

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

burton, the said Alexander had no right in his own person from the Archbishop of St Andrew's, superior of the said lands; and therefore the said writs, as being granted *a non habente potestatem*, were null, and should be reduced. The pursuer having insisted in this removing against the liferentrix, it was *alleged* for her, She could not remove, because she and her husband, from whom she had right, had been some years in possession, which was sufficient to defend her *in judicio possessorio*; to which it was *replied*, That there was reduction raised of her liferent, upon the said reason, which he repeated; whereunto it was *duplied*, That her liferent right being granted to her by umquhile Major John Home, her deceased husband, with a clause of warrandice; as Janet Home, her daughter, was not obliged *placitare*, as to her right of fee, in respect she was minor, so no more was she obliged as to her liferent, in respect that if the same were evicted, she would have recourse against the minor; to which it was *triplied*, The allegiance ought to be repelled, because that the privilege that a minor *non tenetur placitare* was simply personal; and being oftentimes prejudicial to a third party's right and interest, ought not to be extended *de persona ad personam*. And albeit the minor was liable in warrandice of the liferent, yet that is not ground why the liferentrix ought not to dispute anent the said rights; otherwise wherever a singular successor had a recourse of warrandice against a minor, he should not be obliged to dispute upon the merits of his rights, *quod absurdum*, and contrary to all law and reason.—THE LORDS repelled the allegiance founded upon *minor non tenetur placitare*, proponed for the liferentrix, without prejudice of the minor's rights, as accords.

Newbyth, MS. p. 33.

. This case is also reported by Stair:

1695. July 15.—JAMES BORTHWICK, being infeft in the lands of Oversneip, pursues reduction and removing against Janet Skeen, the liferentrix. It was *alleged*, That the fiar being minor, *non tenetur placitare super hæreditate paterna*; and for the liferenter, That the minor was obliged to warrant her liferent-right, and her possession was the minor's possession; so that if her right were reduced, and she removed, the privilege of the minor were altogether overthrown. It was *answered*, That the privilege was personal, and *stricti juris*, and was to be extended to majors; and as for the warrandice, it was never sustained as a ground to exclude a reduction, because warrandice would be inferred against a minor, which is but a personal obligation, and not *hæreditas*.

THE LORDS repelled the allegiance for the liferenter; who *alleged* further, That her right being reduced, the fee was absolute in the person of the minor, who would not suffer the liferentrix to be removed, but she did possess by the minor's tolerance.

It was *answered*, That the pursuer's reduction behoved to accresce to him and his right, and not to the minor's right, that he behoved to enter to the life-

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renter's possession, which would not prejudice the minor; for if the liferenter died during the minor's minority, he might return to the possession in the same way as if the liferenter were in possession; but as for the tolerance, now the liferenter having entered by the liferent right, and it being reduced in favour of the pursuer, as the minor could not thereby attain possession, so neither can he give tolerance to defend the liferenter.

THE LORDS repelled also this second defence.

Stair, v. I. p. 298.

No 13.

The objection was repelled, that the minor's father's author was not infest, his father himself having died infest.

1667. *January 13.*BARBARA CHAPMAN *against* JOHN WHITE.

BARBARA CHAPMAN pursues a reduction *ex capiti inhibitionis*, viz. That Calander being charged to enter heir to his father, who was the pursuer's debtor, and, upon the charge, inhibition was used against him, after which he disposed to the defender's father. It was *alleged* by the defender, That he is *minor et non tenetur placitare de hereditate paterna*. It was *answered*, That Calander, his father's author, was never infest; *2dly*, That the defender's father did dispose the land to his second son; by both which it could not be called *hereditas paterna*.

THE LORDS sustained the defence, notwithstanding of the reply, and found no process till the defender's majority, and that he was not obliged to dispute whether his father's authors were infest, or whether his father had disposed or not, until his majority, that he might seek out his evidences, and defend himself.

Fol. Dic. v. I. p. 588. Stair, v. I. p. 427.

No 14.

A minor not obliged to defend against a reduction of a comprising led by his father, and expired in his time, the reason being that it was satisfied by intromission within the legal; but witnesses may be examined to prove possession, that the depositions may lie *in retentis* till majority.

1671. *January 5.*ALISON KELLO *against* KINNEIR.

ALISON KELLO, as heir to her mother, Margaret Nisbet, having pursued a reduction of an apprising of the lands of Paxtoun, led at the instance of Mr Samuel Hume, against the said Margaret, in *anno* 1622, and assigned to Mr Alexander Kinneir, in *anno* 1623, upon this reason, that the said Mr Alexander was satisfied by his intromission within the legal, this pursuit being against Mr Alexander Kinneir's son, who is minor, and being stopped upon his minority, *quia minor non tenetur placitare de hereditate paterna*;—THE LORDS did, upon the pursuer's petition, grant commission to examine witnesses upon the intromission, to remain *in retentis* till the cause might be determined, in respect the witnesses might die in the meantime; which being reported, the LORDS remitted to an auditor to state the count of the intromission, according to the probation, that the stated account might remain *in retentis*. The defender being heard again before the Lords, did *allege*, That the account could not be stated