

1634. January 17.

EARL OF MARR against His VASSALS.

No 10.

IN the action of reduction, the Earl of Marr against His Vassals; *alleged* for Blackhall, He was minor, 'et non tenebatur placitare super hæreditate.' *Replied*, That ought to be repelled, except he could allege that he was 'in tenemento, ut habetur in Reg. Maj. L. 3. C. 32. N. 3.' THE LORDS sustained the exception notwithstanding, otherwise minors of ward lands could not enjoy the benefit of this maxim. Next *replied*, The exception could not defend his mother, who was liferenter of the lands, and called also; but she behoved to answer for her interest. THE LORDS found the exception relevant for her likewise, because her son would be obliged to warrant her liferent to her.

Fol. Dic. v. 1. p. 588. Spottiswood, (MINORS AND PUPILS.) p. 213.

1665. January 31.

ALISON KELLO against PRINGLE.

No 11.

ALISON KELLO pursues a reduction against the Lairds of Wedderburn and Pringle, and craves certification. It was *alleged* for Pringle, no certification, because he was minor, *et non tenetur placitare de hæreditate paterna*. The pursuer *answered*, *Primo, non relevat* against the production; but the minor must produce, and may allege that in the debate against the reason; *2dly, Non constat* that it is *hæreditas paterna*, and therefore he must produce at least his father's infeftment; *3dly*, All he alleges is, that his father had an heritable disposition, without infeftment, which cannot make *hæreditatem paternam*, else an heritable bond were not reducible against a minor, or an apprising and tack; *4thly*, Albeit the allegiance were proponed, in the discussing of the reason, yet the reason being *super dolo et metu*, upon which the defender's original right was granted, and not upon the point of preference of right, the brocard holds not in that case, as it would not hold in improbation, *in casu falsi*.

The defence, *minor non tenetur*, was not sustained, where neither the predecessor was infeft, nor the defender, his heir.

THE LORDS found, That the defender ought to produce his father's infeftment, and that a naked disposition would not be sufficient; which being produced, they would sustain the defence, *quoad reliqua*, against the production; but that they would examine witnesses upon any point of fact in the reason to remain *in retentis*, that the witnesses might not die in the mean time, without discussing the reason, but prejudice of their defences.

Fol. Dic. v. 1. p. 588. Stair, v. 1. p. 260.

* * * Newbyth reports this case:

IN a pursuit raised at the instance of Alison Kello and her spouse against Isobel Home, relict of umquhile Mr Alexander Kinnier, their son, and heir to the said Mr Alexander, for reduction of a contract and disposition of certain lands

No 11.

passed betwixt the said umquhile Mr Alexander Kinnier, the Laird of Wedderburn, and others, wherein the pursuer called for several charters, comprisings, and other writs and securities; and there being a defence proponed for the minor, that *non tenetur placitare*; the LORDS found, That albeit the minor *non tenetur placitare*, yet *tenetur* to produce his father's infestments, whereby it may appear that the same was *hereditas paterna*; and found likewise, that they might take the deposition of witnesses to remain *in retentis*, if need were, till the minor were major, the witnesses being old or in possibility to die.

Newbyth, MS. p. 23.

1665. July 8.

BORTHWICK against SKEEN and Others.

No 12.

A minor fiar being bound to warrant a liferent to a liferentrix, the Lords, in a reduction of the liferentrix's right, repelled the allegiance of *minor non tenetur*, because the privilege is purely personal, and when the minor is pursued himself, not when he only becomes liable in consequence; yet the Court declared that this should be without prejudice of the minor's right.

IN a reduction pursued at the instance of James Borthwick, apothecary in Edinburgh, against Janet Skeen, relict of ——— Home, and Janet Home, their daughter, for reducing their infestment of the lands of Birksneip, the pursuer declared he insisted *primo loco* against the said Janet Skeen, who had got a defence found relevant upon her liferent infestment clad with seven years possession in a removing, and who in this reduction *alleges*, That she being only a liferentrix, and the heir being called, who is obliged to warrant her infestment, what defence is competent to the heir is also competent to the liferentrix; but so it is, that if any were insisting against the heir, he would allege, that *non tenetur placitare* being minor. It was *answered*, That the liferentrix is major, and the defence *non tenetur placitare*, is only personal, and not transmissible to a major; and though the minor be obliged to warrant, *hoc nihil est* to the pursuer, who finding a person infest in his lands, and in possession, may very well pursue for taking away that incumbrance, and she may pursue warrandice, as she will be served.

THE LORDS repelled the allegiance; and thereafter she *alleging*, That she bruiked by tolerancē of the minor *qui non tenetur*, this was repelled also, in respect she had founded her defence upon a liferent infestment, and, in respect thereof had excluded the pursuer's removing; likeas, her infestment was produced.

Fol. Dic. v. 1. p. 589. Gilmour, No 157. p. 111.

* * * Newbyth reports this case :

1665. July 8.—JAMES BORTHWICK, apothecary, being infest in the lands of Birksnews, upon a right flowing from the Lord Borthwick, pursues a removing against Janet Skeen and her tenants, from the said lands, as also pursues a reduction of the said Janet Skeen, her liferent right of the said lands, whereof the reason was; that both the liferent and fee being derived from Alexander Hali