

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.