No 14.

lands of Paxtoun 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 allegeance, 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 defunct 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 intented against Mr Patrick, the father, and was depending against him when he died; 2*do*, 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 intented and depending against a predecessor, it may be continued against the apparent heir,

or heirs served, albeit they be minors; as likewise, that apparent heirs having a right by disposition, and not as heirs served and retoured, cannot crave the privilege of 'non tenetur placitare, the subject not being 'hæreditas paterna,' and far less the liferenter, whose right is quite different, and of another nature. No 15.

Fol. Dic. v. 1. *p.* 588. *Gosford, MS. No* 876. *p.* 131.

1678. *November* 27. GUTHRIE *against* The Laird of GUTHRIE.

No 16.
The maxim *minor non tenetur placitare*, was found not competent where the minor's right was only an apprising, at his father's instance, on which his father was never infeft.

JAMES GUTHRIE having pursued reduction and improbation of the right of some lands, against the Laird of Guthrie, he did *allege* against the production, that *minor non tenetur placitare*, which was repelled, and reserved to the discussing of the reasons of reduction; and being now repeated, the pursuer *alleged* that the defender could not plead this privilege, because all he founded upon was an apprising, which is always accounted as if it were a personal right, which may be taken away by exception upon payment, satisfaction by intromission, or compensation, much more in this case where there is not so much as an infeftment alleged in the defender's father's person, and therefore he not dying in *tenemento*, his heirs cannot be disprivileged, for heretage in that maxim is understood only of that which is properly so called, being *jure soli*, but is not extended to heretable rights by destination, as heretable bonds or dispositions without infeftment.

THE LORDS repelled the defence, in respect the defunct died not *in tenemento*, for there was only alleged an apprising without infeftment; but had not the occasion to determine, whether an apprising with infeftment could plead that privilege.

Fol. Dic. v. 1. *p.* 588. *Stair, v.* 2. *p.* 647.

*** Fountainhall reports the same case:

1678. *November* 8.—THIS day the actions between Guthries and the Laird of Guthrie came to be advised. THE LORDS having first advised the action of mails and duties, and the probation of Guthrie's defence upon the possessory judgment of seven years, by virtue of a real right of a comprising standing unreduced, and the sasine and depositions of the witnesses adduced for proving thereof, "they found the allegeance sufficiently proven thereby, and therefore assoilzied the defender from the hail points of the said libel." Then the LORDS having called the reduction, the pursuer insisted on this reason, that the comprising was null, because no right was instructed in the person of him against whom the comprising was led. And as this reason was relevant, so it was also true; for by mistake they had apprised lands, whereof he had only right to dispone by virtue of a factory from one that was then out of the