he is dead; *vita præsumitur nisi mors probetur*. *Answered*; This ought not to stop your taking a term to produce, and you may insist on your reduction, as accords. THE LORDS found it not receivable *hoc loco*, being only proponed *dilatatorie*, else all the consummate diligences of Scotland should meet with that objection, you have charged the wrong heir, I offer to prove there was a nearer then on life, but if they would propone it *peremptorie totius instantiæ*, then the LORDS would consider it.

December 13.—In the cause of Keith and Burnet, mentioned 6th December current, the LORDS, on a bill given in by Burnet, allowed this to be tried, whether he had renounced his wadset to Sir Peter Fraser of Doors, the reverser, and if he had ceded to him the possession, and delivered up to him all the writs; for if the wadset was extinguished, and he out of possession, the LORDS thought it hard that he should be obliged to take terms to produce the rights in an improbation, which might be cancelled, and though he would get a diligence against Doors to exhibit them, yet it seemed more reasonable the action should

No 158.

No 159.

A defence in a reduction, that a charge to enter heir had been given to a wrong person, being proponed only *dilatatorie*, was not received unless pleaded *peremptorie totius instantiæ*.

No 159. go on against the possessor of the lands, than against him who was denuded both of the right and the possession.

Fol. Dic. v. 2. p. 189. Fountainhall, v. 1. p. 575. & 577.

SECT. VIII.

Incident Diligence.

No 160.

In a process of spuilzie a new diligence was granted against witnesses not mentioned in the first diligence *in utrum atrocis criminis.*

1589. January. KARKETTLE against DICKSON.

THERE was one Karkettle that had got a libel to his probation against one Dickson, for the destroying, and cutting down, and eating, in time of night, of certain growing corns pertaining to the pursuer, and after that he had led and deduced probation for the three terms which are granted for proving a libel, and produced so many witnesses as use to be granted, he desired to produce some other witnesses that were not examined nor produced before, and offered to make faith, that they were newly come to his knowledge; and because it was *in facto atrocissimo*, and such an extraordinary time, he ought to be admitted to produce the said witnesses, nam de jure prout in Cod. Quando liceat unicunque sine iudice se vindicare, L. 1. Nocturnus agrorum populator sub hac serie comprehenditur; and so, in detestation of such a horrible crime as to destroy growing corns in the night time, albeit it was against the order observed in other causes, the petition ought to be granted, which was so found by the LORDS.

Fol. Dic. v. 2. p. 190. Colvil, MS. p. 448.

No 161.

1606. March 5. MACKBRAIR against CARRUTHERS.

In a reduction pursued by Robert Mackbrair of Almagill against John Carruthers, the LORDS would not grant any incident to the defender for obtaining production of a factory whereupon he had founded his allegiance, because he protested not for his incident, when litiscontestation was made.

Fol. Dic. v. 2. p. 189. Haddington, MS. No. 1082.