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 *hereditas 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 placitare 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-

petent to be proponed by the defender, who was only apparent heir, and not served heir.

No 17.

P. Falconer, No 66. p. 43.

*** Sir P. Home also reports this case:

' CHRISTIAN FLEEMING and John Ker her husband, having pursued a reduction against John Carstairs of Kilconquer, of an apprising; *alleged* for the defender, That the lands whereof the rights are craved to be reduced, was his father's heritage, as appears by the rights, and ' non tenebatur placitare de ' hæreditate paterna.' *Answered*, That the lands cannot be understood to be the defenders father's heritage, seeing his father did not succeed to the lands, as her to any of his predecessors, but was the first that acquired the right himself; as also, any right the father had was but a personal disposition to the apprising, whereupon no infeftment had followed, and so could not be reputed heritage, so as to give the defender the benefit of the brocard in law, *non tenetur placitare*, as was decided 31st January 1665, Kello against Pringle, and the Laird of Wedderburn, No 11. p. 9063.; as also that defence is by the old law of *Regiam Majestatem*, lib. 3. cap. 32. is only competent to persons served heir in general, and not to apparent heirs, and the defender is not served heir. *Replied*, That it is to be understood *hæreditas paterna*, to which the son may succeed as heir to his father, whether it was conquest or heritage in the father's person; and whether the right was completed by infeftment or not, it was still heritage, as was decided, Pringle against Sir John Ker and the Earl of Home, No 7. p. 9059.; and Hamilton against Mathison, No 6. p. 9057.; where a minor was found to have the benefit of that statute in a reduction, albeit his father was not infeft in the subject controverted; and the practique, Kelly against Kinear, does not meet this case, seeing there was only a naked disposition; whereas, in this case, the superior was charged to infeft upon the apprising, and the benefit of that maxim is competent to apparent heirs, as well as the apparent heir, may make use of his father's rights to defend himself in the possession of the lands. THE LORDS found that the apprising craved to be reduced was *hæreditas paterna*, although it was acquired by the father, and that the superior being charged thereupon, it fell under the maxim, that *minor non tenetur placitare*, albeit the father was not infeft; but found that the defender being only apparent heir had not the benefit of that law, which was only competent to persons served heir in special to their father's.

Sir P. Home, MS. v. 1. No. 487.

*** The same case is also reported by Harcarse:

A MINOR in a reduction against him having founded his defence on the brocard ' minor non tenetur placitare,'

No 17.

It was *alleged* for the pursuer; That minors were only privileged against reduction of their father's heritage, and not against reduction of rights conquest by them. *2do*, The pursuer's father was never infeft. *3tio*, A minor who claims this privilege of being continued in possession during his minority, ought to be infeft, *Reg. Majest.* lib. 3. cap. 32. No 3. and the defender is not infeft, for should he chance to die after some years intromission, the pursuer, though prevailing in the reduction, might run the hazard of loosing these years rents, seeing the next apparent heir might pass by the minor, and evade a representation.

Answered for the defenders; *Perinde est* whether the father's lands were heritage or conquest, Hamilton *contra* Matthison, No 6. p. 9057.; Pringle *contra* Ker and Earl of Home, No 7. p. 9059.; *2do*, It appears by the said last practique, that infeftment in the defunct's person was not required to give his son, the minor, the privilege of the brocard; besides, the defender's father's right was an assignation to an adjudication whereupon a charge had followed at the cedent's instance, which must be considered as equivalent to an infeftment. *3tio*, The minor needs not to be infeft, seeing that would subject him to a representation, if not revoked *debito tempore*; and till the event of the reduction he could not know if it would be proper for him to revoke or not.

The Lords repelled the first and second allegeance made for the pursuer, in respect of the answers; but sustained the third and second, that by King William's statute, cap. 39th, the brocard 'minor non tenetur placitare' can only be proponed by minors who had real rights by infeftment, or diligences of apprising, &c. *habili modo* established in their person. Though some of the Lords were of opinion, that the offering unquestionable security for the rents *medio tempore* uplifted by the minor, might satisfy the interest of the pursuer of the reduction, that the minor might not be put to represent the defunct.

Harcarse, (Minority.) *No* 706. *p.* 199.

No 18.

1694. *November* 21. Robert Davidson *against* James Alcorn in Kelso.

This was an action for mails and duties, wherein the defender excluded him with a prior right, which made the pursuer repeat a reduction *ex capite inhibitionis*. *Answered*, I am minor, and my father died in possession, and so *non tenetur placitare*. *Replied*, That takes only place in ancient inheritances, and not in wadsets and redeemable rights, and it is not good as to the warrandice-lands. The Lords found the maxim behoved to defend him as to the principal lands whereof he was in possession, but not as to the warrandice-lands during the not eviction; and therefore refused process in the reduction as to the principal lands. See 31st January 1605, Kello, No 11. p. 9063.

Fol. Dic. v. 1. *p.* 588. *Fountainhall, v.* 1. *p.* 644.