No 144.
A minor being lesed *in facto*, by omitting to produce a contract in a reduction, the Lords restored him *contra rem judicatam*.

1697. *January* 14. JOHN ALEXANDER *against* PARK and ORD.

IT was a reduction of a certification, in an improbation of a minute of sale of a tenement of land, on these two reasons; 1*mo*, Park was minor at the time of obtaining it, and has quarrelled it *intra annos utiles*; 2*do*, You was *in mala fide* to crave certification against that minute, because it was in your hands, and you had made use of it by serving inhibition thereon. *Answered*, Minority is no ground of restitution *quoad* points *in jure*, as was found between the Marquis of Montrose and Cochran, (*See* APPENDIX). 2*do*, Though I have a mutual contract in my hand, yet I may call for your double of it, and crave it to be reduced for not implement, or any other legal grounds. THE LORDS considered the minor was here lesed *in facto*, by omitting to produce the paper called for; and therefore law restored him in such cases *adversus sententiam et rem judicatam*. And as to the minute, it did not appear that there were two principles, and therefore they reponed the minor to this defence against the certification, that I offer to prove you had the writ called for, (and against which you took the certification,) in your own hand at the time, because as it was competent to me then, it was competent for me to propone it now.

Fol. Dic. v. 1. *p.* 583. *Fountainhall, v.* 1. *p.* 755.

No 145.
A minor craved restitution against a decree *in foro*, alleging iniquity in the interlocutors. Not reponed against defences, proponed and repelled, but the decree opened as to objections omitted either in fact or law.

1698. *January* 7. COUNTESS of KINCARDINE *against* WILLIAM PURVES.

THE Countess obtained a decreet against him *in foro*, on the passive titles, as representing Sir William, his granfather, for intromission with sundry wards and marriages, whereof the Earl of Kincardine, her husband, had a gift. Purveshall insisted on this reason of reduction, that I was *minor indefensus*, my curators not being legally cited, and though Advocates compeared and debated for me, and interlocutors *in jure* passed thereon, yet I was lesed, and the decreet on that nullity must be open *in toto*, being before the late regulations, declaring nullities of decreets shall operate no farther than to redress the prejudice; and this must be a total nullity; for, though a minor compear by his procurators, yet if his curators be neither called, nor compearing, he is truly on the matter absent, they being absolutely necessary not only for advice and direction, but also *ad integrandam minoris personam*; and Dirleton, *voce* MINOR, p. 126 shews, in such cases, *minor non habet personam standi in judicio, et sententia contra eos indefensos lata, est ipso jure nulla*. *Answered*, 1*mo*, He was not *indefensus*, for he compeared by Advocates, and debated, and received interlocutors *in jure* on the several points; likeas his father and uncles were cited, who were his curators; only the execution is in some particulars informal; and whatever effect this may have to repone a minor against omissions, yet it can

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.

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,