1671. *June* 17. JOHN BOYD *against* HUGH SINCLAIR.

No. 15.

JOHN BOYD having a right to some teinds in Orkney, pursues Hugh Sinclair as intromitter therewith, who alleged absolvitor, because he had right to a tack, set to umquhile Sinclair during his life, and to his first heir after him, during his life, and nineteen years thereafter, which is not yet expired; for though the defunct's eldest son survived him, yet he was never entered heir to him, neither did he possess these teinds, and died shortly after his father; but it is not nineteen years since the second son died, whose retour is produced, as heir to his father.

The Lords found, That the eldest son surviving his father, although he never possessed, was the first heir as to the tack, and that he needed not be served heir.

Fol. Dic. v. 2. *p.* 366. *Stair, v.* 1. *p.* 735.

1675. *July* 9. HUME *against* JOHNSTON.

No. 16.
Heirs of tacksmen need not be served to enjoy a tack let to heirs.

IN a process between Hume and Johnston for removing, and mails and duties, a defence was proponed upon a tack, set to the tacksman during life, and after his decease to his first heir, which was alleged to be yet unexpired, because there was no heir served to the tacksman. It was answered, That there was no necessity to serve heir for the enjoyment of tacks, but the party who had right to be heir might bruik the same, without any service, according to ancient and unquestionable custom, and it was offered to be proven, that the tacksman was dead, and that his eldest son was also dead, who bruiked the lands after his father's death, during his life.

The Lords found, that there was no necessity of a service of the heirs of tacksmen, and therefore sustained the allegeance to instruct the expiring of the tack.

Fol. Dic. v. 2. *p.* 366. *Stair, v.* 2. *p.* 343.

1739. *February* 16. CAMPBELL *against* CUNNINGHAME.

No. 17.
Whether an heir can convey a tack without a service?

CAPTAIN Charles Campbell, purchaser of a part of the estate of Boquhan, in a sale at the instance of the apparent heir, having craved a deduction from the price effeiring to the value of the teinds, on this ground, That the defunct bankrupt had no right thereto, the alleged right being an old tack of the teinds to one of the defunct's predecessors, to which he had made up no title by service, without which it was pleaded, that though he had right to possess, he could not have conveyed, and therefore the teinds could not be sold by the present apparent heir as an estate that was in the defunct; the Lords "Found, that the defunct having been in pos-

No. 17. session of the teinds upon the tack, the right to the tack was fully established in him without a service."

Though it was said by the Lords, who were not clear about this point, that as this judgment, which supposed the heir's power to convey without service was new, it must as a consequence introduce this farther novelty, that a tack should be *in hæreditate jacente* of the apparent heir, and affectable by his creditors.

Fol. Dic. v. 2. *p.* 367. *Kilkerran, No.* 2. *p.* 508.

1754. *June* 26. SCOTT *against* BAIRD.

No. 18.
The heir in a lease may continue the possession of his predecessor without a service; but can he challenge without a service a conveyance of the lease made by the predecessor?

MATTHEW LOUDON, in possession of certain lands upon a lease from the proprietor to endure for three nineteen years, sold and disponed the same to James Baird *anno* 1725, and entered the assignee into possession. Above twenty years after, the conveyance to Baird was challenged by the representative of Matthew Loudon, as wanting some of the necessary solemnities. The answer was, that the heir in a lease may continue his predecessor's possession without a service; but cannot challenge without a service any conveyance made by his predecessor. The Lord Ordinary having sisted process until the pursuer should make up a title to the lease, by a general service as heir to Matthew Loudon, the matter was stated to the Court in a petition and answers. At advising, the question was put in abstract terms, in the following words: "When a tacksman is denuded of his possession before his death, whether his apparent heir is entitled without a service to remove the possessor?" It carried that a service was not necessary.

To judge of this decision, we must enquire into the reason why a service, necessary to convey heritable rights from the dead to the living, is not necessary to convey a lease, though an heritable right. An apparent heir is, with regard to all subjects, intitled to continue the possession of his ancestor. But as infeftment is not required in a lease, and that possession completes the right, the heir, by entering into possession, has a complete right, and therefore can have no use for a service. But where the ancestor himself is denuded of his lease, and is not in possession when he dies, the heir cannot otherwise claim the lease but by a service; because his privilege is only to continue the possession of his ancestor, and not to turn another out of possession who has in appearance a good title.

According to this decision it must be maintained, that the right to a lease transmits to the representative *ipso facto*, and that the rule *quod mortuus sasit vivum* holds in this case. This accordingly was maintained by the President and Drummore; who gave their opinion, that an apparent heir is liable for the rent unless he repudiate. In answer to this I observed, that the doctrine of repudiation, borrowed from the Roman law with regard to *sui hæredes*, was afterwards altered by the Romans, and that at present there is no example of it any where in Europe; that according to this doctrine, if an apparent heir should live seven years without either