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

No 34. pertinents of the lands of Murie, in respect she was minor, and lesed by the not probation thereof, and ought to be restored against any omission of her curators, in not putting distinct and particular interrogatories to the witnesses, especially in a competition with an odious gift of recognition.

Answered; Though minors might claim to be restored against allegeances, or omission of competent allegeances in fact or law, *quæ tangunt jus tantum privatum*, they have no such privilege in things concerning form of process, and order of probation devised for putting certain and speedy issue to pleas, because *ea tangunt jus publicum*, which even by the common law excluded the privilege of minority; and if it were otherwise, no right would be secure wherein minors have been concerned; yea, their names might be used by others for quarrelling of rights. Again, with us the privilege of minority is much restricted; for the long prescriptions before the act 12th, Parliament 1617, run against minors; and all short prescriptions since then run also against them, unless where they are excepted; they are also liable to be prejudged by the falling of escheats after year and day, and by irritant clauses in charters *ob non solutum canonem*; and perhaps certifications in improbations, or circumductions of terms would be effectual against them; nor if a curator should neglect to adjudge or apprise for his minor within year and day of other creditors, would the minor be allowed to come in *pari passu* upon an adjudication, without the year; and there is less reason to allow a minor to impugn or quarrel advised depositions of witnesses; and unclearness might always be pretended to colour re-examination and subornation. And it were yet more ridiculous and dangerous to allow the adducing of new witnesses that were not in the first diligence, especially *post didita testimonia*, either *in iisdem articulis* upon which probation has been led, or *directe contrariis*; but minors are sufficiently provided for by the legal recourse against their tutors and curators, if they commit any thing improper, or omit what is pertinent.

THE LORDS, upon considering the depositions, thought that the witnesses did not understand the import of the word pertinents in the interrogatory, and by mistake had not deponed upon the whole subject; and therefore ordained them to be re-examined more distinctly, without respect to the Lady's minority, which might have been reasonably desired by majors as well as minors. And the LORDS declared, That a witness having deponed to the foresaid general interrogatory as to pertinents, that *nihil novit*, he should not be re-examined, seeing such a one might have been instructed or informed since his first deposition. And though the Lords were generally of opinion, that other witnesses than those in the first diligence, and examined, could not be allowed to be adduced now, they gave no interlocutor upon this point, in respect, upon the allowing of the re-examination without respect to the privilege, Ballegerno took up the reduction, upon which the whole debate as to the privilege was founded, and passed from the same.

Harcarse, (MINORITY.) *No* 708. *p.* 200.