Case 10.
Fountainhall, 1 Feb. 1710.
Forbes, 27 Dec. 1711.

John Crawfurd, an Infant, by Jane his Mother and Guardian, - - *Appellant;*
Archibald Crawfurd Esq. - - *Respondent.*

5th *April* 1712.

Minor non tenetur placitare.—The maxim does not take place in a reduction upon the head of dole, or fraud in the minor's father.
Proof.—A deed found proved to be fraudulently altered upon ocular inspection of the different pieces, and a letter from one of the perpetrators of the fraud.
Costs.—40*l.* costs given against the appellant, a minor.

THE parties were grandchildren of James Crawfurd of Ardmillan, the respondent being the son and heir of his eldest son, and the appellant the son and heir of his third son.

The respondent brought an action of reduction, improbation, and declarator before the Court of Session against the appellant, for setting aside certain deeds by virtue of which the appellant claimed the family estate of Ardmillan, and the respondent stated the circumstances of the case to be as follows:

That, the said James Crawfurd the grandfather in 1682, executed a deed of settlement or entail of his estate to himself in liferent, and to James Crawfurd (the respondent's elder brother since deceased) his grandson by his eldest son William, and the heirs male of his body in fee, whom failing to the other heirs male of the body of his said son William and the heirs male of their bodies, whom failing to Andrew Crawfurd his second son and the heirs male of his body, whom failing to James Crawfurd his third son, (father of the appellant) and the heirs male of his body, &c.: upon this deed resignation was made in the hands of the superior, the Bishop of Galloway, in September 1682, and a new charter and infestment expeded in terms thereof.

That James the grandson, the institute in the entail, died without issue, leaving the respondent his brother under age: and Andrew the second son of the entailer also died without issue. About this time a contrivance was carried into execution by the father and the third son James to defeat the former settlement, of a singular nature: this former deed was of the hand-writing of James the son, who had been bred to the law: it consisted of three sheets pasted together, and signed at the joinings, and contained no power of revocation: but by cutting off two of these sheets and part of the third, and joining three new sheets to the said tail-piece, a deed was manufactured bearing to be to the same series of heirs as the former, but containing a power of redemption upon payment of 3*l.* Scots: in pursuance thereof, the father used an order of redemption, and, on the 10th of May 1698, executed a new deed of settlement of his estate to James his third son, and his heirs heritably and irredeemably, and upon this deed James the son was infeft in 1705,—and died in 1706, leaving the appellant his son and heir under age:

But

But the reſpondent Archibald, living in the houſe with his grandfather, by ſome means got poſſeſſion of that part of the original deed, which had been cut off, and a letter from James the ſon to his father, dated in 1696, which explained the tranſaction: the reſpondent after his grandfather's death ſerved himſelf heir to his elder brother deceaſed.

And his action concluded, that it ſhould be found and declared, that the ſaid original deed contained no power of redemption, that the tranſaction had taken place in manner before mentioned, and that the two ſheets and part of the third, (then produced by the reſpondent,) ſhould be added to the tail of the vitiated deed, as it had originally ſtood: and the reſpondent produced alſo the ſaid letter from James the ſon to his father, dated in March 1696.

The appellant appeared by his mother and curatrix, and pleaded for defence to this action, that *minor non tenetur placitare ſuper hæreditate paterna*, and that it was only neceſſary for him to produce his father's infeftment to free him from the action; but the Court finding that the maxim did not defend from the production, but reſerving conſideration thereof after production, the appellant produced the whole deeds called for.

The deed of 1682, being inſpected and compared with what the reſpondent had already given into court, on the 19th July 1711 the Court "found that the two ſheets and 13 lines produced "by the purſuer, had been a part of and joined to the laſt ſheet "of the diſpoſition granted by James the grandfather to his "grandſon James produced; and that the ſaid three firſt ſheets "of the ſaid diſpoſition as it is now produced by the defender, "containing a clauſe of redemption, have been falſely paſted to "the laſt ſheet in place of the ſaid two ſheets and 13 lines cut "off; and therefore found the clauſe of redemption contained "in one of the three ſheets ſo paſted, null, and likewiſe the order "of redemption uſed thereupon; and found the conveyance "to the defender's father null; with the charter and ſaſine fol-"lowing thereupon."

And after a hearing with regard to the maxim, the Court on the 27th of December 1711 "found that the maxim of minor "non tenetur placitare ſuper hæreditate paterna did not take "place in this caſe."

The appellant having reclaimed againſt both theſe interlocutors, the Court by ſeveral interlocutors, (the laſt of them being dated the 11th of January 1712) adhered to the ſame.

The appeal was brought from "a ſentence or decree pro-"nounced by the Lords of Council and Seſſion the 19th July "1711, and by them adhered to after ſeveral re-hearings, the "laſt of which was on the 11th day of January following." Entered, 8 Feb. 1711-12.

Heads of the Appellant's Argument.

The rule *minor non tenetur placitare ſuper hæreditate paterna* is a maxim allowed by the law of Scotland, and alſo by the law of England. By it there is to be a ſtay of all proceedings againſt the minor, when the right of his inheritance deſcending from his father,

ther, who died laſt ſeiſed, is put in queſtion: it is founded upon this, that a minor, is not held to have any conuſance to plead in defence of his title. And in the preſent caſe, this maxim was the only defence pleaded by the appellant, or any perſon on his behalf.

And though there be falſehood or *dolus* alleged in the preſent caſe; yet there is no falſehood or *dolus* alleged againſt the minor, whoſe privilege is inſiſted on, till he himſelf be in a capacity of pleading. If a bare allegation of ſuch crimes be ſufficient, every minor might be eaſily defeated of his privileges: and in the caſe of *Kello* againſt *Pringle*, 31 January 1665, it was found that the allegation of *dolus & metus* was not ſufficient to take away from a minor the benefit of the maxim; and there never was any deciſion to the contrary.

Stair's Deciſions, vol. i. No. 259.

The interlocutor of the 19th July 1711, was a determination of the matter of fact before any iſſue was joined, and without evidence; for nothing more was inſiſted upon for the appellant than his minority, and his privilege of minority was not determined until the 27th of December 1711, which was near ſix months after pronouncing the interlocutor.

And even if the matter of fact might have been examined into, yet it is not found, that there was any alteration of the diſpoſition *after* the charter and infeftment followed thereupon, which is the ſubſtance of the reſpondent's libel in this action.

Heads of the Reſpondent's Argument.

However general the maxim pleaded by the appellant may be, yet it has known exceptions, and particularly that it never takes place *ubi agitur aut de obligatione aut de dolo defuncti:* and as this is the opinion of the moſt eminent lawyers, ſo it is moſt reaſonable, for if a perſon happens to get into poſſeſſion of an eſtate by *dolus*, and ſoon after dies leaving his heir a minor, it would be very hard that his minority ſhould protect him from pleading to the action, and prevent the true proprietor from being re-poſſeſſed of his own eſtate, of which he was only diſpoſſeſſed by the father's fraud.

The law, it is true, preſumes in favour of deeds that are complete and duly executed; but this deed has no manner of pretence to that character, as appears from ocular inſpection. The grain and length of the paper of the part added do not agree with the reſt of the deed, and the ſtrokes of the long letters appear upon the ſheet where it was cut off. The laſt ſheet of the deed exactly quadrates with the two ſheets and 13 lines cut off.

All this was perfectly evident from the appellant's father's letter to James the grandfather, which was produced in the action, wherein the whole ſcheme was ſet out, and that the deed as it ſtood originally contained no clauſe of redemption. By this tranſaction a forgery was impoſed upon the witneſſes, who were not witneſſes to the deed as it was altered, at a date as appeared by the letter long ſubſequent to the original execution of it.

The

The appellant alleged a declaration of the grandfather, that he being diſpleaſed with the firſt, had executed a new deed, on which the charter proceeded; and that his father by paying large debts was a purchaſer for an onerous conſideration. But the declaration of the grandfather, who appears to have been a party to the contrivance, was of no import. For the debts paid, the appellant's father took aſſignments in his own perſon; and in ſo far as they are juſt debts, the reſpondent will be obliged to pay them.

After hearing counſel, *It is ordered and adjudged, that the ſaid petition and appeal be diſmiſſed, and that the ſentences or decrees therein complained of be affirmed: And it is further ordered, that the appellant ſhall pay or cauſe to be paid to the reſpondent the ſum of* 40l. *for his coſts in this Houſe.* Judgment 5 April 1712.

For Appellant, *Ja. Mountague.* *P. Crawford.*
For Reſpondent, *Edward Northey.* *Sam. Dodd.*

The letter written by the appellant's father to James the grandfather of the parties, is ſtated by the reſpondent to have been of the following tenor:

" SIR,

" I received by this bearer incloſed in your's the diſpoſition in " favour of your oye James, and according to your deſire, I " have by the aſſiſtance of that perſon you ſignified to me drawn " it as I ſuppoſe to your ſatisfaction, and I have added the " clauſe of redemption as perfectly as I think it will hold in law, " and as you may diſpoſe of your eſtate to any child you have " notwithſtanding of that tailzie. Sir, I was neceſſitated to write " this, to know if you have any further to do in it; for I have " not ended it, waiting to know your commands: and ſince I " cannot have the occaſion of this friend there, ſo let me know " by this bearer, being a ſure hand, as ſoon as poſſible. I add " no more, but deſtroy this line, and reſt,

" Sir,

" Your dutiful ſon and ſervant,

" *Edinburgh,* " JAMES CRAWFURD."

" *March* the 4th, 1696.