

was admitted, wherein protestation was made betwixt the said abbot and Mr George, after long reasoning and diverse allegeances. And in the mean time Mr George died, and left behind him two daughters, the eldest thereof of ten years of age, whom the abbot called to hear and see the said matter transferred in their heirs foresaid. The bairns *alleged*, That no action should be transferred or pass in them, contrary to the deprivation of their heritage during the time of their minority.—The abbot *alleged*, That in respect the process was begun in their father's time, and litiscontestation made after diverse allegeances, wherefore it should be transferred, notwithstanding their minority; which allegeance of the Abbot the LORDS found relevant, and ordained the process to be transferred in the said minors, notwithstanding their minority, in the same state as it was the time of their father's decease, in respect of litiscontestation made in their father's time, and against them.

In the foresaid action the minors *alleged*, That no action could be had against them in this matter, because they were not as yet served as heirs to their father.—The Abbot of Dunfermline *alleged*, That they two were charged by the King's letters to enter heirs to their father at a certain day, with certification that if they fail, that sicklike process should be given against them, as if they were entered, and for verification thereof, produced letters duly executed and indorsed.—The daughters minors *alleged*, That the indorsation was false and feigned, and offered them to improve the same as accords of the law.—The Abbot *alleged*, That notwithstanding the improbation, the process should not stay in the mean time; for by the practice, where any take to improve the execution of a summons, it stays not the process.—The defender *alleged*, That these letters were of another nature than a common summons, because these letters are a charge to do a deed, as to enter heir to their father; and also the Abbot pursuer has used these letters of charge *in modum probationis*, to instruct his action, and therefore the process should stay in the mean time; which allegeance of the defenders was found relevant by the LORDS; and assigned to them a day to improve the indorsation foresaid, and ordained process to stay in the mean time.

Colvil, MS. p. 242.

1581. July.

SCOTT against KINCAID.

ALEXANDER SCOTT burgess of Edinburgh, pursued one Edward Kincaid pupil, Scott his mother, and David Couris her spouse, for his interest, to hear and see certain infeftments, with the sasines, and all that followed thereupon, of certain acres of land, with other infeftments, and given in clause of warrandice, to be reduced, retreated, and rescinded. The principal reason of the summons was, because umquhile James Kincaid maker of the said infeftments, and giver of the said sasines, of his own motive will, uncoacted or compelled, with consent

No 35.
Found in conformity with
Queen's Advocate
against Wemyss,
No 29. p.
9089.

No 35.

of John and William Logans and Stephen Kincaid, interdicted himself from alienation or disposition of any lands or heritages, unto his perfect age of 21 years; the which interdiction was registered in the books of Council, and decrees of the Lords, and executorial past thereupon, and thereafter letters published openly at the market cross, and sufficient intimation of the same made to all as effeirs; and so the said infestments, made in the same time, ought to be reduced, retreated, and rescinded, as made and given by him who had no power to do the same.—It was *answered* by the defender's advocate, That the pupil could not be presently compelled to enter in plea, because he was but *infans trium annorum*; and the infant was produced to the inspection of the whole Lords, and great lamentation made to move the Lords to cause such an infant and orphan to be convened and deprived of his heritage in the estate he was presently.—It was *answered*, That in this case the municipal law had no place, for he was convened 'de dolo paterno, quia fraus et dolus nemini patrocinare debent.'—To this was *answered*, That 'quoad debitum paternum,' it was 'expressis verbis' spoken in the text, de debitis paternis propriis et non a dissasina, but there was no mention 'de dolo paterno, aut delicto, seu quasi paterno; et ubi lex non distinguit nec nos distinguere debemus.'—THE LORDS, after long reasoning, voted for the most part, that the pupil and infant ought to answer upon his father's deed, 'et quod minor non debuit locupletari cum alterius jactura, et tenebatur de dolo paterno quatenus ad eum pervenit, L. unica, Cod. Ex delictis defunctorum, in quantum hæredes conveniantur, nam, ut ait lex, post litem contestatam tenentur in solidum, et aliter in quantum ad eos pervenirit, ne alieno scelere ditentur.

Fol. Dic. v. I. p. 589. Colvil, MS. p. 310.

No 36.

The brocard was found not to take place, where a minor was pursued to append the Seal to a charter, already signed by his predecessor, and to grant a precept thereon.

1582. May.

LAIRD OF ORMISTON *against* LAIRD OF CALDER.

THE Laird of Ormiston pursued the Laird of Calder, and Stuart of Craigiehall, his tutor, for his interest, to append a seal to his charter, and to give precept of sasine according to the same; and that by reason the said laird was heir and successor to the Lord of Torphichen Sandiland that last departed; which charter was subscribed by the said Lord before his departing off the world, but not sealed and perfected, and no sasine past upon the same.—It was *alleged* by the said Laird, That he was minor annis et non tenebatur placitare de hæreditate, vel de eo per quod potuit privari hæreditate; for he being now *in tenemento*, and served, seased, and retoured into the lands contained in the said charter, which were sought by Ormiston to be sealed, and precept and sasine to be granted thereupon, the same would be a good deed, whereby he would be utterly deprived of his heritage, expressly against the law generaliter, l. 3. Zulvii, quod nullus homo infra ætatem potest nec debet implacitare super terras per breve direct. quia nihil firmum facere potest priusquam veniat