No 91.
found to homologate a bond granted by a wife *stante matrimonio*.

with her husband, and so was null.—It was *answered*, That she had ratified the bond judicially, and given her great oath never to come in the contrary, as likewise had made payment of the annualrent since her widowity.——The Lords did find the payment of the annualrent relevant to make her liable, but did not give their interlocutor upon her judicial ratification and solemn oath never to quarrel the same. Yet it seems that the bond being for borrowed money, as it is null, so the addition will not make it valid; for women being secured *per senatusconsultum macedonianum*, are in the case of minors and pupils, who neither by their bond nor oath adjected thereto, can contract debt.

Fol. Dic. v. 1. *p.* 383. *Gosford, MS. No* 535. *p.* 284.

1711. *December* 1.

Mr Francis Wauchope of Cakemuir, Advocate, *against* William Hamilton of Fallahall, and his Tutors.

No 92.
A party using and founding on a decree, determining controverted marches, *per modum tituli*, in actions at his instance, and against him, was found no homologation of a verbal error in the decree.

In the process of reduction and declarator at the instance of Cakemuir, against Fallahall, for ratifying a decreet arbitral pronounced in anno 1608, determining the marches betwixt the lands of Cakemuir and Falla, upon this ground, That there was a literal error in the decreet, *northwest* being written in place of *northeast*; the Lords found, That the pursuer's using and founding on that decreet, *per modum tituli*, in actions at his instance, and against him, was no homologation of the marches craved to be ratified; because homologation doth, *regulariter*, infer a consent to the deed only as it is in *rei veritate*; and the using a stated account doth not infer homologation of errors *in calculo*; seeing *nihil tam consensui contrarium est quam error. Plus valet quod agitur, quam quod simulate concipitur.* And the truth which is instructed by the tenor of the writ, is not impaired by the error, but prevails over it; *actorum verba emendare tenore sententiæ perseverante, non est prohibitum, L.* 46. *D. de re judic. Veritas Rerum Erroribus gestarum non vitiatur, L.* 6. § 1. *D. de Officio Præsid.* Besides, the pursuer founded upon the decreet by way of action and defence to support his claim, according as he now pretended it should have been worded; and *actus agentium non operantur ultra eorum intentionem.*

Fol. Dic. v. 1. *p.* 383. *Forbes, p.* 551.

No 93.
Disputed whether a deed granted by a child of eleven years of age is capable of homologation.

1726. *June.*

Katharine Harvie *against* Mr George Gordon, Professor in Aberdeen.

Katharine Harvie, the youngest of five heirs-portioners, having jointly with her sisters disponed the common heritage to Mr George Gordon, took bond for the price. At that time she was only eleven years of age, and conse-

quently the deed as to her was *ipso jure* null. In a reduction, therefore, of that disposition at her instance, it being *alleged*, that after her majority, she had homologated the transaction, by accepting the annualrents of her share of the bond given for the purchase, the question arose, ' If a disposition of lands ' *ipso jure* null, is of that nature, to receive any force from homologation.' No 93.

And it was *pleaded* for the pursuer, in such things as may be perfected *solo consensu*, and where writ is not necessary, it is allowed that null deeds may be homologated, because the deeds of homologation are a proof of an after consent; and so if a pupil had granted a bond or sold his moveables, deeds of homologation after majority might validate the deed or sale, because in neither of these cases is writ necessary; so the wife's new promise after dissolution of the marriage, is an effectual new obligation, and effectual, though the former was *ipso jure* null. But the singularity of the present case lies here, that by our law there can be no conveyance of heritage, without some valid deed in writing, however express the consent of parties be; now the disposition in question is *ipso jure* null, not any conveyance of the property, more than it had been a disposition without the subscription of the party or witnesses; wherefore it is necessary, that there intervene some valid writ, obliging her to dispone the lands; for her verbal promise to dispone, or her facts and deeds implying an acquiescence in that null writ, does no more oblige her to sell or quit her property, than if no such null writ had intervened.

It was *answered*; That here the disposition is in itself a formal valid deed, without any objection that appears against it *ex facie scripturæ*. It is indeed reckoned null, as subscribed by a pupil; but what is undertsood by this nullity? Not that it is entirely and to all intents null, as a disposition unsubscribed; this cannot be the meaning, for without question it is a good title for prescription; but barely that the objection of its being the deed of a pupil is receivable against it, directly by way of exception, without necessity of a reduction. The disposition then is in itself a formal deed, and proper to convey the lands in question. The pursuer indeed had an objection against it, sufficient to hinder the transmission; but, if she has consented expressly or tacitly not to use this objection, the case comes to the same, as if it never had been competent; for though land-rights are not transferable by sole consent, any objection may be renounced by sole consent, competent against a disposition of lands already formally constituted. To illustrate this, let it be considered, that a disposition of lands by a minor in the confines of majority, without consent of curators, is equally null with a disposition granted by a pupil; and yet it will hardly be maintained, but that the disponer's express ratification after majority, though not in writ, will exclude him from making any objection against the conveyance.

Replied; If it should be yielded, that a verbal ratification is sufficient to confirm a minor's disposition, there is no argument from that to the case in dispute. It might be pleaded with some shew of reason, that a minor's deeds

No 93.

without consent of curators being null, not for want of a formal consent, but from the presumption *juris et de jure* of lesion, if in his majority he renounce the objection, the deed comes to be good; for here the deed is once formally established, with all its essentials, and the objection competent against it, not founded in any intrinsic defect of the right, but in the personal circumstances of the granter. And this will be more evident, when deeds are considered, granted by minors who have no curators, which are equally effectual, as where there are curators, and they consenting. Now, it appears plain, all other things being equal, that the extrinsic circumstances of a minor's having or wanting curators, cannot have the force, to make intrinsically null or formal, any deed granted by him. And therefore it is, when a minor's deed without consent of curators, is pronounced *ipso jure* null, it is not that the deed is any way intrinsically defective, more than where the curators consent, or where there are no curators; but simply in opposition to those cases, where lesion is not presumed, but must be proved, which makes the form of a reduction necessary; whereas, here the lesion being apparent without any proof, as a defence instantly verified, needs not run the circuit of a reduction. But when deeds granted by pupils are said to be *ipso jure* null, it is in a different sense; there the nullity is intrinsic, through the original want of consent, the law having laid down in general, a *præsumptio juris et de jure*, in the case of pupils, idiots, madmen, that by defect of understanding, none of them are capable to consent, or can bring themselves under legal engagements. The comparison therefore is just, at least as to the question in hand, that this disposition is no more effectual, than if remaining unsubscribed; the simple consent of the granter is no more capable to validate the one than the other; and whatever effect homologation may have to remove an extrinsic objection competent against a written conveyance of lands, it certainly never can have the effect to establish such a conveyance, where there truly is none.

It was *argued* in the *next* place for the defender; Granting this deed *ipso jure* null, as wanting that rational consent to which alone the law gives effect, and which only can be adhibited by one *sciens et prudens;* yet when that consent is afterwards adhibited, and the deed no longer wants any of its essentials, *eo ipso* it becomes completed and effectual, as if that rational consent had been interponed in the beginning.

To which it was *answered;* Since the alleged effect of the consent here, is not to take away any extrinsic exception, that might be competent against a conveyance in itself intrinsically good, but truly to establish and validate a conveyance, without that consent intrinsically null and of no avail, it ought to be in writing, according to all our laws and practice. For in general, 'no consent can have the force of a conveyance of lands, whether originally interposed, or referring to an anterior otherwise intrinsically null deed, unless it be in writ.'

No 93.

The *second* point *pleaded* was, How far there was sufficient evidence of homologation, supposing the deed capable thereof. And it was condescended on, That she received some of the annualrents and a part of the principal sum in minority, and some of the annualrents after majority, of the bond which was given by the defender for the price of the lands, which was contended to be as strong an act of homologation as could be; for taking the annualrents was an acquiescence in the bond, and consequently in the disposition. And here there are a series of facts, which shew the acquiescence to have been most deliberate.

It was *answered;* The pursuer's knowledge of the bond, does not infer her knowledge of the disposition, to which the bond refers not; there is therefore no evidence, that she knew the circumstances of the transaction; without which knowledge, homologation or acquiescence can never be inferred. And there is this further circumstance, that though she was truly major, she signed the discharges of the annualrents together with her curators, as if minor; whence there is a presumption, she thought herself still minor; and in these circumstances she will be considered, rather as relying upon her curators, than acting *ex propria scientia*. 2*do*, The facts condescended on were not so free and voluntary, as to infer any sort of consent or acquiescence. Mr Gordon was possessed of the pursuer's estate; she had no other fund whereupon to subsist; it was therefore of absolute necessity that she accepted the annualrents; and the law would attribute her acceptance to that cause, and not infer homologation, even though she had known the whole transaction. And indeed it would be inhumanity to interpret an act of such necessity, a forfeiture of the pursuer's right, especially when her adversary was possessed of her estate, and on that account was debtor in much more than he paid her in name of annualrent.

Replied to the *first;* One truly major is presumed to be *prudens* and *sciens*, and is not presumed to take payment of a bond, without knowing for what cause it was granted; besides, that by a clause in the bond, it became only payable upon homologating and approving the disposition in question, which being express, leaves no room for presumptions. To the *second*, If the pursuer chose rather to ratify a reasonable transaction made with Mr Gordon, than to lay out money upon a reduction thereof, and in the mean time want her annualrents, this will be interpreted the effect of prudence rather than of necessity. And even the necessity alleged is but a necessity of choice, a reasonable motive, to oblige one to consent to one thing rather than another; by no means such a necessity of nature, as to take away the freedom of the mind, and capacity of giving consent.

"THE LORDS found, That the deeds and qualifications of homologation insisted on, do not oblige the petitioner to ratify or renew the disposition quarrelled."

Fol. Dic. v. 1. *p.* 383. *Rem. Dec. v.* 1. *No* 85. *p.* 170.