

No 52.

Replied for the pursuer; His declarator of property not being founded on his ancient rights and evidents, but upon the positive deed of the defender's predecessor, viz. his submission and the decreet-arbitral following thereon, assigned delivered by him, with the disposition of the barony of Allans to the pursuer's author, whereby the defender's predecessor was absolutely and as fully denuded, as if by a liquid obligation under his hand he had obliged himself to dispoise the said bog; or had acknowledged it to be part and pertinent of Allans; the defender can pretend to no privilege of exemption from answering to both the conclusions of the pursuer's libel.

THE LORDS found, that the brocard *minor non tenetur placitare* takes no place in the present case; and therefore repelled the defence.

Forbes, p. 433.

1711. December 27.

ARCHIBALD CRAWFORD Grandchild to the deceased James Crawford of Ardmillan, descending by William Crawford his eldest Son, *against* JOHN CRAWFORD, Grandchild to the said James Crawford, descending by James Crawford his second Son, and JEAN CRAWFORD Tutrix to the said John.

No 53.
The brocard does not take place in a reduction upon the dolo or fraud of the minor's predecessor.

IN the reduction, improbation, and declarator at the instance of Archibald Crawford, as heir to James Crawford his brother, against John Crawford, as heir to James Crawford his father, upon this ground; that the defender's father had defrauded the pursuer of his grandfather's estate, by cutting away a part of the last sheet of a disposition of tailzie, made by the grandfather in favours of James Crawford, whom the pursuer represents, and pasting thereto three new sheets, containing a clause of redemption; and then prevailing with the grandfather to scribes the margin, use the order, and by virtue thereof dispoise irredeemably to him the lands of Ardmillan;

Alleged for the defender; He being minor *non tenetur placitare de hereditate paterna*, conform to Stat. K. Wil. 1. cap. 39. § 15. Reg. Maj. lib. 3. c. 30 § 3. c. 32., which rule admits but of one exception, lib. 2. cap. 42. § 9. viz. where a superior having the custody of his vassal is minor, when the vassal attains to majority; and 'Exceptio firmat regulam in casibus non exceptis.' So by the law of England, 'generaliter verum est, quod de nullo placito tenetur respondere is qui infra ætatem est, per quod possit exhæredari,' Skene. Note upon the 32d chapter of the 3d book of the Majesty, 8. R. 2. cap. 4. Coke 2. Instit. 291.

Replied for the pursuer; The brocard doth not hold, *ubi agitur aut de dolo*, as in recognitions and forfeitures; *aut de obligatione defuncti*, as in the case of dispositions and contracts, Stair, Instit. lib. 1. tit. 6. § 45. Dirleton's Doubts, p. 126. M'Kenzie, Instit. lib. 1. tit. 7. Spottiswood's Pract. p. 211. It is true, that *minor non tenetur placitare in brevi de recto*, that is, where his predecessor was in peaceable possession, and had or might have had the benefit of a

possessory judgment. But if either his predecessor was obliged by his own deed or fraud, it had been contrary to sense and reason to defend his heir, because a minor, in his unrighteous possession; since that were to grant an indulgence for a crime. It is in vain to limit the exception against this brocard, to the case where a superior having the custody of his vassal is minor, and the vassal attains to his majority, when our lawyers and decisions have noted and authorised several exceptions, as in the above cited cases, and is further cleared from that betwixt the Master of Jedburgh and Earl of the Home, No 24. p. 9083, where the brocard was repelled in a proving the tenor of a charter, that did exclude the minor's right; now this case is in effect a making up the tenor of the pursuer's right.

Duplied for the defender; The brocard extends to cases of fraud as well as others, those being matters of the greatest intricacy, where the omission or addition of a small circumstance, alters the whole, and supports or elides the conclusion. Yea, the Lords have sometimes extended it beyond the letter, to cases where the minor's right fell only in consequence of that craved to be reduced, Hamilton *contra* Mathieson, No 6. p. 9057. They tacitly sustained it in a reduction *super dolo et metu*, Kello *contra* Pringle, No 11. p. 9063; in so far as they allowed oaths to be taken to lie *in retentis* till the minors were of perfect age; which argues their being of opinion, that the cause could not be insisted in till that time. It was found to exclude a reduction *ex capite inhibitionis*, Chapman *contra* White, No 13. p. 9066, which implied a legal fraud. The Lord Stair, Instit. p. 58, says, that the brocard must defend against improbations, which are founded upon the special reason of fraud and falshood, What his Lordship, Dirleton, and Sir George M'Kenzie say about forfeitures and recognitions, seems founded on a specialty, which brings it under the exception contained in the book of the Majesty; for this being a feudal privilege, it is nothing strange, that superiors, who gave their vassals lands *gratis*, should not be prejudiced by the maxim; especially seeing the superior could not make use of it against his vassal. Besides, admitting that the opinion of these authors were full on the pursuer's side, whatever respect be due to their authority, it is not so strong *ut vincat legem*. Nor was the allowing the tenor of a charter to be proved, Master of Jedburgh against The Earl of Home, No 24. p. 9083, an exception from the brocard; for though the Master of Jedburgh had, after making up the charter, insisted in a reduction, the brocard would have taken place; because, making up the tenor did put him in no better case, than if the writ had never been lost, in which case he could not insist in his reduction. So that the practise is not to the present purpose, where the first thing craved is to tear or destroy a writ subsisting.

THE LORDS found, that the brocard, *minor non tenetur placitare de hæreditate paterna*, doth not take place in this case.

Fol. Dic. v. 1. p. 589. Forbes, p. 565.