No 191.

*designatio nihil operatur;* and the subject-matter assigned being only the teinds of the barony, the word comprehending is only exegetic and demonstrative; which demonstration being clearly erroneous, contrary to the meaning of the bargain, it cannot prejudge the disponer. Likeas, it was offered to be proved by the communers that made the bargain, that no more was communed upon but the teinds of the barony, being Sir George's own lands; for if the particular enumeration had not fully comprehended the whole rooms, but that some one had been omitted, yet, if the subject-matter had been clear, of the teinds of the whole barony in question, Sir George could not have been prejudged; even so when a room is erroneously designed *quia plus valet quod agitur, quam quod per errorem concipitur.* And to evidence it was but a clear error, Sir George was never in possession, nor did he ever claim the teinds, though the disposition was made *anno* 1656.

The Lords repelled the allegeance, in respect of the libel and reply.

*Fol. Dic. v.* 2. *p.* 150. *Gilmour, No* 98. *p.* 74.

---

1672. *June* 28. Gilgour *against* Menzies.

No 192.
Found in conformity to Dickson against Orkhill, No 190. p. 11514.

Gilgour, as assignee by two sisters of Menzies of Enoch, pursues him for their shares of their father's executry; who *alleged,* Absolvitor from that part of the libel, in relation to a bond granted to his father, which was heritable, and belonged to himself as heir. The pursuer *answered,* That the heir having confirmed this sum amongst the moveables, he had thereby homologated the right of the executors, and could not come against his own deed, especially seeing he might then have known that it was moveable by a charge, and now he might have suppressed the charge; 2*do*, It cannot be counted an error or mistake, because the heir, though he may claim the whole right in heritables, yet he may communicate the same, to take his share of the whole means, heritable and moveable, and his confirmation doth import so much. The defender *replied,* That the confirmation can only be interpreted an error, and no homologation of the executor's right, which cannot operate against the manifest truth appearing by the bond; for, though he had in the narrative of any writ under his hand narrated that this was a moveable bond, that would not operate against the express tenor of the bond, much less can a confirmation, which passes of course; neither ought it to be presumed, that the bond was moveable by a charge, unless it were proved; neither can the confirmation be esteemed a communication, unless it had been so expressed; and the error is the more presumable, that the defender, the time of the confirmation, was a minor. The pursuer *duplied;* That the defender cannot pretend his minority; because he hath continued without declaring his mind or error, and without raising a reduction till now his *anni utiles* are past. The defender *triplied;*

That he did not found any defence upon his minority, but adduced it only as an evidence of his error. No 192.

THE LORDS found the confirmation not to infer a homologation of the executor's right, though it had been done by the defender when major; and found it not to import a communication, unless it had been expressed, or that the heir had uplifted his proportion of the executry, and detained the same as his proper right.

*Fol. Dic. v. 2. p. 150. Stair, v. 2. p. 93.*

*** Gosford reports this case:

1672. *June* 27.—JOHN MENZIES, in Enochtown, having left behind him a son, James, and three daughters; the son having been confirmed executor, and having given up an inventory of several debts due by heritable bonds, Kilgour, as assignee by two of the sisters, did pursue for their parts of the inventory. It was *alleged* for the Brother; That when the testament was confirmed, he was minor, and the bonds given up in inventory being heritable, he could not be thereby prejudged, that being an error only. Likeas, thereafter, he did serve himself heir to his father, and thereby had right to the said bonds. It was *replied;* That he never having revoked the said confirmation *intra annos utiles*, nor being reponed by any sentence, but, on the contrary, having kept the bonds, and meddled with the sums in the inventory, he could never now be heard as having right thereto as heir.

THE LORDS did sustain the defence; and found, that the brother being minor when he was confirmed executor, it could not prejudge him of his right, as heir, to keep or uplift the sums that were truly heritable, if *intra annos utiles* he was served heir: But if he suffered these years to elapse, or did uplift the sums before he was served heir, they found, that it was a collation of any right he had with the sisters, against which he could not now be reponed, not having revoked *intra annos utiles*.

*Gosford, MS. No 499. p. 263.*