

1702. *January 7.* ROBERT BROWN *against* JOHN RULE.

RANKEILOR reported Robert Brown, merchant in Dumfries, against John Rule, apothecary there. Brown, as an adjudger of a tenement there from Cunningham, the heritor, pursuing maills and duties; Rule compears for his interest, and produces a disposition thereof to his father, whereon he was infest and in possession more than twenty years ago; and craved the benefit of a possessory judgment.

ANSWERED for Brown,—The disposition is, *ipso jure et ope exceptionis*, null, being from a mother, tutrix to her son, who had no manner of right to the fee; and he repeated a reduction, which he had raised *incidenter* of that disposition, as flowing *a non habente potestatem*, and so could not afford the benefit of a possessory judgment.

The Lords repelled the defence on the possessory judgment, in respect of the reduction; which they received *hoc ordine*.

Then Rule ALLEGED,—I am not obliged to answer the reduction, because I am minor, *qui non tenetur placitare super hæreditate paterna*.

ANSWERED,—That brocard holds where the minor's right is anywise disputable; but here it is plainly null: And the foresaid maxim has many exceptions in law; and particularly if the defunct, the minor's father, was *in dolo et culpa*, as here he was, to accept a right from one he knew could give him none; and, at this rate, a party possessing by such a null right, leaving an infant of a year old, that child, for twenty years till his majority, should continue to possess, by a right visibly null, and so lucrates the rent, and defraud the true heritor: And the maxim secures them against producing their rights, because they may be abstracted, or the minors not masters of them, or competent defences may be omitted: but here the disposition is already produced *in campo*, and so he must debate its validity.

REPLIED,—Though the tutrix be the disponent, yet there be cases in law where her disposition may subsist as valid; *viz.* if she had the *decretum prætoris*, and authority of a judge, finding the alienation necessary, or if the price was *in rem minoris versum*. Now, a minor may want his documents to instruct thir, and so be unjustly dispossessed of his father's heritage: For though a disposition in a contract of marriage becomes null where the marriage dissolves within year and day, yet the wife's liferent-infestment will subsist in law till the tocher be repaid: And, on the 18th of January 1667, *Barbara Chapman against White*, the Lords found a minor not obliged to debate whether his father's author, from whom he derived his right, was infest or not,

The Lords, ere they would decide this point, thought it deserved to be farther heard and considered. I find Stair, *Institut. book 1. tit. 6.* says, the minor's privilege, *quod non teneatur placitare*, does not exclude nor hinder the proponing a nullity against a disposition made by a wife to her husband, where the marriage dissolves within the year; and cites a decision, 15th February 1678, *Gordon against Maxwell*.

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