never annul the interlocutors *in jure*. *Replied*, Though his friends were called, yet it was not *curatorio nomine*, but for debts owing by themselves *proprio nomine*, so the minor must be restored not only to defences competent and omitted by him, whether they consist in facts or *in jure*, but likewise must be heard as to all the allegeances proponed and repelled, as if they had not been repelled. THE LORDS though this would be a dangerous extension of the privilege of minority, if he were allowed to quarrel the interlocutors on iniquity; and that they had lately refused this in the case of Cochran and the Marquis of Montrose, since the Revolution (*See* APPENDIX); therefore the LORDS, by plurality, found the informal citation of the tutors and curators was not a total nullity, opening and loosing the hail interlocutors in the decreet, which proceeded on debate, but only reponed the minor to defences omitted either *in facto* or *in jure*.

No 145.

*Fol. Dic. v.* 1. *p.* 584. *Fountainhall, v.* 1. *p.* 810.

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1699. *November* 7. CUBIE *against* CUBIES.

No 146.
A minor's procurators rashly referred to the other party's oath. The minor altho' plainly lesed had no remedy.

IN the concluded clause, Cubie *contra* Cubies, it was *alleged* against some bonds of provision, granted by a father to his children, 1*mo*, They were never delivered, 2*do*, They were satisfied and paid, in so far as they had got sums equivalent thereto from their father, posterior to these provisions; whereunto it was *answered*, (as appeared by the debate in the act of litiscontestation) that these bonds being now in their hands, they needed not prove delivery; neither did such writs require a formal delivery, To the *second*, That donations by parents were presumed to be *distinctæ liberalitates*. *Replied*, That cannot be supposed, because they offered to prove by their oaths that they were given in satisfaction of their former debts. Which reply being found relevant, three of them compeared, and deponed, that when their father gave them these sums, he expressly declared he gave it them over and above their bonds of provision; and the fourth said, she got her sum from her elder siter, Helen Cubie, but neither said it was in satisfaction or not. These oaths falling to be advised this day, it was *objected* by the pursuer of the reduction, that he was minor, and disclaimed the debate made for him, being plainly lesed thereby, seeing the presumption of law militated for him, that the posterior payments must be ascribed to satisfy and extinguish the prior bonds, *quia debitor non præsumitur donare*, and there was no necessity of referring it to oath, that it was either given or accepted in satisfaction; and therefore craved to be reponed, as has been often decided, Young *contra* Paip, *voce* PRESUMPTION, and 12th Nov. 1698, Sydserf, IBIDEM. THE LORDS were sensible the process was wrong managed, but seeing it was *juratum*, they refused to repone him now. But as to the sister, whose oath was not special, they ordained her and her sitser Helen to be re-examined, what the father declared when he gave Helen the money to deliver to her younger sister,

No 146. if he said it was over and above what she was provided to, or in part of it *pro tanto*, and what Helen said to her sister when she gave it her. Neither did the LORDS regard that it was contended to be an extrinsick quality, that the father gave it them over and above their portions, and so ought to be *aliunde* proved, for they thought the *causa dandi* intrinsick. Parallel cases to this have been so oft decided and marked, that this might have been omitted, had it not been for the special circumstance of the oath, which exeems it from the common case and presumption ' quod debitor non donat nisi expresse id actum ' fuisse appareat;' and that it was unnecessarily referred to oath by a procurator, to the prejudice of a minor, his client.

*Fol. Dic. v.* 1. *p.* 584. *Fountainhall, v.* 1. *p.* 65.

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1699. *December* 20. ELIZABETH LAGIE *against* WILLIAM KER.

No 147.
Competent and omitted is not a proponable objection against a minor.

I REPORTED Elizabeth Lagie, relict of Andrew Ker, in Lithgow, against William Ker, her husband's brother's son, on a decreet *in foro*, whereby the LORDS found him debtor in L. 658 to her husband, and ordained her to have the liferent of it. His reason of suspension was, that it was obtained against him when minor, and though the LORDS had justly found that he had the foresaid sum in his hands, according to what was then pleaded, yet he was lesed by omitting this reply, that, prior to *that*, his father and uncle had competed together for Bonhard's money, as appears by the discharge now produced, granted by Andrew, the pursuer's husband, to Bonhard, and so he had neither funds nor effects then in his hand; which, if then proponed, would have assoilzied him, and is receivable now, he being minor. *Answered*, 1*mo*, It is *res judicata*, which must bind minors as well as others, especially where it has been fully and maturely heard; 2*do*, By a back-bond, granted by William Ker, the suspender's father, subsequent to the precepts he accepted, and also to the receipts he had given to Bonhard, and to Andrew's discharge, he obliges himself to count for the debts assigned to him, in so far as he shall intromit or recover them, with exception only of L. 20 Scots yearly, as an aliment to a natural child of the said Andrew's; which the LORDS found only payable till the age of 16; for, after that, they may go to service; and seeing these precepts were not reserved, *exceptio firmat regulam in casibus non exceptis;* and if he had not had effects to pay them, he would have much rather mentioned them than the lesser sum of L. 20 Scots. *Replied*, That decreets *in foro* ought to be inviolable and sacred even against minors, where defences distinctly proponed are repelled; but competent and omitted can never be obtruded against minors, especially where the allegeance consists *in facto*, and is now instantly verified, as was lately found betwixt the Countess of Kincardine and Purves of that Ilk, No 145. p. 9016; and had been oft decided before; 1st December 1638, Stuart