in office, or his heir, may do when he thinks fit; and that against this omission they fell to be reponed on the head of minority and lesion.

No 133. minority and lesion; alleging, that their tutors ought to have withdrawn the caution.

But as this was no direct lesion, but a lesion arising from the accidental bankruptcy of the principal, and that occasioned by his latent and scarce to be suspected malversation, the LORDS 'found it not to be a lesion of that nature, against which the minor could be reponed; and therefore repelled the defence.'

It is a different question, how far tutors are liable to make up the loss arising from their omissions; for though, in this case, even the tutor would not be liable, as it was such an omission as a prudent man might have fallen into, yet, in many cases, minors will not be reponed against their tutors' omission, to the prejudice of a right acquired by third parties, when yet the tutor may be liable to make up the minor's loss.

Fol. Dic. v. 1. *p.* 582. *Kilkerran*, (MINOR.) *No* 4. *p.* 347.

1743. *February.* JACK *against* HALYBURTON.

No 134. An adjudication had been raised on a transaction which had been entered into very improperly by the tutor of a minor. The adjudication was alleged to be null, on account of minority and lesion. Found that objections could not be stated, after 40 years, on this ground, by way of exception.

ROBERT WEIR, March 1669, executed a disposition of his heritable and moveable effects, in favour of his second wife, Bethia Glen, under this express provision, 'That the same shall nowise prejudice his sons of the first marriage, 'Thomas and Alexander, of the sum of seven thousand merks provided to 'them in their mother's contract of marriage, nor prejudice the granter's just 'and lawful creditors; but that they shall have right to satisfy themselves out 'of the subjects disponed, saving always to the said Bethia her preference for 'payment of the annualrent of six thousand merks provided to her in her con-'tract of marriage.' This right came by progress into the person of John Scot, an infant, to whom Patrick Scot, writer in Edinburgh, was tutor nominate. There was an easy manner laid down by law for the management of this fund, as well as of the other funds which descended to the pupil from his father. The disposition by Robert Weir to his wife was not with the burden of debts, nor did the acceptance make the disponee personally liable. The tutor therefore, after making up proper titles in his pupil's person, had a safe course to pursue, which was to convert the effects into money, for paying the creditors in the first place; and if there was any surplus, which could not now appear, the pupil had it free to himself, without being subjected personally to any obligation. But instead of this course, the tutor entered into a very extraordinary transaction with Thomas and Alexander Weirs, which was, 'That they should 'make up titles to their father's heritable and moveable estate, and convey the 'same to John Scot the pupil, in order to fortify the right he already had by 'the said disposition; that the tutor, in name of his pupil, should grant them 'a bond to relieve them of all their father Robert Weir's debts, and another 'bond corroborating the 7000 merks due to them by their mother's contract of

No 134. ' marriage, and binding his pupil to pay the same;' and this transaction was completed by executing the several deeds covenanted. The tutor's management in other branches was not less arbitrary, by selling some houses which belonged to his pupil at short hand without authority of a judge, and without leaving any document to shew what became of the price.

When John Scot came to be of age, there was no remaining vestige of any moveable effects; and his heritable effects were all possessed by his adjudging creditors, for sums above their value. Being thus reduced to indigence, he had neither knowlege nor credit to obtain redress from his *quondam* tutor; and he gradually lost all hopes of retrieving his circumstances.

The creditors had all of them led adjudications in the years 1680, 1681, and 1682, during John Scot's minority; and among the rest, Thomas and Alexander Weirs led an adjudication for the balance remaining due to them of the 7000 merks contained in the tutor's bond of corroboration above mentioned. From that period, the time was wasted in trifling disputes among the creditors, without bringing matters to any conclusion. In the year 1740, it was *objected* against this adjudication, now in the person of Mrs Haliburton, that the transaction upon which it was founded could not be justified by any motive, whether of necessity or utility; that it was in its nature a dangerous transaction, as it subjected the pupil to all Robert Weir's debts; in short, that it was at best an arbitrary transaction, which even the extraordinary powers of a tutor cannot support; that it is null and void as *ultra vires*, and therefore that an adjudication founded upon it is null and void; or, taking it in the most favourable light, that it is at least an exercise of the extraordinary powers of a tutor, and therefore not effectual in law, unless evidence be given of *utiliter gestum*. THE LORD ORDINARY having repelled this objection, in regard that the prescription of 40 years was run without bringing any challenge by a process, the other creditors reclaimed; and the substance of their argument was as follows. They set out with distinguishing betwixt the ordinary and extraordinary powers of a tutor; under which last head it was an agreed point, that the transaction fell.

A deed of ordinary administration is *per se* valid and effectual, and must therefore stand, unless the minor undertake to shew lesion. A deed of extraordinary administration is not valid and effectual of itself, but must be supported by evidence, that it was *utiliter gestum*, or *in rem versum*. The party who contracts with the pupil, by intervention of the tutor acting in his extraordinary capacity, comes thereby to be subjected, as well as the tutor is, to justify the deed, without which he cannot make the same effectual against the pupil. The reason is obvious; the pupil is not bound by such a deed, unless the rationality of it be clearly evinced; and therefore whoever insists upon the deed, must be subjected to bring this proof.

The application of this doctrine to the point in hand is obvious. A deed of ordinary administration is effectual in law, and must be attended with every legal effect consequent upon such a deed, till it be taken out of the way by a

reduction, in which it is incumbent upon the minor to prove lesion. There ought to be a short prescription of such actions, otherways all who deal with minors will be left at utter uncertainty; and accordingly a reduction on minority and lesion is confined by law to the *quadriennium utile*. But with regard to acts of extraordinary administration, which of themselves are not valid and effectual in law, but require to be supported by a proof of *utiliter gestum*, there can be no occasion to bring a reduction of these upon the minor's part; it is sufficient for the minor to stand upon the defensive; and, when sued upon such deeds, to object that they were not *per se* effectual in law. It would be against principles, and against the analogy of law, to confine such an objection within any length of time; for it is not in the power of the *quondam* minor to bring this objection when he has a mind; the opportunity to him is furnished to him no sooner than his party is pleased to bring his action. A better example cannot be given of this than a tutor's borrowing money for the use of his pupil. The minor has no occasion to bring a reduction of this deed; he may wait securely till the creditor please to bring his action; it will be then competent to make the objection, that borrowing money is not within the ordinary powers of a tutor, therefore not effectual *per se*, and that the minor cannot be bound unless the creditor prove *in rem versum*. And upon the same plan, a transaction made by a tutor, though of a depending process, which is of all the best reason for a transaction, may notwithstanding be objected to after the *quadriennium utile*; and the objection must be sustained, unless the party claiming under the transaction can justify the utility of it. No 134.

More particularly with regard to the defence of prescription, it was *observed*, that prescription relates to actions, not at all to exceptions or objections. If a man forbear to put in his claim within a limited time, he is understood to have relinquished the same; and after that period, the law refuses to afford him an action; but the using an exception or objection depends not upon the person to whom it is competent, but upon the person against whom it is competent; for, if he bring not his action, there is no place for proponing the objection or exception. Therefore a man can never be said to relinquish an objection or exception, so long as the action is not brought against him. Indeed after the action is set on foot, he must put in his defence *debito tempore*, or he will be cut out. And thus it comes, that the only proper limitation or prescription of exceptions or objections is competent and omitted. The objection therefore that is here moved, cannot be barred by the 40 years prescription; and as little by the decennial prescription, which bars only the mutual claims betwixt the tutor and pupil, and not any objection competent to the pupil, when he is charged for performance of a deed granted by the tutor.

In answering this objection, it was premised for Mrs Halyburton, that the challenges which lay against a deed are of two kinds; they either import that the deed is null and invalid, that is, that the deed is not *per se* effectual in law; or, resolve into grounds of reduction, which suppose the deed to be good in

No 134. law, and of itself effectual to produce an action, till it be taken out of the way by the sentence of a judge. Challenges of the first sort are proponable by exception or objection; challenges of the latter sort cannot be proponed but by a process. Hence all objections which resolve into grounds of reduction, are the subject matter of prescription; for an action of reduction is not privileged against prescription, more than an ordinary action. If a party have no occasion to reduce, the objection or exception competent to him may be effectual, at whatever distance of time the action be brought; but if a reduction be necessary, he must bring it within 40 years, otherwise give up his claim. In the present case, were it the intention of Mrs Halyburton to subject the pupil or his representatives personally, the foregoing objection proponed by them against a process for payment at her instance, would undoubtedly be sustained; but the present case is an objection against an adjudication which has stood 40 years without challenge; and such an objection, of whatever sort it be, is not competent but in the form of reduction; it is the privilege of all decrees that are *ex facie* formal, not to be voided by way of exception, nor otherways than by a proper reduction; and therefore the objection ought to be repelled, even upon the argument urged for the creditors.

'And accordingly the Lords adhered to the Ordinary's interlocutor.'

Fol. Dic. v. 4. p. 8. Rem. Dec. v. 2. No 39. p. 62.

1749. *June 9.* Seton *against* Seton.

No 135. Tutors of a minor had made up his titles to an estate, in a particular way. The minor having died in minority, the next heir brought a reduction within the *anni utiles*. The action was dismissed, as in so far as the pursuer had been prejudiced, there was another remedy.

Archibald Seton of Touch, did, in his contract of marriage in 1721, dispone his lands and barony of Touch Seton 'to himself, and the heirs-male of 'the marriage; whom failing, to the heirs-male of his body of any other mar-'riage; whom failing, to the eldest heir-female of that marriage; whom fail-'ing, to the eldest heir-female of any other marriage,'

Archibald Seton died, leaving a son and daughter, both infants; and the tutors of the son made up his titles by a service as heir-male to his father upon the old investitures.

The son having died in minority, the daughter was served heir of provision in general to her father in virtue of the destination contained in his contract of marrige, and expede a charter thereon under the Great Seal. And she being still minor, at least within the *anni utiles*, pursued a reduction against Sir Harry Seton the heir-male, of the special retour precept and infeftment in favour of her brother while minor, upon the head of minority and lesion; and the lesion condescended on was, that his tutors, in place of serving him heir of provision to the procuratory contained in the contract of marriage, had expede a service as heir-male upon the old investitures, whereby they had varied the course of succession established by his father, which the father himself could not have done in prejudice of the settlement in his contract of marriage; and