them? According to Mr Dundas's argument, he ought to continue the lands in his charters, were it for 500 years. The present question is of great moment to the land rights in Scotland. If this were an estate held of the crown, the argument would be the same; and thus Mrs Drummond would be obliged to take out a charter from the crown for the single conveniency of the vassal: and this obligation might often recur, to her great detriment and expense, without any possibility of advantage.

PITFOUR. The reason of the obligation to infeft, and of the warrandice, is in case the disponer happens not to have a full right to the lands.

MONBODDO. It seems to be admitted that Mrs Drummond might enter if she pleased. The question is, Whether does the warrandice oblige her to enter? If Mr Dundas had a precept, and no procuratory, he might have compelled Mrs Drummond to enter. Why should his right be diminished by having both procuratory and precept?

PRESIDENT. When there is only a precept, there remains a superiority,—a real estate in the superior; but, when there is a procuratory, there is a right defeasible at the will of the vassal; and this makes the difference.

GARDENSTON. Had this method of disappointing the superior been lawful, it would have been discovered long ago.

On the 10th February 1769, "The Lords found that Mrs Drummond could not be obliged to enter with the superior, and therefore assoilyied, and found expenses due;" altering the interlocutor of Lord Monboddo.

Act. H. Dundas. *Alt.* R. M'Queen. *Diss.* Monboddo. He was much hurt with this interlocutor: he said to me, "Will you leave us no law?"

1769. *February* 10. JOHN BADENOCH *against* GEORGE, &c. KELMANS.

MINOR.

Decree having been pronounced against a Minor having a tutor, and the reclaiming days having, through negligence, been allowed to elapse—*found* that the Minor was not entitled to be reponed on the head of minority and lesion.

JOHN Badenoch was a minor, having a tutor. In a process, at the instance of Kelman, against him, the Lord Ordinary, after pleadings, both *viva voce* and written, upon the merits of the action, in which the minor's pleas were fully stated, decerned against him. A representation was prepared against this interlocutor, but it was omitted to be lodged until after the lapse of the reclaiming days, and was, in consequence, not received; and the decree was extracted. In a reduction of this decree, at the instance of the minor, it was

PLEADED,—The pursuer has no occasion to maintain that, where a minor's cause has been fully and fairly heard, and a decree has been pronounced, which has become final, minority affords any reason for opening up the decree: But he maintains that minority is a good reason for restoring a party against the

lesion he sustains by the fault of his tutor, or agent, as this truly arises from his nonage; seeing it is to be presumed, that, if he had been major, and capable of attending to his own affairs, he would not have allowed the reclaiming days to expire without representing. *Gordon* against *Earl of Queensberry*, 15*th June* 1680; *Logie* against *Keir*, 20*th December* 1699; *Cockburn* against *Haliburton*, 10*th February* 1672; *Alexander* against *Pack*, 14*th January* 1697; *Lady Balgerno* against *Lady Ross*, *November* 1683. *Bankt.* 2,679.

ANSWERED. It may be doubted whether the privilege of minority extends to the reponing, even on the ground of competent and omitted; *Oakly* against *Telfer*, 22*d January* 1675. But it is unnecessary to argue this, as the grounds on which the decree is attempted to be opened are not *competent* and *omitted*, but were actually *proponed* and *repelled*.

"The Lords found it not competent for the pursuer to insist for an alteration of the interlocutor of 3d March 1767, as the same was not complained of within the reclaiming days."

The following opinions were delivered:—

PITFOUR. The Roman law allowed *restitutio in integrum* to minors if lesed. *Si non provocavit intra diem* is one of the cases there put. Our law gives another sort of remedy: competent and omitted is always allowed to be set aside in the case of minors. The highest certification is that in the House of Lords, if an appeal is not brought within five years: from this certification minority is exempted. The defenders would undoubtedly lose their cause upon the merits, were it to be tried in the House of Peers: for the interlocutor is precisely the reverse of the judgment of the House of Peers, in the case of *Skirvan*; and that House is always uniform in its judgments. Such would be the case were the pursuer rich enough to carry the cause there; and I should be sorry were the case of the poor to be different from that of the rich.

KAIMES. Lord Pitfour has spoken properly as to competent and omitted. I wish he had also spoken to the present case, which is proponed and repelled, with an extracted decreet.

MONBODDO. I would wish to be relieved of the *res judicata*, because I am satisfied that the judgment on the merits of the cause is erroneous. With respect to competent and omitted, that plea is disregarded in the case of a minor; because, there, the judge has given no decision upon the minor's plea, which was never before him. But I always thought that a decree, repelling an allegation, cannot be reduced, however unjust. A minor is in no better situation than any one else. Were there to be any other rule established, there could never be a final judgment against a minor.

AUCHINLECK. The maxims of law are plain. *Res judicata pro veritate habetur, et vigilantibus jura subveniunt.* Let the minor have recourse against him who neglected the cause. But, after a point is stated and judged of, can another lawyer come in and say, "Hear me, for I will plead the cause better?"

PRESIDENT. If you sustain this plea of minority, you will, in all probability, set aside the bulk of decisions pronounced in this Court. By the same rule you may hear a minor after two subsequent interlocutors, and if, after two, why not

after twenty? He has the benefit of a review in another court: let him use that benefit. There is a difference between a court reviewing its own final decree and another court receiving an appeal after the *dies fatales*.

GARDENSTON. A minor is entitled to be restored where a tutor has injured his right by neglect. There was such a neglect here,—an overly pleading and not so much as a representation offered against the judgment. If the tutor had taken the opinion of the whole Court, he would have been exauctorated, and the minor would have had no pretext for restitution.

BARJARG. When a minor is injured from the circumstance of minority, he may be restored; but, if he is not injured from that circumstance, there is no remedy. The law does not favour minors more than others. The minor was *defensus*, for he got a judgment in the cause. If he has been *male defensus*, his recourse lies against his tutor.

KAIMES. Why should we extend the privileges of minors to the hurt of all the rest of the world? By the rule now sought to be established, a minor may bring as many appeals as he pleases, and may drop them as often as he pleases.

On the 10th February 1769, "the Lords found it not competent for the pursuer to insist for an alteration of the interlocutor of the 3d March 1767, as the same was not complained of within the reclaiming days;" adhering to Lord Gardenston's interlocutor.

Act. D. Græme. *Alt.* A. Elphinston.

Diss. Strichen, Pitfour, Gardenston.

1769. *February* 11. JOSEPH CLARK and OTHERS *against* MR ARCHIBALD HOPE.

COALLIERS.

May be employed at any Coal possessed by their master.

[*Faculty Collection, IV. p. 337; Dictionary, 2362.*]

KENNET. All the different coals are existing; neither are any of them deserted. A master may aliment his coalliers in the interim while his works are interrupted. What should hinder him to aliment them by employing them in a work which is not more dangerous, nor less lucrative, than the work to which they are engaged?

MONBODDO. This is a point already decided, and well decided. There is no argument on the side of the coalliers, but the opinion of some lawyers, who compare coalliers to the *adscripti glebæ* of the Romans, and the *proprii homines* of Germany. What was the condition of those persons I do not well know. I think they are a relict of the *nativi;* which was the state of great part of the lower sort in Britain in former times. The *nativi* were not *adscripti*