

1680. November 26. WILLIAM LOCKHART *against* Mr JOHN ELIES, Elder.

' THE LORDS upon Forret's report, found Mr John Elies not being *originaliter* conveyed in that process of William's against Lockhart of Lee, but only called by an incident to concur and defend, but not upon a conclusion of payment, that he must be cited upon a signet summons, ere he can be obliged to answer why he should not be liable in payment as one of the tutors or protutors; though they would have him answering upon a bill as a member of the Session.

1681. February 10.—' THE LORDS, upon Forret's report, find this process against Elieston coming in *incidenter* against Elieston upon that other process against the Laird of Lee, and being relative thereto, that Mr John Elies ought to answer presently thereto, without enrolling.'

1682. February 3.—WILLIAM LOCKHART *against* Mr John Elies of Elieston (26th November 1680) was advised, and Elieston was found, upon the qualifications adduced, to have been his tutor, and therefore they decerned him to count and reckon; which was thought very hard.

1683. March 16.—MR JOHN ELIES'S action of relief against Lockhart of Lee, Menzies of Culterallers, and the other co-tutors of William Lockhart, (*vide* anent this No 4f. p. 504.) being reported by Kenmay; THE LORDS found the said co-tutors liable to relieve him *pro rata*, notwithstanding of their allegiance upon his dole, that the said testament was all his contrivance and malversation, and so he should have no recourse against them, seeing *ex suo maleficio non debet habere actionem mandati*; which the LORDS repelled. *Nota*, This interlocutor was afterwards stopped.

1686. January 13.—THE case of William Lockhart *contra* Mr John Elies was reported by Saline. It was *objected* against his wakening, that it was only executed against Elieston, and not against the other co-tutors, who behoved to be called to the wakening as well as to the principal summons. ' THE LORDS allowed him to cite them *incidenter cum processu*, providing they were cited any time before advising of the cause.'

January 28.—THE LORDS having considered Mr John Elies's bill, with William Lockhart's answer, they allowed the petitioner a diligence for citing of other persons, havers of writs or witnesses, in place of those formerly cited who had deceased before they were examined, the number of them not exceeding those who were deceased, providing the same do not stop the advising of the cause, in case they be not examined before it come in to be advised; and allowed the like diligence to the pursuer, if he be in the same case; and allowed both parties farther diligence against persons formerly cited, if they desire the same,

No 13.

A wakening against tutors being only executed against one, and not against the other co-tutors, who it was alleged must be called to the wakening, as well as the principal summons, the Lords allowed them to be called *incidenter cum processu*, provided they were cited any time before advising the cause.

No 13. providing it do not stop the advising of the cause as said is. See This case No 41. p. 504.; and *voce* TUTOR and PUPIL.

*Fol. Dic. v. 1. p. 132. Fountainball, v. 1. p. 118, 129, 171, 226, 391, & 398.*

No 14.

1687. November. GEORGE ROBERTSON *against* JOHN KER.

FOUND sufficient to arrest in a minor's hand, without necessity to execute the arrestment against his tutors or curators, either personally, or by leaving a copy at the cross, though those ought to be cited in the forthcoming; and here a posterior arrester, who had arrested in the curator's hands, was competing.

*Fol. Dic. v. 1. p. 133. Harcarse, (ARRESTMENT) No 92. p. 18.*

No 15.

A decret against a minor, and his curators not cited with him *in initio litis* upon two diets, but only cited *cum processu*, by virtue of an incident to appear on two days warning, was turned into a libel.

1705. December 28.

Captain ALEXANDER GAVIN *against* SIR ROBERT MONTGOMERY of Skelmurly.

SIR ROBERT MONTGOMERY of Skelmurly being charged upon a decret obtained against him and his curators, at the instance of Captain Alexander Gavin, where the curators were not cited *in initio litis* with the minor upon the *induciae legales* of two diets, but *ex post facto* only cited *cum processu* by virtue of an incident to compear upon days warning; THE LORDS turned the decret into a libel.

*Fol. Dic. v. 1. p. 132. Forbes, p. 58.*

No 16.

The Lords sustained the objection to a sale of a minor's lands, that the tutors and curators of the minor were not called, and found they could not be called by a diligence.

1752. Feb. 18. & June 26. DALGLEISH *against* HAMILTON.

DALGLEISH, as creditor to James Hamilton late provost of Kinghorn, brought a process of sale against Hamilton his son and heir, of certain houses and tenements lying about Kinghorn; in which it was *objected* by the defender, that the process could not proceed, in respect the defender was a minor, and his tutors and curators were not called.

The pursuer having applied to the Ordinary, for a diligence to cite the tutors and curators, the Ordinary stated the case verbally to the Lords; and the LORDS, in respect the defender was minor and not pupil, having advised the Ordinary to grant diligence, he granted it accordingly.

They considered the case of minor and pupil to be different. A tutor acts for the pupil who is himself considered nobody; whereas a minor acts with the curator; and as a husband may be called by a diligence, so a curator might.

But, upon advising petition and answers, the LORDS sustained the objection to the sale, that the tutors and curators of the minor were not called, and found they could not be called by a diligence.

*Fol. Dic. v. 1. p. 129. Kilkerran, (PROCESS) No 13. p. 439.*