

No 170.

1732. July 14.

GRIEVE against TAIT.

THE defender was assoilzied from a reduction of a bill granted to him for the price of goods sold by him to a minor who was a merchant at the time, though, in fact, the minor was employed by a third party to buy the goods for him, who accordingly received them; and therefore, in effect, the minor was but a cautioner, but the seller was ignorant of this. See APPENDIX.

*Fol. Dic. v. 1. p. 585.*

1782. November 20.

ROBERT JOHNSTON against The Hon. WILLIAM MORDAUNT MAITLAND, and the EARL of LAUDERDALE, his Administrator-in-law.

No 171.

A minor, who had a commission in the army, found liable for various articles bought by him, although the persons liable by law to aliment him could not have been obliged to pay for them.

MR MAITLAND, in the 15th year of his age, received a commission in the army; and having, in the course of a few months after, run in debt to Mr Johnston, toyman in Edinburgh, he granted his acceptance for the amount, being L. 17:7s. A few days after he incurred a farther debt of L. 7:18s. Of the furnishings composing this debt, some might have been deemed altogether useless and frivolous; but the greater part were articles which, although not absolutely necessary, are commonly possessed by young gentlemen of fashion and fortune.

Payment having been refused, Mr Johnston commenced an action before the Sheriff of the county, and attached Mr Maitland's horses in security. The Sheriff "ordained the articles which were still in the defender's possession, to be delivered up, and assoilzied *quoad ultra*;" and Mr Johnston having brought this judgment under review of the Court of Session by a bill of advocacy,

*Pleaded*; By following a profession, and enjoying an income independently of his father, the defender's situation is different from that of a minor living in the house, and under the immediate direction of his curators, either legal or dative. Hence, furnishings made to him *bona fide*, for no more than an adequate price, like money lent on bond or bill to a minor who is a writer or merchant, ought to be sustained as the foundation of diligence for attaching his proper estate. To require a special mandate in transactions of this sort, would be attended with much unnecessary embarrassment to the minor, and those interested in his welfare.

Farther, As a merchant may lawfully supply a minor with clothes, and other necessaries, the privilege of restitution is inapplicable to the present case. Under the appellation of necessaries are not included food and clothing alone. Furnishings even for the purposes of luxury and show, when becoming, or usually possessed by persons of like rank and fortune, are to be put in the same class. And the bulk of those now under con-

sideration being of that description, the few remaining articles will fall under the maxim, *De minimis non curat prætor*.

No 171.

Lastly, As most of the articles were such as could not be destroyed in the using, the Sheriff's interlocutor, instead of limiting the restitution to those still in the defender's possession, ought to have obliged him to declare where they were; the pursuer, from the nature of restitution, being entitled to recover the possession of them wherever they are to be found.

*Answered,* The general rule in this matter is undoubted, that every contract entered inso by a minor without the consent of his curators, and which is not conducive to his real advantage, is *ipso jure* void and null. Nor does the present case afford an exception from this salutary regulation. Although effect be given to the obligations of minors relative to the trade or profession in which they are employed, because a contrary practice, by excluding them from all commerce and credit, would tend to their irreparable prejudice, it surely will not follow, that contractions nowise connected with their employment should be entitled to the same indulgence.

By necessary furnishings, in the other exception from the general rule, are meant those which are of indispensable use in the minor's subsistence and education. Some of those now under consideration, without great impropriety, might have been made to the minor for money instantly advanced. Others are of a species so uncommonly useless and extravagant, as to exclude every pretence of *bona fides*. The circumstance, too, of the pursuer's taking a bill of exchange for the debt, by shewing, in the clearest manner, his conviction, that the young gentleman's expenses were not supplied by his guardians, and could not be afforded out of his pay as an officer, must place this claim in a most unfavourable point of view.

One of the Judges, considering the practice of merchants taking bills from minors as highly improper and inexpedient, was for dismissing the action; another was for making a distinction between the furnishings which were altogether extravagant, and the rest; and all agreed, that contractions of this sort were incapable of producing action against a father upon his natural obligation to afford an aliment to his children. The majority, however, were of opinion, That in an action against the minor himself, and to the effect of attaching his proper estate, the circumstance of his enjoying a commission in the army was sufficient to justify advances such as the present, which were in general unexceptionable.

THE LORDS therefore advocated the cause, repelled the defences, and decreed.

Lord Reporter, *Gardenston.* Aet. *Henry Erskine.* Alt. *Geo. Fergusson.* Clerk, *Orme.*

C.

*Fol. Dic. v. 4. p. 5. Fac. Col. No 69. p. 107.*