1677. *December* 13.

The MASTER of MORDINGTON and CURRIE *against* OLIPHANT.

No 32.
Found in conformity with the above.

THE Master of Mordington having granted a security to Charles Oliphant in the lands of Nether Mordington, &c. of which he had granted a tack to James Currie, bearing a reversion of his annualrent, there is a reduction raised at the instance of the Master and Provost Currie, upon minority and lesion, and upon the nullity of Charles's infeftment, as being granted by a son authorised by his father, as lawful administrator *in rem suam*, in so far as the security is granted for the father's debt upon an estate belonging to the son. The defender *alleged* absolvitor from both reasons, because the Master had by this right in the formal words of an oath sworn, 'never to come in the contrary,' which did exclude him from quarrelling it upon any head; and, 1*mo*, It doth exclude him from reduction upon minority, because it cannot be pretended that a minor is lesed by paying of a sum to prevent his perjury; nor is there is any question but the insisting in a reduction after his oath infers perjury; so that there being no lesion, there can be no reduction on that head; and also it takes off the nullity, the minor being excluded from proponing of it by his oath; and, that an oath is effectual against revocation or reduction, is clear by that famous Roman law, '*Sacramenta puberum super contractibus rerum suarum non retractandis inviolabiliter custodiantur*;' and, by the canon law, all oaths are to be observed *nisi vergant in detrimentum animæ aut tertii*, which accordingly hath been allowed, and constantly followed by our custom, for which four or five decisions were adduced, bearing expressly the reason of the decision, because the minor could not be lesed by losing his means for saving his oath, and there was never a contrary decision in this kingdom; and many famous lawyers are positive, that an oath supplies the defect of formalities and nullities therein. It was *answered* for the pursuers, 1*mo*, That judges are not to decide *secundum forum poli*, but *secundum forum soli*, and therefore are not to regard promissory oaths *quæ solum Deum habent ultorem*, but are to respect the lesion as it concerns mens estates; and the contravention of the oath is already incurred; and if this shall be sustained, there is a door opened to abuse and ruin all minors, for by the same facility that they are induced to engage to their hurt, they will be also induced to swear the same; and therefore the laws of most nations have provided a remedy; for in Popish countries they obtain dispensations for the oath, and in Protestant countries, there are express statutes against the taking such oaths of minors, as in Holland; and in the decisions adduced, the matters in question were but small, but here they are great; and 2*do*, Whatever might be pretended against the minor, it cannot operate against Provost Currie, who derives right from him; for it is no perjury in him to insist upon the privilege of revocation competent to the minor his author, who can be excluded only upon the account of the detriment to his soul; 3*tio*, No oath can supply a nul-

No 32. lity, for that were to make a deed of that which is no deed; so that the want of registration of a sasine could be supplied by no oath, 'not to come in the 'contrary,' because the law hath declared such sasines null and void; and public laws cannot be derogated from by private pactions or oaths, and therefore the Lords, in the case of Catharine Alexander, found, "That an oath granted by a wife, never to come in the contrary of a bond granted by her, could have no effect, because the law had declared such bonds null." And if a minor having curators, grant bond with an oath, the law having annulled such deeds, the oath cannot supply them; and it is all one for a minor, having curators, to contract without them, as when the curators authorise to their own behoof; and, it is beyond question, that a father, as lawful administrator, is tutor to his children in their pupillarity, and curator in their minority; so that Mordington having induced his son, a minor, to undertake his debt and burden his proper estate, could not authorise his son to that effect. It was *answered* for the defender, That whatever be the course and practice of foreign nations, this kingdom, which is governed by a consuetudinary law, hath clearly, by many consequent decisions, without any in the contrary, excluded minors from reduction upon pretence of lesion, accounting it always no lesion to observe their oath; and, for the custom of Popish countries, it is a most wicked and unwarrantable practice of the Pope to dispense with an oath, which is binding by the law of God; and none can pretend that the Pope's dispensation will have any effect here, though the Master of Mordington, who is a Papist, should obtain it; and it is certain, that many Popish countries, to wit, those where the Roman law is in vigour, adhere to this authentic *sacramenta puberum*, &c. And, as to the law of Holland, they have done very well by severe laws to prohibit the inducing of minors to swear under great penalties, by application whereof they may remedy the minor's loss; but the Lords must proceed according to law, till such a statute be introduced; and it is true, that the pactions or oaths of private parties cannot derogate from public laws, in so far as they concern the public interest, or are against laws prohibiting and annulling; but we have no such law, but only a law granting a liberty or privilege to minors lesed to raise reductions on these reasons within their age of 25 years, which is a mere personal privilege that he may use and not use, and doth not prohibit or annul deeds of minors, unless they have curators; and therefore, if the oath exclude the minor, Provost Currie cannot insist upon the reasons of minority; for revocation being personal, no creditor of a minor can make the minor revoke or revoke for him, or insist in his revocation if he be excluded; for he must found upon the minor's right, which he cannot, because it is excluded; and, as to the nullity, though fathers (as lawful administrators) be in place of curators, yet not with the full effect, because the minor may chuse other curators; and if the son be emancipated, and not in his father's family but living a-part, and having a patrimony managed by himself, in that case the father is no more curator, but the son is *sui juris*, and none of his deeds are null upon that head. It is true,

in the case of Sir George M'Kenzie against Fairholm, Sect. 4. *h. t.* a son becoming cautioner with his father, the son's deed was found null; but there it was proved, the son was in his father's family entertained by him, and had no several employment or estate, neither was the son authorised by the father, but his authority was pretended indirectly, because both subscribed the same writ; but here the father doth expressly authorise. No 32.

THE LORDS found the reason of minority and lesion was excluded by the oath, and that the creditor could not insist upon the minor's reduction, himself being excluded; but as to the nullity, the LORDS, that they might prefer neither of the parties in the probation, did, before answer to the relevancy, ordain either party to produce such evidences as they could, for clearing, whether at the time of this deed the Master was in his father's family, or if he had a separate estate managed by himself, and lived a-part.

Fol. Dic. v. 1. *p.* 575. *Stair, v.* 2. *p.* 578.

*** Such oaths are utterly discharged by act 19th Parliament 1681.

1681. *November.* GEORGE HERIOT *against* Mr HENRY BLYTH. No 33.

A CURATOR having, in obedience to a letter sent from his minor abroad, furnished the minor's younger brother with 300 merks, the LORDS sustained the article of payment in the curator's discharge, though quarrelled upon minority and lesion, in regard it was *res minima*, and done to a brother who was indigent, and had but 400 merks of stock.

Harcarse, (MINORITY.) *No* 697. *p.* 197.

1683. *November.* Sir JOHN HAY *against* POWRIE and BALLEGERNO. No 34.

A minor alleged, that witnesses, as to the value of lands, had not been properly examined, and craved that, on account of the privilege of a minor, they ought to be re-examined. They were ordered to be re-examined, on account of former error, without respect to the alleged privilege.

IN a declarator of recognition, at the instance of Sir John Hay of Murie against the Creditors of Ogilvy of Murie, the LORDS having, before answer, ordained the rental of the whole lands of Murie to be proved, to the effect they might know if the major part was alienated; and there being a probation *hinc inde* led and advised; mean time it being understood, that some of the witnesses who had deponed upon the rental of the lands of Murie and pertinents, had not made distinct answers in relation to the lands of Murieside, in so far as they deponed, that they knew not what the lands of Murie did pay of yearly rent, in respect they never knew them set; and it was notour to the whole country, that the lands of Murieside were set; so that it appearing the witnesses did not clearly understand the import of the ambiguous term of pertinents,

It was craved in behalf of the Lady Ballegerno; That the Lords would allow her to prove the rental of Murieside and Carcathie, which are parts and