

## S E C T. IX.

## Lesion in Legal Proceedings.

1621. *January 31.* BAILLIE *against* SILVERTONHILL.

No 136.

A DECREE of certification in an improbation, pronounced in absence, against a minor of six years old, found irreducible, and that he could not be heard to produce.

*Fol. Dic. v. 1. 583. Kerse.*

\*\*\* This case is No 12. p. 6616, *voce* IMPROBATION.

1624. *November 27.* FORRESTER *against* SINCLAIR and CUNNINGHAM.

No 137.

THE LORDS reopened a minor against a decret given for circumduction of the term, eight days after it was pronounced, upon supplication to propone an exception *noviter veniens ad notitiam*.

*Fol. Dic. v. 1. p. 430. Kerse, MS. fol. 146.*

1638. *December 1.* STUART *against* STUART.

No 138.

A decree of exoneration obtained by a tutor against his pupil and curators, was reduced *ex capite minorennitatis, et lationis*, although the curator appeared and defended, several articles having been omitted by the tutor, out of the charge, and several answers having been neglected to be proponed for the minor.

ONE William Stuart pursues restitution, after he had past the age of 21 years, but far within the time of *anni utiles*, against Robert Stuart, who was his tutor, while he was a pupil, and which tutor had obtained a decret of exoneration before the LORDS, against his said pupil, and his curators, they compearing after count and reckoning, and thereupon heard and allowed, and decerned by the LORDS; against the which sentence, and articles of the count, this party desiring to be reponed, as being thereby enormly prejudged, by sundry omissions left out by the tutor, and by sundry answers omitted to be given in to his charge, by his curators; and the said Robert compearing, *alleged*, That this action ought not to be sustained, in respect of the sentence given against him, authorised with his curators compearing, who, if they had done him any wrong, either in commission or omission, they are answerable to him therefore, and they are his direct parties, who are in law countable to him, and he cannot come back again upon him, to crave a new account, as prejudged by the first, in respect of his sentence *parte comparente*, whereby he is *in tuto*; otherwise there could never be an end of such actions, which were a dangerous prepara-

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.*Akt. *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<sup>c</sup>Kenzie.**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.