

No 12.

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

upon this probation, but that there being yet no litiscontestation in the cause, neither can be, through the defender's minority; and this probation being but before answer to remain *in retentis*, and taken by commission, the defender not being present at the examination, and the matter being very ancient, fifty years ago, the Lords ought to give the defender the sole or conjunct probation of this allegiance, viz. That he offered him to prove, that during the years of the legal, the lands were possessed by several persons, by dispositions or tacks, both under reversion, for certain sums of money due by the said Margaret Nisbet, which rights were granted by her, and were now produced by the defender, which, with the said rights produced, is much more pregnant than the pursuer's probation, by some inconsiderable country people, without any adminicle in writ. It was *answered* for the pursuer, That the allegiance was no way relevant, being contrary to her libel, and founded *super jure tertii*; for this defender hath no interest in the wadset rights, nor doth any person appear for them, or own them; and if this were sustained, it would afford a current evasion in all kind of pursuits upon intromission, by offering still to prove that the defender did not, but that a third party did intromit; and therefore the Lords have never sustained such a defence upon the defender's sole probation, and in no case have allowed a conjunct probation. It was *answered*, That in a matter so old, and where the sole probation of a thing of so great moment was to be by witnesses, the Lords *ex officio* might examine witnesses for either party, and have oft so done; especially the same ought to be done here, where the probation is by inconsiderable persons, and so suspect and exorbitant, proving Kinneir's intromission to be before he had any right, and the quantities to be much higher than the written tack of the lands produced.

THE LORDS found that they could not admit a probation for the defender, upon the possession of any third party, from whom he derived no right, but that upon the consideration alleged, they would sustain no probation for the pursuer, but that which were clear and pregnant, and allowed the defender to give in any objections against the hability of the witnesses; yet having considered their testimonies, they found that they did not prove Kinneir's intromission to be before his right, but that after his assignation he had removed and dispossessed Margaret Nisbet, and entered in the natural possession and labouring himself, which is a fact more palpable than the lifting of duties from tenants.

Stair, v. I. p. 703.

* * * Gosford reports this case :

1671. *January 6.*—In a reduction of a comprising, led at the instance of Mr Alexander Irving, in *anno 1623*, to which Kinneir's father was assigned, upon this reason, That it was satisfied within the legal, by intromission, in so far as Kinneir had entered to the possession in *anno 1625*, and had possessed the

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lands of Paxton ever since, the rents whereof did far more than satisfy the sums contained in the comprising; it was *answered* for the defender, That he was a minor 'et non tenetur placitare super hæreditate paterna,' the legal being expired before the father died. THE LORDS did sustain the answer, and continued the discussing of the reason, until the minor's majority; but, in respect that it was 'res antiqua,' and that the entry to the possession, and the continuance thereof could not be proven but by witnesses who were very old. They ordained that their depositions should be taken to lie 'in retentis;' after which the defenders did *allege*, That the reason of reduction could not be sustained, because they offered them to prove, that albeit the witnesses had deponed that the entry to their possession was in *anno* 1625, the pursuer's mother (to whom she was heir), with her husband, had granted tacks to other persons of the same lands, which were then standing; as likewise, the Laird of Wedderburn, who was superior, after obtaining of a decreet of improbation, had granted new rights of the said lands to other persons, who, by virtue thereof, did possess the same in *anno* 1625, and several years thereafter, and therefore craved that they being so pregnant, might have the sole probation, at least a conjunct probation. THE LORDS did repel the allegiance, as being contrary to the libel, and 'super jure tertii;' and, in respect that the compriser's entry was clearly proven, they refused a conjunct probation, it not having been craved till after the pursuer's probation was closed.

Gosford, MS. No 315. p. 140.

1676. July 8.

WILLIAM YEOMAN, Advocate, *against* the RELICT and CHILDREN of
MR PATRICK OLIPHANT.

No 15.

An heir who has right to the estate, by *disposition* from his de-funct predecessor, not entitled to the privilege. See Angus against Ker, No 3. p. 9056

In a reduction at the said William's instance, against the said relict and children, of their right and disposition, it was *alleged* for the Children, That they were minors 'et non tenentur placitare super hæreditate paterna;' and for the Relict, it was *alleged*, That her right being a liferent in the body of that same disposition of fee made to the children; and, in case of eviction, she having right to pursue them, if they were not obliged to answer to the pursuit, she ought to have that same privilege. It was *replied*, That they ought to answer notwithstanding, else a decreet ought to be pronounced, because the pursuit was intended against Mr Patrick, the father, and was depending against him when he died; *2do*, The rights craved to be reduced were not 'hæreditas paterna,' the children having no right as heirs, but by a particular disposition, as likewise the mother, who was liferenter. THE LORDS did repel the defence, in respect of the reply, and found that where the action was intended and depending against a predecessor, it may be continued against the apparent heir,