

1744. June 26.

JAMES DOUGLAS of Hillside, Pursuer, against ARCHIBALD INGLIS of Auchin-
nie, and JOHN RIGBY INGLIS, an infant, Defenders.

ANNO 1621, John Symington of that ilk, wadset the lands of Over-Pul-
muckshead to John Symington.

In the year 1696, John Inglis writer to the signet, adjudged these lands from
John Symington's Representatives, whereby he carried right to the wadset, and
got into possession. And in the 1711, John Inglis disposed the same to his
second son Patrick Inglis, to be holden either of himself or his lawful superi-
ors; and, to that effect, the disposition contained both a procuratory and pre-
cept. Patrick Inglis, being about to go to the West Indies, borrowed L. 550
Sterling from his brother Archibald Inglis; and, for his security, gave him an
heritable bond on the wadset lands; and to validate this heritable bond, Patrick
Inglis was infeft upon the precept contained in his father's disposition.

The pursuer, as in the right of superiority of these lands, brought a reduc-
tion and improbation against Mr Archibald Inglis, and against the representa-
tives of Patrick his brother, of all right in the persons affecting the said lands;
and the summons further contained a declarator of non-entry, redemption,
count, reckoning, and payment.

The first defence pleaded for the son of Patrick Inglis was, That his father
having died infeft, and in possession of the lands in question, that the defend-
er his heir, being minor, *non tenetur placitare, &c.*

Answered for the pursuer, That while Patrick lived, his brother Archibald
enjoyed the rents in virtue of a factory from him; but after his death, he in-
verted the possession, and took up the same upon the title of his assignation in
the heritable bond; so that the apparent heir of Patrick is not in possession, di-
rectly or indirectly. The fact so standing, he cannot have the benefit of this
privilege, as it was only introduced in favours of minors, that they be not put
out of their father's heritage, whereof he died in possession; and in this case,
the estate is affected with a debt which exhausts the value, so that the minor
can have no interest to plead this privilege. Besides, he has not taken up his
father's heritage, nor represents him as apparent heir. To illustrate this: Let
us suppose, that a man dies bankrupt after his creditors have adjudged his e-
state for debts exceeding the value; surely the creditors would not be allowed
to borrow the name of an infant heir, to protect themselves against a prefer-
able right, and keep themselves in possession, when the infant cannot, in all
human probability, have any interest in the question. Now, this is precisely
the present case; for the debt due to Archibald does exhaust the value of the
hereditas paterna; and it is obvious, that the pupil, who has no other interest
in the question, is no other than a borrowed name to protect Archibald in his
possession. See Stair.

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The privilege
of *Minor non
tenetur placi-
tare* is not a
good defence
against a de-
clarator of
non-entry.

Whether the
privilege is
competent,
where the mi-
nor's interest
in the lands
is not direct.

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Replied for the minor, It appeared from his father's infestment produced, that he died infest in the property of the said lands; so also he was truly in possession at his death, the rents being uplifted by his brother Archibald, in virtue of a factory from him, which was all the possession that possibly could be had of lands by a gentleman who resided in a foreign country: And supposing the fact true, that Archibald has uplifted the rents since his brother's death, in consequence of his heritable bond, still such possession is as much the infant's, as it was his father's before his decease. When a creditor possesses in virtue of a right in security, upon which he is accountable to the debtor, the creditor uplifts towards extinction of the debt, which is truly the possession of the debtor, or his heir who must in either case pay the debt. It is likewise entirely groundless to say, the succession in this case was *obarrata*, so as his heir can never find it his interest to take it up, seeing Patrick left several funds in Jamaica, as is properly vouched in process; so that to compare this case to the succession of a defunct who dies bankrupt, and whose estate is carried off by adjudications for sums above the value, is plainly unjust. Here there is no bankruptcy, no diligence led against the lands which can carry them off from the heir, only a right in security, which must at all times be redeemable by him, and which he must redeem, were it above the value of the lands, before he can touch his father's other effects. In a word, the profit and loss of the rents here is entirely the minor's; and it cannot possibly make any difference, with respect to his interest, whether they are uplifted by himself or his creditor.

In the *second* place, the pursuer *insisted*, in the conclusion of his summons, with regard to the non-entry, and pleaded that the brocard *minor non tenetur, &c.* could not be a good defence against that claim, in so far as he did not seek to cut down the defender's right, but to make a demand, which all feudal property is subject to where the fee is empty and the vassal not entered. This must surely have been the case, were this process brought directly against the minor as his heir to the pursuer's vassal. But this is not the case: Patrick Inglis died infest in the lands holding of his father John Inglis; so that Patrick not being the pursuer's vassal, he neither does nor can bring a process of non-entry against Patrick's heir. His process of non-entry is brought against Archibald Inglis, heir apparent to his father John Inglis; which John would have been the pursuer's vassal, had he thought proper to enter upon his adjudication above set forth. Archibald can have no defence against it in his own right, and he cannot be allowed to assume the name of the sub-vassal and minor, to defend himself against this process. When a process of non-entry is brought against the vassal, such a defence, hitherto, it is thought, has not been sustained, that the process cannot go on, because the sub-vassal is minor, and his interest may be hurt *per consequentiam*.

3tio, Supposing the minor should not be bound to produce in the reduction and improbation, nor be obliged to debate upon his father's rights to the lands in question, yet the pursuer is certainly entitled to redeem the lands, as it

clearly appears from the progress produced, that the defender's right to the lands can be no other than a wadset; for this is truly not insisting to reduce or annul the defender's right, but insisting in an action which is quite consistent with it. The brocard will not defend against a reduction *ob non solutum canonem*, nor against a process of recognition; and as little ought it to defend against a declarator of redemption.

Answered to the pursuer's claim of non-entry, That the privilege *minor non tenetur*, does not bar actions which arise from the nature of the minor's right. If he found upon his father's infeftment, he must take it with its qualities; and therefore, if that infeftment, or its warrant, had acknowledged the pursuer as superior of the lands, the minor could not object to any process, brought at his instance, for the casualties of his superiority, because his right, *ex facie*, was burthened with it, and he cannot plead against the nature of his own right. But surely there is no pretence from thence to argue, that when his father's infeftment bears John Inglis to be his superior, it is competent to any third party, who derives no right from this superior who granted the infeftment, to bring a process, setting forth, that, above 120 years ago, one Symington was superior, and that he the pursuer derives right from this Symington, and therefore the minor must take his charters from him, or else the lands must be found in non-entry. If this were to be allowed, it would be easy to evict from minors the property of their father's estate, as well as the superiority. And as for the argument, that this declarator of non-entry is against Archibald Inglis, as apparent heir of John Inglis, and that it can be no objection to it, that the minor subvassal's right may be hurt *per consequentiam*; it was *answered*, That a declarator of non-entry could not take place against any person who does not appear to be heir of the pursuer's vassal, and that there were no documents produced to show that ever John Inglis was the pursuer's vassal; but supposing it had been so, and that Archibald were to be considered as the apparent heir of the pursuer's vassal, still the consequential interest of the minor, it is believed, would bar a decret of non-entry; the effect of which must be, to turn him out of possession; and so it has been determined. See November 25th 1624, Hamilton, No 6. p. 9057.; June 23d 1625, Pringle, No 7. p. 9059.

As to the *third* point, viz. That the pursuer should be allowed to insist in his declarator of redemption; it was *answered*, That where the minor's father's right bears to be under reversion, there, no doubt, it is true what the pursuer pleads, that a declarator of redemption is not inconsistent with the nature of the right, but may be prosecuted during the minority, as much as a declarator *ob non solutum canonem*, or a recognition where his father's right produced appears to be subject to such casualties; but where the minor's right appears to be absolute and irredeemable, as in the present case, there a declarator of redemption is by no means consistent with the nature of his right; and consequently, the minor is protected against it during his minority. It may be true, that these lands were granted six-score years ago under reversion; and at the

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same time it is very possible that the right of reversion may have been discharged or extinguished many different ways, which the minor cannot account for. The law presumes him ignorant of past transactions, and unable to recover the documents by which they are to be instructed, and therefore protects him from suffering during his non-age.

THE LORDS sustained the defence against the reduction, That *minor non tenetur placitare*; and found, that it is no sufficient defence against declarator of non-entry; and remitted to the Lord Ordinary to enquire into the pursuer's title to the superiority of the lands, and whether all persons having interest were properly sisted.

Fol. Dic. v. 4. p. 9. C. Home, No 269. p. 433.

1749. February 14.

STRANG against CRAIG.

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The privilege of *minor non tenetur placitare* found to take place, when the right was *ex facie* irredeemable, although it might turn out to be otherwise.

STRANG disposed the twenty shilling land of Corsehill to Craig in 1692; the disposition bore to be in security; but it bore also a clause, that, if the money was not paid before Whitsunday 1701, the reversion should expire, and the lands belong irredeemably to the disponee.

The heir of Strang now pursues the heir of Craig for a count and reckoning, and extinction of the wadset; for whom it was *alleged*, That, although the right may originally have borne an improper wadset, yet, as the term of reversion was suffered to expire, and that it was now 40 years since the term was expired, his right was become absolute, as was found in the case of Pollock and Story in 1738, No 51. p. 7216. *voce* IRRITANCY, at least that he being *minor non tenetur placitare*.

THE LORDS sustained the defence upon the brocard, *minor non tenetur placitare*, notwithstanding its being *replied* for the pursuer, That he was also minor, and that, deducting the years of his minority, 40 years were not run since the expiry of the term of reversion; for they considered it to be enough to found the brocard, that the right was *ex facie* become irredeemable.

Fol. Dic. v. 4. p. 10. Kilkerran, (MINOR.) No 9. p. 350.

*** Lord Kames reports this case.

1748. June 24.—JAMES STRANG of Corsehill, being *ab ante* debtor to William Craig in L. 1000 Scots, and having instantly borrowed from him 2500 merks more, did, upon the 27th of May 1692, for the said William Craig's further security, dispone to him heritably, under reversion, the twenty shilling land of Corsehill, with procuratory and precept, redeemable as follows: ' By payment of the foresaid two sums, amounting to 4000 merks, with the annual rent thereof, from the term of Whitsunday then last, and in time com-