*and ſtand as a charge upon the heritable eſtate; but as to the interlocutory ſentence in November* 1709, *for ſuſtaining the bar of preſcription, whereby the appellants were not allowed to make any deduction out of the perſonal eſtate for ſeveral of the deceaſed's debts paid by the appellants to Sir Robert Blackwood and others, ſuch debts being merchants accounts and adjudged barred or preſcribed by the ſtatute of King James the* 6th, *as not being ſued for in three years, the ſaid interlocutory ſentence is hereby affirmed: and as to the interlocutory order made the* 28th *of November laſt, touching the reſpondent's coſts, the ſame is hereby remitted to the Lords of Seſſion to reconſider the ſame, together with the ſaid demands of the appellants touching the funeral expences, and the ſaid coſts and expences, touching the adminiſtration or confirmation of the ſaid teſtament, and determine thereupon as ſhall be juſt.*

For Appellants, *Tho. Powys. Rob. Raymond.*
For Reſpondent, *David Dalrymple. Sam. Dodd.*

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Part of the Judgments here reverſed, are founded on as exiſting cases in the Dictionary vol. I. voc. *Funeral Charges*, p. 338. and vol. II. voc. *Perſonal and tranſmiſſible*, p. 74.

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John Hamilton, of Pumpherſton, Eſq. - *Appellant*; Caſe 12.
Katherine Lady Cardroſs, - - - *Reſpondent.* Fountainhall, 20 Feb. 1708. 2 January 1711. Forbes, 20 Feb. 1708.

8th *April* 1712.

*Minor.*—A tack ſuſtained, which, in the recital, bore to be gran'ed by a Minor with conſent of his Curators, but was ſigned by the landlord only.

*Homologation.*—In a reduction of a Tack on the ground of nullity, it being found that the receipt of the rent by the Grantor's heir for more than 30 years, imported no homologation, the Judgment is reverſed.

IN 1671, Sir William Stewart, of Kirkhill, the reſpondent's brother, let to Alexander Hamilton the appellant's father, then his factor or baillie, the lands of Strathbrock for the term of three 19 years, at the rent of about 50*l.* annually. The tack in the recital bore to be granted by the ſaid Sir William, with the conſent of his curators, but it was ſubſcribed only by himſelf.

Sir William died ſome time after the date of this tack, but the preciſe date of his death does not appear. The reſpondent, his ſiſter, ſucceeded to his eſtates; and the appellant's father and the appellant himſelf poſſeſſed their farm in virtue of the ſaid tack, without challenge for more than 30 years; and part of the rents had been paid, (as ſtated by the appellant) to Sir William before his death, and the remainder regularly to, or for the uſe of the reſpondent.

In 1706 the reſpondent commenced an action before the Court of Seſſion againſt the appellant, to remove him from the poſſeſſion of the ſaid lands, on the ground, that his tack was void being granted by Sir William Stewart when a minor, with-

out conſent of his curators. And to prove the minority the reſpondent produced a certificate of his baptiſm, and ſeveral deeds executed by him, both before and after the date of the ſaid tack, with conſent of his curators, to one of which, the appellant's father was a ſubſcribing witneſs; and ſhe founded upon the tack itſelf, which bore conſent of curators, though none were ſubſcribing (*a*).

The appellant made defences to this action, and the Court on the 20th of February 1708, "ſuſtained the nullity againſt the "ſaid tack, the ſame not being ſigned by the minor's curators."

The appellant having ſtated objections to the proof of minority, and of Sir William's being under curatory, and pleaded homologation, the Court on the 15th of July 1708, "found that the "diſcharges for the rent did not import any homologation, "acknowledgment or confirmation of the tack for the time that "was to run thereof." And on the 16th of July 1708, "decerned againſt the defender in the removing."

Entered, 11 February 1711-12.

The appeal was brought from "an interlocutor or decree of "the Lords of Council and Seſſion, made on behalf of Katherine "Lady Cardroſs, the 20th of February 1708, and of an inter-"locutor pronounced the 15th of July 1708, and of one other "interlocutor pronounced the 16th of July 1708, whereby the "appellant was decreed, to quit his poſſeſſion of the lands "therein mentioned."

*Heads of the Appellant's Argument.*

There was no direct or legal proof of Sir William Stewart's minority, which ought certainly to have been clearly proved; the certificate of his baptiſm could be no proof, as leaving the time of birth uncertain. Nor could deeds executed by him, with conſent of his curators, be in law a ſufficient proof, that he had ſuch curators ſo as any deed done without their conſent ſhould be void. For there are two kinds of curators: the firſt are ſuch as are legally choſen and authorized by a judge upon the minor's ſpecial choice; theſe curators having accepted, any deed done by the minor without their conſent is void. But there are a ſecond kind of curators, otherwiſe called procurators, who without any legal choice, but the conſent of the minor, act as curators; but their acting does neither validate, nor does the want of their conſent invalidate any deed done by the minor. It is, therefore, to be preſumed, that the curators who appear to have conſented to any of Sir William's deeds were of this laſt ſort, unleſs it had been proved that they were otherwiſe legally authorized, which the

(*a*) The papers and vouchers produced by the reſpondent are ſtated by Forbes to have been—Certificate of Sir William's baptiſm in 1652; a ſuſpenſion and ſummons in 1666, an act and commiſſion in 1669; a ſummons in 1670, a charge in 1671, and a ſummons in 1672, all at the inſtance of Sir William Stewart and his curators; with a tack and factory in 1667, ſubſcribed by him and them, to which two deeds the appellant's father was a ſubſcribing witneſs, and a regiſtered factory in 1672 executed by the ſame parties. She produced alſo a certificate under the hand of the Commiſſary clerk of Edinburgh, that Sir William's act of curatory ſtands in the minute book 8th May 1667, and a receipt for the act of curatory itſelf in 1671.

reſpondent

reſpondent ought to have proved, ſeeing *actori incumbit probatio.* Nor is the appellant's father's being a witneſs to the deeds in 1667 executed by Sir William and his curators any proof of the minority; for Sir William might then indeed have been a minor, and of lawful age in 1671; a witneſs to any deed is not obliged to know what is contained in it.—And though the tack to the appellant's father bears to be with conſent of curators, and none of them ſign, yet that might either proceed from this; that at the time the tack was drawn Sir William was not of age, but might be ſo before it was executed; or that the tenant finding they were only procurators thought their conſent of no force;—and though he lived, as is agreed on all hands ſome time after he came of age, yet he never called this tack in queſtion, but received the reſerved rent thereof during his life (*a*). The tenant, then, needed not the conſent of the curators to attain poſſeſſion, becauſe he had been many years poſſeſſed of the lands let; nor to validate the deed, for the firſt payment to the landlord did bar all exception of nullity and behoved to confirm the tack. And in the preſent caſe every thing ought to be preſumed favourably for the ruſticity of the tenant.

In a reduction of this kind leſion muſt be proved; but though the minority had been clearly proved, yet the tack being granted at as high, if not a higher rent than before, the landlord ſuffered no loſs by it. Theſe lands would not anſwer at the appellant's father's entry, but he having ameliorated their condition at conſiderable expence, they came at laſt to be productive; but the tenant would ſtill be a conſiderable loſer ſhould he at preſent be deprived of his tack.

As Sir William Stewart never called the tack in queſtion during his life, ſo the reſpondent his heir who ſucceeded to her brother in 1674, though ſhe knew of the tack, yet acquieſced in it till 1706, when the preſent action was commenced, having all the while received the reſerved rents yearly and granted acquittances for the ſame. The appellant produced to the Court a general diſcharge from the late Lord Cardroſs, the reſpondent's huſband deceaſed, dated the 26th of December 1674, for the year 1673, and all preceding, which included the rent for the firſt year of the tack; and this diſcharge mentions that an account had been made, and preſumes that the vouchers for the preceding years were given up to the reſpondent, or to her huſband. The ſilence, therefore, of the reſpondent during ſo long a period is an undoubted confirmation of the tack, whereof ſhe is preſumed to have known the terms and condition: and the civil law in nullities of the ſame kind, did not only conſtrue ſuch ſilence to be a confirmation ſo as to ſupply any defect; but Juſtinian by an edict, expreſsly declares "that if in five years no queſtion be moved by the grantor, nor his heir, that ſilence ſhall be held as a confirmation. Cod. L. 5. Tit. 74. And the learned Perez obſerves, that according to the general cuſtom, ſuch queſtion muſt not only be Cod. L. 5. Tit. 74.

(*a*) There does not appear to have been any direct proof of this averment.

moved in five years, but finally decided in ten; whereas this leaſe has ſtood unqueſtioned for 37 years.

*Heads of the Reſpondent's Argument.*

By the law and uncontroverted uſage of Scotland, all deeds done and executed by minors before their full age of 21, without the advice and conſent of their curators, are ipſo jure null and void. And in every act and deed that is to be obligatory upon a minor, the conſent of ſuch curators muſt be teſtified by their ſubſcribing the deed along with the minor in preſence of *famous* witneſſes.

By the law of Scotland a perſon's right of quarrelling an inſufficient and illegal deed is nowiſe cut off or weakened by delaying it, unleſs they let it run up to 40 years complete, which is not pretended in this caſe.

The reſpondent ſufficiently proved, by the deeds and other documents produced by her, that Sir William Stewart was a minor having curators, at the date of the tack in queſtion; and the appellant's father, then his factor, did moſt unwarrantably prevail upon him, without the knowledge or conſent of his curators, to grant this tack for three 19 years, at a rent more than one third under the true value. This fact is evident becauſe the appellant, having, in conſequence of the decree of the Court below, been removed from the poſſeſſion of the farm, the reſpondent granted a new tack to another tenant for a term of 11 years, at above 30*l.* per annum more rent.

Sir William never received any rent after he attained his full age of 21 years, and he died within four months after that period; and if the appellant has any diſcharges from the reſpondent for his rent, they do not mention the tack. But if they did, they cannot validate the ſame, being abſolutely null and void.

Judgment, 8 April 1712. After hearing counſel, *It is ordered and adjudged, that the ſaid interlocutors, decree, and orders complained of in the appeal, be reverſed, and that the Lords of Seſſion do order the appellant to be forthwith reſtored to the poſſeſſion of the ſaid lands, and to have ſatisfaction for what he has loſt in reſpect of the profits of the ſaid lands, by reaſon of the decree orders and interlocutors hereby reverſed.*

For Appellant, *Samuel Dodd.*
For Reſpondent, *Pat. Turnbull, Paul Jodrell, jun.*

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In the printed appeal caſes in this queſtion, another point is ſtated, which it was deemed unneceſſary to detail. After the date of pronouncing the *laſt* interlocutor here appealed from, the appellant applied to the Court to be indemnified for certain improvements made by him and his father, and the Court found that the expences of amelioration were, mala fide, laid out and ſufficiently compenſated by a 30 years poſſeſſion. But it does not appear from the judgment in this appeal, that this laſt mentioned part of the judgment of the Court of Seſſion was appealed from: and the reverſal upon a preliminary point renders the judgment of the Court of Seſſion thereon of no effect. It is however ſtated as a precedent in the Dictionary, vol. I. voc. *Bona fide conſumption*, p. 108.