

1728. *January.* BELL *against* SOUTHERLAND.

No 106.

A MINOR *in familia* with his father, having attested a cautioner in a suspension, without his father's concurrence, and being pursued for the debt, proposed this defence, that his deed was *ipso jure* null. It was answered, That deeds by minors, without their fathers' consent as administrator, are not *ipso jure* null, but need reduction, and now the *quadriennium utile* is past without any challenge made to the obligation. THE LORDS found the deed *ipso jure* null. See APPENDIX.

Fol. Dic. v. 1. p. 579.

1781. *July 3.* JAMES THOMSON *against* WILLIAM PAGAN.

No 107.

JAMES THOMSON, a minor, granted a receipt, along with his father, for two bills, which they became bound to give back entire, or otherwise to pay the contents to William Pagan the original holder of them. The bills were delivered to the father, who afterwards became insolvent; and Pagan, at the distance of ten or twelve years, brought an action against the son for payment, or redelivery. He again brought a reduction of the debt, *ex capite minorennitatis*, in which it was

Deeds granted by a minor who has no curators, subsist till set aside in a proper action, and that action cannot be brought after the *quadriennium utile* is expired; but deeds granted by a minor, having curators, without their consent, are *ipso jure* null, and to them the *quadriennium utile* does not apply.

Pleaded for Pagan; That the action was incompetent, as not having been brought within the *quadriennium utile*; Erskine, B. 1. Tit. 7. § 35.

Answered; A distinction should be made between deeds which are *ipso jure* null, and deeds which are valid till cut down by a rescissory action.

Of this last kind are deeds granted by a minor who has no curators; or by one having curators, with their consent. These subsist till set aside in a proper action; and that action cannot be brought after the *quadriennium utile* is expired.

But, where deeds are granted by a minor, having curators, without their consent, there is no occasion for a rescissory action. They are *ipso jure* null. The *quadriennium utile* does not apply; and the exception arising from the minority of the granter need not be pleaded, till he finds it necessary to defend himself against the consequences of his imprudence.

This distinction we have borrowed from the Roman law; and it is adopted by all our lawyers, particularly by Lord Bankton, B. 1. tit. 7. § 88.

In the present case, the pursuer was certainly under the legal curatory of his father. But no curator can be *auctor in rem suam*; and, therefore, his consent to the deed in question, of which he himself was to reap the whole advantage, was the same as if no consent whatever had been interposed.

No 107.

As the deed was clearly in favour of the father, who could not be *actor in rem suam*, the COURT adhered to the judgment of the Lord Ordinary, "sustaining the reasons of reduction."

Lord Ordinary, *Kennet.* Act. *Cha. Hay.* Alt. *D. Armstrong.* Clerk, *Colquhoun.*
L. *Fol. Dic. v. 4. p. 7. Fac. Col. No 64. p. 104.*

S E C T. VII.

Lesion in extrajudicial proceedings.

1614. *January.* EDGAR *against* EXECUTORS of EDGAR.

No 108.

IN an action pursued betwixt John Edgar and the Executors of umquhile Edward Edgar, the LORDS found, that John Edgar minor could not be restored *in integrum* against a bond, in respect he qualified no lesion, but that the gear had made shipwreck after the date of the bond.

Fol. Dic. v. 1. p. 580. Kerse, MS. fol. 146.

1631. *January 25.* HOUSTON *against* MAXWELL.

No 109.

In a reduction of an assignation upon minority and lesion, it was not sustained that an equivalent sum was paid for the right, unless it were also offered to be proved, that the sum was profitably employed for the minor's use.

HOUSTON, as heir to umquhile Helen Murdoch, pursuing Maxwell for reduction of an heritable alienation of some land, made to the said Maxwell by the said Helen Murdoch, upon this reason, because at the time of the said disposition, she was minor, and received not a competent price for the said alienation, neither was there any just or lawful cause, which may sustain the said alienation, nor no sentence of any sovereign Judge interponed finding the said alienation necessary, and to be a warrant to authorise the same, without which the same cannot be sustained, the woman being within 14 years of age, and greatly prejudged; and it being excepted for the defender, that this reason ought not to be sustained, in respect of the bond of alienation produced, which bears the woman's receipt of the money therein contained, for the alienation, and which is more than the just worth thereof, and so she could never allege lesion, no more can her heir do; seeing he offered to prove by witnesses in fortification of the bond of alienation, that he had really paid the sum upon her great and instant desire, when she was travelling to England; so that there needed no decret, it being given to her truly, as said is. THE LORDS found the reason relevant,