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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same made to all as effeirs; and so the said infestments, made in the same time, ought to be reduced, retreated, and rescinded, as made and given by him who had no power to do the same.—It was *answered* by the defender's advocate, That the pupil could not be presently compelled to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 pervenerit, 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

ad etatem, nam si secus, essent judicia elusoria; and so, after the meaning of the foresaid law, if the minor who was but *in infantili etate*, was compelled to grant the desire of the summons, which was to append a seal and subscribe a precept, it should be to him as impossible *de facto, ut de jure*; for *de facto* he could not do the same, because he was but in infancy and could not subscribe; *et de jure* he ought not, by reason of the above rehearsed laws.—To all this was *alleged*, That the law generaliter had no place in this case, nor yet could the appending of the seal to the charter, nor yet the giving of the precept, and subscribing of the same prejudice the minor, because the lands were disposed before by his predecessor, the Lord of Torphichen; et sic fuit factum et debitum predecessoris, et quasi debitum paternum.—It was *answered* to this, That it could never be alleged to be debitum paternum aut predecessoris, except they would allege it was done for great sums of money owing or delivered; the which if they would allege, should be admitted.—THE LORDS, after long reasoning and advising, for the most part voted that the law generaliter had no place in this case, and the minor should answer notwithstanding of his less age. Bona pars dominorum, &c. that the case agreed very properly with the law, et quod fuit minor hic in tenemento et sasitus in sua hereditate, but while he had been of perfect age, et tutius fuit to have deferred the matter to his perfect age, than to have compelled him to enter inconsiderably in the question, of that thing which might have deprived him of his heritage, quia quod differtur non aufertur.

In the same action there was a letter purchased by the Laird of Calder and his tutor dative, directed to the Lords of Session, desiring them to continue and suspend the foresaid action, intended by Ormiston against the Laird of Calder, being but a pupil and infant, and by reason of his less age; the which writing, albeit it was past by the advice of the Secret Council, and sealed under the Privy Seal, was not obeyed by the Lords; and found by the Lords, that the same was impetrated against the statutes of the Session, where it was contained that justice should not be hindered by privy writings. Some of the LORDS were of opinion, That the said letter could not be counted a privy writing, because it was past the Seals, and that nothing could be counted privy that had past the Seals; and that, conform to the practick that passed lately betwixt the Laird of Sand and Young Lady thereof, and Laird of Balcasky, for his interest, and of the law, as was reasoned by some of the Lords, licitum est principi dilatione per scriptum concedere ut in l. 2. C. De precibus imperatori, &c. Quia, ut ibi ait gloss. quod differtur non aufertur, et quotidie solent principes inducias illas quinquenniales concedere debitoribus, quas germani suo idiomati vocant quinquernal.