

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.*

1699. December 20.

ELIZABETH LAGIE against WILLIAM KER.

No 147.

Competent and omitted is not a proportionable 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 decret *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 fore-said 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, imo*, It is *res judicata*, which must bind minors as well as others, especially where it has been fully and maturely heard; *2do*, 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 allegiance 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

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 reponned 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 reponned against a material defence omitted by his procurator.