No 29. *citare super hæreditate paterna*, and am not obliged to produce the tailzie; but in due time it shall be made appear, that it was seen and read as it stands, bearing a redeemable clause, before the year 1696, at which time it is pretended this alteration was made. But law secures me not to expose my rights till I be of age to understand and defend them; and so it has been decided, 31st January 1665, Kello *contra* Pringle and Wedderburn, No 11. p. 9063. *Answered*, That brocard suffers many exceptions; for, as it does not defend against the superior's casualties, so neither against the fraud, dole, and falsehood of his predecessor; and here being a plain delinquency, it can never shroud him from production of this deed, seeing the mean of probation may perish ere he come to age.—THE LORDS found the brocard took not place here against the exhibition, and ordained him to produce.

*Fol. Dic. v. 1. p. 589. Fountainhall, v. 2. p. 562.*

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1714. *February* 10.

THOMAS GORDON of Earlstoun *against* MARGARET GIBSON.

No 30. IN an exhibition of a wadset right, at the instance of Thomas Gordon of Earlstoun against Margaret Gibson, the LORDS repelled the defence of *minor non tenetur placitare de hæreditate paterna*; an exhibition having no effect, either as to the carrying away, or the least impairing, the minor's heritage.

*Forbes, MS. p. 25.*

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1797. *June* 29.

CHRISTIAN M'FARLANE *against* SOPHIA HUME, and her Tutors.

No 31.
The heir of an adjudger found not entitled to plead this privilege against the debtor.

DAVID STEWART, a creditor of Daniel M'Farlane of Letter, after his death raised a process of constitution against his daughters, who were minors; and their tutor *ad litem* having given in renunciations for them, Stewart, in 1742, adjudged the lands, entered into possession, and was afterwards, in 1758, infeft upon a charter from the superior.

David Stewart, at his death, disponed the lands to his brother Dr Hume Stewart, who obtained a charter of resignation, on which infeftment followed. By this charter the lands were destined to heirs-male.

Dr Stewart was succeeded by his son, who did not make up titles; but, in his marriage-contract, settled the lands upon the heirs of the marriage. The contract contained neither procuratory nor precept.

The tutors of Sophia Hume, the only child of the marriage, upon the death of her father, executed a general service, and led an adjudication in implement against the heirs-male.

No 31.

During Miss Hume's minority, Christian M'Farlane, one of the daughters of Daniel M'Farlane, brought a process of exhibition, and a reduction, in which she averred, that David Stewart, when acting as pro-tutor to her and her sister, had adjudged the lands for fictitious claims; and therefore concluded, that the adjudication, and the subsequent titles, should be set aside.

Miss Hume's tutors produced Dr Stewart's charter and infeftment, and pleaded the maxim, *Minor non tenetur placitare super hæreditate paterna.*

THE LORD ORDINARY ordered the party to argue, in memorials to the Court, 'imo, Whether the lands of Letter, which once belonged to the pursuer's father, and are now held by the defender under the titles produced, are, in her person, such a *hæreditas paterna* as properly falls within the rule or brocard founded on by her; 2do, Whether the nature of the present action, said to be a challenge of the defender's right upon the alleged fraud, not of the defender's father or grandfather, but of her granduncle, their author, is sufficient to render it an exception from the application of the foresaid rule; and, 3tio, Supposing the defender entitled to the benefit of the rule in this case, whether the same must operate as a total bar to all further procedure in this action during the defender's minority; or if the pursuer may still be entitled to a further production of writs, or be allowed, *in hoc statu*, a proof by witnesses of relevant allegations, or before answer, to be kept *in retentis* till the expiry of the defender's minority.'

The defenders, *pleaded*; 1mo, Miss Hume is heir of her father, and through him of her grandfather, in whom the subject was feudally vested; it is therefore *hæreditas paterna* in her person.

Nor does it signify that her father was not infeft. It would have been enough to make room for the application of the maxim, *Minor non tenetur, &c.* that he had been able to connect himself even with a stranger who was infeft, *see* No 17. p. 9070.

It is of as little consequence that Miss Hume led an adjudication in implement. This was merely the form of completing her titles, and she represents her father just as much as if she had connected herself with him by a special service.

2do, The object of the maxim is to prevent minors from being deprived of their paternal inheritance, in consequence of their tutor's being ignorant of the proper defences to be stated for them; Stair, B. 1. T. 6. § 45.; and there is even more occasion for it in a case like the present, which requires an investigation into facts, happening at a remote period, than where the question turns upon a point of law; Gordon, No 51.p. 9100.; Bankt. B. 1. Tit. 7. § 115.

3tio, The maxim, from its object, must operate as a bar to all proceedings, which are not necessary to establish that the subject is *hæreditas paterna*; Bankt. v. 1. p. 190. § 114.; Ersk. B. 1. Tit. 7. § 46.

No 31.

*Answered*; 1*mo*, The maxim founded on is now considered more a matter of antiquity than of practice; Pitmedden's MS. in the Advocate's library *; and if not wholly in desuetude, it ought to receive the strictest interpretation, as it is unreasonable that a minor should be allowed to retain possession without investigation, where his right is disputed. It applies only where the defender holds the subject by special service as heir of the last investiture; *see* No 11. p. 9063.; whereas, the right of the defender depends on a personal deed, executed by a person not infeft, by which he altered the destination, and his daughter holds the estate in consequence of an adjudication from the heirs-male; Stair, B. 1. T. 6. § 45.; 31st January 1665, Kello against Pringle, No 11. p. 9063.; 27th November 1678, Guthrie against Guthrie, No 16. p. 9069.; Ersk. B. 1. T. 7. § 46.

2*do*, The maxim does not apply where the right of the ancestor is challenged on the head of fraud; Reg. Maj. lib. 3. c. 32. § 15.; Stair, B. 1. T. 6. § 45.; Erskine, B. 1. T. 7. § 45. and 46. 27th December 1711, Crawford against Crawford, No 53. p. 9102.; 4th February 1685, Gordon against Farquhar, No 51. p. 9100. And as Dr Stewart represented David Stewart, the case is the same as if fraud had been alleged on the part of the former.

3*tio*, If the maxim did apply, it would not preclude an immediate full production, nor a proof to lie *in retentis* till the minor be of age, as otherwise the necessary evidence might be wholly lost; Stair, B. 1. T. 6. § 45.; Ersk. B. 1. T. 7. § 45.; Dict. Sect. 2. and 3. *h. t.*

*Observed* on the Bench; The Court have had no occasion, in the present age, to consider the application of the maxim here founded on; but it was at no time understood to protect a minor from the necessity of implementing the deeds of his ancestor, whether arising *ex contractu* or *ex delicto*. In this case, the title of the defender depends on an adjudication, in which the right of the debtor has not been foreclosed by a declarator of expiration of the legal, and the question resolves into a count and reckoning.

THE LORDS unanimously repelled the defences.

Lord Ordinary, *Eskgrove*. Act. *W. Erskine, Baird*. Alt. *Rolland*. Clerk, *Colquhoun*.

*D. D.* *Fac. Col. No* 41. *p.* 95.

* This MS. contains the decisions by Sinclair, Maitland, and Colvil.