

No 7. *in consequentiam*, yet it would take away from the minor the benefit and commodity of his land, which was alike and as great a prejudice as if his right had been principally quarrelled; and albeit that his father was not seased in the lands when he died, yet seeing the minor was infeft in the lands, and was served heir to his father who had acquired the right from Sir John Ker by virtue of a contract of alienation, and conform whereto he was in possession the time of his decease albeit he was not seased, yet it ought to be repute his heritage, seeing his author, viz. Sir John Ker was seased, whose right was his right, and the minor's self being seased, the not taking sasine by his father, ought not to make the land to cease to be his father's heritage, and to be any reason to debar the excipient from the benefit of the law competent to him through his minority; and so it was found by the LORDS, for it behoved to be repute heritage to the minor, the father being the conquerer thereof, and the minor coming in the right of the lands through the preceding right acquired and conquest by the father; for the minor could not be repute to have conquest the same, which if he had done, the privilege of minority would not have excused him to have disputed if he had been quarrelled thereupon, nam minor in conquestu a se ipso facto, si super eo quæstio illi fiat, tenetur disputare, quamvis minor sit.

Act. *Aiton & Nicolson*, younger.

Alt. *Hope & Belshes*.

Clerk, *Scot.*

Fol. Dic. v. 1. p. 588. Durie, p. 165.

* * * Spottiswood reports this case :

IN a reduction pursued by Alexander Pringle against Sir John Ker of some lands of Coldstream, my Lord Home being called for his interest, *alleged*, The privilege of that tenet, quod minor non tenetur placitare super hæreditate. *Replied*, That his father was never vested nor seased in the said lands, and therefore it could not be reputed as *hæreditas paterna* to him, but rather as conquest, and so he could not allege that benefit; yet the LORDS admitted the allegiance.

Spottiswood, (MINORS and PUPILS.) p. 211.

* * * This case is mentioned by Kerse in No 6, *supra*.

No 8.

A minor having granted a subaltern right to a major, the privilege was refused to the

1626. *July 12.*

STUART *against* E. HOME and Others.

IN an action of reduction at the instance of John Stuart, as being infeft by the King in the barony of Coldinghame, and also at the instance of Douglas of Evlie and Cranston of Moriston, who were also infeft in the said lands and barony by the said John Stuart to be holden of the said John, against the Earl of

Home and certain others, pretending right to the lands of the barony granted to them by the King; John Stuart's self, who was vassal to the King, being debarred from pursuing by horning; it was *alleged*, That the rest of the pursuers, who were only infeft by a base holding to be holden of the said John Stuart, and not by a public holding of the King, could not be heard to pursue this action of reduction against the defenders, who were infeft by a public infeftment holden of the King; which public right could not be called in question to be reduced by virtue of a base right which was not made public nor holden of the King, and so they could not have interest by virtue thereof to reduce their public right, which was corroborate and depended upon acts of Parliament. This allegiance was repelled; and the LORDS found, that the said base infeftment gave sufficient interest to the pursuers to pursue this reduction of the said defender's public right, albeit John Stuart was debarred by horning, seeing their right was a right of the property, and that the same proceeded from John Stuart who was infeft publicly to be holden of the King. In this same cause, the sasine produced for the pursuers, who had their right from John Stuart, as said is, being quarrelled by the excipients, because it was given at the place of Coldingham, and not upon the grounds of the lands and kirks therein contained, which lies discontigue from the place where the same was taken; and, that no inferior person nor no subject could make an union but the King allenarly; his allegiance was also repelled; and the sasine was sustained, seeing the whole lands were disposed which were contained in John Stuart's own infeftment; and in his infeftment the King had given an union, appointing sasine to be taken at the place where this sasine controverted was taken; so that, albeit a subject could not make an union, yet he might dispoise the lands united in that same manner as he had the same granted to himself; and this was found, albeit the defenders alleged that the disposition could not avail so far as concerned the union, except that disposition had been confirmed by the King; which was repelled, as said is.

July 14.—IN the foresaid action of John Stuart against the E. of Home, whereof mention is made 12th of July 1626; in the which action, the Earl of Home being absent, one compeared who had a subaltern right, viz. a tack of some teinds set to him by the Earl of Home, and which would fall if the Earl of Home's right fell, as was intended by this reduction, and *alleged*, That the Earl of Home, the party principally called, was minor, and so quod non tenetur placitare super hæreditate, &c.; and which benefit ought to extend to the excipient whose tack is of a part of the teinds contained in his heritable erection desired to be reduced; the LORDS repelled this exception, being proponed for this defender and not for the Earl of Home, who compeared not to allege the same, seeing neither he to whom it was competent compeared to propone it; neither did the proponer thereof show what prejudice the Earl of Home could have by the proceeding of this reduction; for the pursuer *replied*, That the

No 8.

major, because the minor could sustain no prejudice by reduction of the major's right.

No 8. Earl of Home was denuded of his heritable right in favours of another person who was convened in this same reduction, neither was the Earl of Home obliged in warrandice of any of the rights disposed by him, and so he could have no prejudice, being allenary obliged to warrant from his own fact and deed; and so the process was sustained, notwithstanding of his minority.

Act. *Craig.*Alt. *Belbes.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 588. Durie, p. 213. & 216.*

1628. *March 21.* BALMANNO *against* YULE.

No 9.

Action was sustained against a liferenter, tho' the fiar was minor, and his right was involved, and contained in the same deed.

IN a reduction, Alexander Balmanno *contra* Yule, for reducing of an alienation of a house, in prejudice of the pursuer's tack, set to him by the annailzier, and whereon he had served inhibition before the alienation made to the defender's father in fee, and to his mother in liferent; and albeit the defender, son to the receiver of the alienation, was minor, and so 'qui non tenebatur placitare super hæreditate paterna,' as was so found here; yet the action was sustained against the wife, who was liferentrix, and the delaying of process against the minor was not admitted to stay process against her, albeit her security was in the same body of the writ, which was the minor's right, seeing the action concluded not properly reduction, but that the pursuer should be declared to have good right to bruk during the years of this tack, notwithstanding of that right made to the defenders, which the LORDS found might be tried against the relict, who was liferentrix, notwithstanding of the minority of the fiar; and because the duties of the lands set in tack for the bypast years, since the inhibition, were uplifted by the liferenter, the LORDS put it in her option either to restore the said bygones of the year, since the tack began, to the pursuer, or otherwise to let him bruk as many years after the tack expired, as he hath wanted since the inhibition, uplifted by her, as said is.

1628. *March 26.*—IN the reduction, Balmanno *contra* Rule, mentioned 21st March 1628, the pursuer's tack, whereupon he had served inhibition, being set to him by the husband of the wife, the wife being heretrix of the land herself, and she not consenting to the tack, and the heritable alienation being made by the wife and her husband together, after the said inhibition, which wife and husband were both living the time of the reasoning of this cause; the LORDS found no necessity to summon the wife, who was heretrix, to this reduction, seeing her husband, who was setter of the tack, was summoned; albeit it was *alleged*, That she was a necessary party to have been cited, seeing she is subject to warrant the alienation controverted, made to the defender.

Act. *Mowat.*

Alt. ———.

Clerk, *Gibson.**Fol. Dic. v. 1. p. 588. Durie, p. 366. & 371.*