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

No 16. country. But the reason was elided by this reply, that the defender Guthrie being then minor, *non tenebatur placitare super hæreditate paterna*; which was sustained to stop process, but will not defend against production in an improbation.

Fountainhall, v. 1. *p.* 19.

1683. *November* 20.

FLEEMING and KER *against* CARSTAIRS of Kilconquer.

No 17.
The privilege found to apply, although the subject was conquest in the father's person; but the minor must be served heir.

Alleged, he was minor, and so *non tenetur placitare super hæreditate paterna. Answered*, The brocard meets not, this being only conquest *in persona patris*, and so not *hæreditas paterna. 2do*, The minor was not served heir, and so could not claim the privilege. *3tio*, He not being infeft, he had not the benefit of the maxim. *Replied* to the *first*, It is enough that it is *hæreditas* in the son's person, whatever it was in the father's. To the *second*, The apparent heir may propone it. To the *third*, They had a charge against the superior, which was equivalent to an infeftment; and though it was a feudal axiom, yet the LORDS within this twelve months in a pursuit at the instance of Bruce Bishop of Dunkeld against Fletcher of Aberlady, about the patronage of that kirk, admitted this dilator that he was minor and *sic non tenebatar placitare*, though a patronage be not heretage but *jus incorporeum et spirituale et fundo annexum.* This being reported by Pitmedden, 'the LORDS repelled the first, and found the maxim held though it was conquest in the father's person; and as to the second, found he behoved to serve heir before ever he could plead this delay, but allowed him a competent time to do it in, and demurred on the third about the charge, and declared they would hear it further.'

Fol. Dic. v. 1. *p* 588. *Fountainhall, v.* 1. *p.* 243.

*** P. Falconer reports this case:

IN the action of reduction and improbation, pursued at the instance of Fleeming against Carstairs of Kilconquer of a comprising and charge against the superior thereupon, to which the defender's father had right by disposition; it was *alleged* for the defender, That he was minor, and so 'non tenetur placi-'tare super hæreditate paterna.' It was *replied* for rhe pursuer, That this was not 'hæreditas in persona patris' being only conquest by the father; *2do*, The father was not infeft: *3tio*, That the defender was not served heir to him. THE LORDS found, That the comprising was 'hæreditas paterna', although it was conquest by the father and so fell under the axiom of 'hæreditas paterna' albeit the father was not infeft, there being a charge against the superior used by his author; But the LORDS found, That the foresaid defence was not com-