

No 50.

non tenebatur placitare, and also the other defence foresaid, and they sustained the action of recourse against the warrandice lands.

Fol. Dic. v. 1. p. 589. P. Falconer, No 51. p. 28.

* * * Harcarse reports this case :

ONE having disposed kirk-lands with absolute warrandice against all evictions, perils, dangers and inconveniencies, and there being three acres thereof afterwards designed for a glebe, the buyer raised a declarator of eviction against the disponent's heir, who was minor.

Alleged for the defender ; That *minor non tenetur placitare*, this process having the effect of a reduction.

“ THE LORDS repelled the defence.”

Harcarse, (MINORITY.) No 704. p. 198.

No 51.

1685. February 4. GORDON of Fechil *against* FARQUHAR of Moonie.

In a reduction upon the act of Parliament 1621, against a minor, of a right granted to his father ;

It was *alleged* for the defender ; That *minor non tenetur placitare*.

Answered ; It was *dolus paternus et fraus* to take a disposition without an onerous cause, *post contractum debitum*.

“ THE LORDS sustained the minor's defence, and refused to make him find caution, which they thought to be difficult for a minor who had his lands questioned ; but allowed the pursuer to lead a probation by witnesses to lie *in re-tentis*, which he might use in the discussing of the reduction.”

Harcarse, (MINORITY.) No 716. p. 202.

No 52.

The brocard is not effectual in any process for making good the right of a purchaser of lands.

1720. June 27. SIMON M'KENZIE *against* DONALD M'KENZIE.

MR SIMON M'KENZIE of Allangrange standing infeft in these lands with the pertinents, pursues Donald M'Kenzie of Kilcowie in a molestation, and declarator that the defender ought not to disturb and molest him in the peaceable possession of the bog of Drummore, which is not only an uncontroverted part and pertinent of the barony of Allangrange, but was so found by an indenture and decret-arbitral in 1677, and craving it may be found to pertain and belong to him in property. *Alleged* for Kilcowie, the defender, That in so far as he libelled a molestation, *non facit vim*, he was willing to answer ; but having accumulated in this process likewise a declarator of property, he was minor, and so had the benefit and privilege of the maxim, *quod non tenetur placitare super*

hæreditate paterna, as was clear from the decision marked by Dirleton, Hartshlaw *contra* Hartwoodburn, No 139. p. 9009, and Sir George M'Kenzie's observations on the 42d act 1587. *Answered*, No minor ever hitherto pleaded this privilege to extend to molestations in possessory actions, even though accumulated in one libel with a declarator of property; and the decision does not meet this case. For the brocard founded on, has as many exceptions nearly as the cases wherein it holds; amongst which this is one, that *in judicio finium regundorum*, where the question is about meiths and marches, it takes no place. Next, there is a plain decreet-arbitral in the case which is *finis litium*, fixing march-stones, and adjudging this bog to the pursuer's lands. *Replied*, That this was to engage a poor minor to produce his charter-chest, and endanger the loss of his property which law had secured him against; and he was not bound to debate the import of the decreet-arbitral, though it was plainly *ultra vires compromissi*, the marches not being submitted; and all the country about, knew that the said bog was always a commonty to both lands, though Mr Simon would now most iniquously appropriate it to himself. It occurred to the Lords, that there was another exception from the rule pleaded on, viz. if the minor's predecessors were denuded of the right in his own lifetime; for then *non placitabat de hæreditate paterna*; and here Allangrange positively asserted that Kilcowie the defender's grandfather was denuded of this bog in 1677, by the decreet-arbitral; therefore they remitted to the Ordinary to hear parties how far his predecessors were denuded, before they would oblige him to debate in the declarator of property.

Fal. Dic. v. 1. p. 589. Fountainball, v. 2. p. 580.

* * * Forbes reports this case :

1710. July 25.—UPON a submission made by Alexander M'Kenzie of Kilcowie heritor of the barony of Allans, the bog of Drummore being decerned by a decreet-arbitral in *anno* 1677 to be a part of these lands; and he having in the year 1678, disposed to Mr Roderick M'Kenzie advocatè the barony of Allans with the pertinents, and delivered to him the writs and evidents upon inventory, comprehending the decreet-arbitral; Mr Simon M'Kenzie, who derives right to the barony of Allans by progress from Mr Roderick, pursued a declarator of property and molestation, against Donald M'Kenzie, grand-child and heir to the said Alexander M'Kenzie, and his tutor, for declaring that the bog of Drummore belongs to the pursuer, and that he, his tenants and servants ought not to be molested in the possession thereof.

Alleged for the defender; He is content to debate with the pursuer, if he will restrict his libel to a molestation. But he ought to be assolizied from the conclusion of declarator of property; because, his grandfather died in the possession of the bog in controversy, and himself is minor, 'qui non tenetur placitare super hæreditate paterna.'

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