

against Stuart, No 138. p. 9008; Hope, *tit.* Universal and Lucrative Successors; and 14th Feb. 1677, Duke and Dutchess of Buccleugh against the Earl of Tweeddale, No 8. p. 2369. And the LORDS, in the case of Cochran of Kilmarnock against the Marquis of Montrose (*See APPENDIX*), did lately refuse to reponne the Marquis, though minor. There it was no new defence, but only farther illustrated from new topics *in jure*, and was contained in the decret, and there repelled. THE LORDS reponed Ker against this decret; and found competent and omitted could not be obtruded against a minor, especially where the defence consisted *in facto*, as here: And, as to the allegiance itself, whether William had then effects of his brother Andrew's in his hands, or if it was elided by William's back-bond produced, the LORDS were equally divided, so that it came to the President's vote; but there being several *non liquets*, they got till next day to clear themselves, who accordingly sustained the suspender's emergent reply; and so he gained the point.

*Fol. Dic. v. 1. p. 582. Fountainhall, v. 1. p. 74.*

1705. January 23.

RICHARD OAKLEY against JAMES TELFER.

RICHARD OAKLEY, merchant in London, having furnished some merchant-ware to Robert Telfer, he took his bond for L. 50 Sterling, as the price; and distressing him for it, James Telfer of Haircleugh, his brother, in December 1679, writes a letter to the said Mr Oakley, entreating him to forbear distressing his brother Robert till Whitsunday, and he formally engages to pay him at that term. On this letter he forbore him; and both Robert and James Telfers dying within a year or two after this, without paying the debt, Richard Oakley raises a pursuit against James Telfer of Haircleugh, as heir to his father, and as lawfully charged, and founds on his father's letter; and in 1682 obtains a decret against him *in foro contradictorio*, wherein there is compearance and sundry defences proponed; and thereon leads an adjudication. Of this decret, and the diligence following thereon, Haircleugh raises a reduction, and insists on these reasons, that he was the time of obtaining the said decret, in 1682, a minor, and truly upon the matter *indefensus*; for though several defences were proponed, yet the material objection was omitted, that the letter founded on was not probative, being neither holograph, nor mentioning writer's name nor witnesses, and so null of the law; and though competent and omitted be not regularly admitted, as receivable against decreets *in foro*, yet it can never be obtruded against him, an infant at the time, and who now propones the same. And, by the common law, *tit. C. Adversus rem judicat.* minors are sometimes restored against judicial sentences. *Answered,* Though the privileges of minority be very great, yet they are not such as to restore minors to

No 147.

No 148.

A minor was not reponed against a material defence omitted by his procurator.

No 148. obvious allegiances, which, if they had been true, could not have been omitted; but they had not the confidence to deny the verity of the letter at that time; and now it ought not to be received, when so long a course of time as 22 years has made such an alteration in prejudice of the party with whom they have to do, as what was easy to adminiculate and astruct them of being his hand-writing, is next to impossible now, all the parties being dead; and if you have, by your delay, deprived me of that probation, you ought to reap no benefit thereby, seeing if you had quarrelled it then, I would have infallibly proved it; and minors may be reponed in points of fact, but not *in jure*, as was found since the Revolution, betwixt Cochran of Kilmaronock and the Marquis of Montrose (*See APPENDIX*), and the Lady Kincardine against Purveshall, No. 145. p. 9016; *2do*, There is no necessity for these solemnities in this case; for, though Haircleugh was no merchant, yet his brother Robert, and Oakley, with whom he contracted, were, and the subject-matter was trading and merchant-ware; so that such missives need neither be holograph nor have witnesses. *Replied*, As soon as he came to understand his business, he insisted vigorously in his reduction; and this is neither *res mercatoria* nor *inter mercatores*. It is true, bills of exchange are regulated *jure gentium*, and are dispensed with as to these solemnities; but this letter is not of that kind, but a mere fidejussory obligation; and cautioners in law are very favourable. *Duplied*, That the principal party's employment, and the subject-matter determined, if it was *res mercatoria*; and even a minor merchandising, giving bond for ware, will not be reponed: And here he is not so much cautioner as *expromissor*, and taking the debt upon him *in constituta pecunia*. THE LORDS repelled the reasons of reduction, and adhered to the decret *in foro*, and refused to repon the minor in this case.

*Fol. Dic. v. 1. p. 583. Fountainball, v. 2. p. 260.*

No 149.

1732. January 14.

ANDERSON *against* GEDDES.

A DECREE having been obtained against a common debtor, during the minority of another creditor, reduction was intended of the same, upon minority and lesion; and it was *pleaded* for the creditor-reducer, That the decree was iniquitous, an obvious objection lying against the claim upon which it was founded; and that he had an interest to reduce, in regard that, at the time of establishing this unjust debt, the common debtor had not a sufficiency of funds to satisfy both. It was *answered*, That the very objection now founded on was proponed by the common debtor himself, and repelled, and minors are never restored against proponed and repelled. And *esto* it had been omitted, minors are only restored to their defences, which were competent and omitted in processes against themselves, where their interest is direct, but not where the pro-