

specially seeing they were obliged in the alienation, made to the defenders, to warrant the land to them;—The Lords repelled the allegiance, and found no necessity to summon the minor's curators to any such pursuit, seeing there was nothing concluded in this process against them; and any clause of circumvention done by them, which was libelled in this summons, the pursuer past from the same, and insisted only upon this reason of minority and lesion; and the Lords had no respect to that part of the allegiance, bearing, *That the curators were obliged to warrant the alienations*, for that was no cause why the pursuer ought to be compelled to summon them; and albeit the minor had *actionem curatela* against them, yet that debarred her not from this pursuit.

Act. Craig.

Alt. —.

Fol. Dic. v. I. p. 138. Durie, p. 835.

1667. July 2.

LORD BLANTYRE against WALKINSHAW.

THE Lord Blantyre pursues a reduction of a bond, as being granted in his minority. It was *alleged for Walkinshaw*, assignee to the bond, absolvitor, because there was no process intented against him *intra annos utiles*, till the pursuer was past twenty-five years. It was *answered*, That the defender's cedent was cited, to whom the bond was granted, and this defender's right will fall in consequence, and there was no necessity to cite him in the same way; that the service of an heir may be reduced without calling of his creditors, or those that are infeft by him.

The defender *answered*, That his assignation was intimated before the citation against his cedent, which cannot be miskenned by the pursuer, to whom the intimation was made, after which the cedent had no right, and any citation against him was of no moment; neither is the case alike to the reduction of a retour, wherein the reducer doth neither know, nor is obliged to know, the creditors rights.

THE LORDS found that the assignee, after the intimation, behaved to be cited *intra annos utiles*, but they sustained improbation against the citation, made against the assignee by way of defence. In this case it was not urged, whether the intimation was personal to the pursuer, or only at his dwelling house; or whether it was recent before the citation; for, if it were not personal, or recent, it were hard to oblige the pursuer to remember so transient an act, as an intimation.

It was further *alleged by the defender*, That there was no lesion, because he offered him to prove, that the sum was delivered to the minor's curators, at least to the minor and his curators jointly, who being persons abundantly *solvendo*, and very provident, the minor could have no lesion, seeing they were comptable. It was *answered, non relevat*, unless it were alleged *positive*, that the sum were *utiliter impensum*, for the minor's profit; for, the minor has his option, either to pursue the curators, as intromitting, or to reduce his obligation, and

No 75.

No 76.

In reduction of a bond granted in minority, if the assignation be intimated, the assignee must be cited *intra annos utiles*, and not the cedent.

No 76.

the curators not being in this process, no probation of the delivery of money to them will bind them, but were there necessity, that they were both cited, and it instructed by writ.

THE LORDS repelled this defence, but severals inclined not to sustain process, till the curators were first discussed; and whether the minor was lesed or not.

Fol. Dic. v. 1. p. 138. Stair, v. 1. p. 468.

S E C T. XIX.

Citation in Reductions of Judicial Deeds.

1661. July 24.

MITCHELS *against* JOHN HUTCHISON.

No 77.

In the reduction of a retour, necessary only to call the Judge, the clerk, and the inquest.

JEAN and MARION MITCHELS having pursued John Hutchison, in *anno* 1659, for reduction of a decret obtained by him against them, as heirs to their father, upon minority and lesion; and also, because their service, the only ground of the decret, was reduced in *anno* 1656, wherein there was an act of litiscontestation now wakened; the defender *alleged* he got wrong in the said act; because, he having proponed a defence upon the pursuers behaving themselves as heirs, (no ways acknowledging their minority), he alleged they behoved to prove the reason, as well as the exception, seeing they were both consistent; yet the act ordained him to prove his defence of behaviour, but did not ordain them to prove their minority.—THE LORDS found this allegiance relevant.

It was further *alleged*, that the reduction of the pursuer's retour is not competent against this defender, to reduce his decret; because the said reduction was long posterior to his decret, and he was not cited to the reduction. The pursuers *answered*, they needed call none to the reduction of their retour, but the Judge, and clerk, and inquest; and though the defenders decret was anterior, they did not know the same, having been obtained when they were within twelve years of age, and never charged thereupon, before the reduction of their retour, and so they never knew it, nor were obliged to know it.

THE LORDS repelled this defence, and sustained the reason of reduction, unless the same were elided by the said defence, of behaving as heir.

Fol. Dic. v. 1. p. 138. Stair, v. 1. p. 55.