No 28.

The Lords considered, that where a minor serves heir, he will be reponed without the necessity of proving lesion; for he may repudiate the *hæreditas quamvis lucrosa*, says the law, and the minor not renouncing cannot be in a worse case than if he had served: Nor was it thought anyways contrary to equity to restore him in this case; as it was a lesion to him to be deprived of the rise of the intermediate rents, or to have them withdrawn by his father's creditors, who by law could not affect them, from his own creditors who could affect them.

The Lords however sustained the adjudications as decrees *cognitionis causa*; for so the practice was before the act 1695, when the service to the predecessor last infeft did not subject the person serving to the debts of the intermediate heir, who had not made up his titles; for, in that case, where a minor was restored against a decree of constitution and adjudication following thereon, the adjudication was notwithstanding in practice held good as a decree *cognitionis causa*, in which the act 1695 can make no difference.

N. B. This judgment was, upon an appeal, reversed by the House of Peers, and the interlocutor of the Ordinary affirmed; but whether upon the speciality of this case that adjudication had been obtained, or upon a more general consideration, is not certainly known.

Kilkerran, (PASSIVE TITLE.) *No* 10. *p.* 372.

1752. *June* 13.

JOHN LOWDON, and other Creditors of EDWARD MURRAY of Drumstenchill, *against* GIDEON MURRAY, Tenant in Drumstenchill.

No 29.
A tack granted by an apparent heir, though three years in possession, was found not effectual against an adjudger.

ALEXANDER MURRAY, being in possession of the lands of Drumstenchill, as apparent heir to his father Edward, set in tack a part of these lands to Gideon Murray for the space of 19 years, at the same rent they had formerly paid.

The creditors of the said Edward Murray having adjudged the said lands from Alexander, as charged to enter heir to his father John Lowdon, one of the creditors brought a sale of the estate, and together therewith a reduction and improbation, as is usual, in order to force production of all rights affecting the estate.

The summons of reduction and improbation was executed against Gideon Murray the tenant, who appeared and produced his tack; against which the creditors *objected*, that it was null, being granted by an apparent heir. The Lord Ordinary, 2d July 1751, 'sustained the reason of reduction of the tack, as flowing *a non habente potestatem*.'

Long after the days of reclaiming were over, Gideon Murray applied to the Ordinary, and afterwards by petition to the whole Lords, setting forth, that the proceedings in this process against him were irregular; for he was properly no

party in the reduction, nor was the tack called for in the summons, or any ground of reduction thereof libelled, the process being intended only to force creditors to produce their rights and diligences, that the ranking might go on: The summons was by mistake executed against him, and he ignorantly produced his tack; but as the certification would not have struck against the tack had he not produced it, so neither could it be reduced in this process when produced. And this being the case, he insisted that he was not forclosed by the lapse of the reclaiming days, because the whole proceedings were void and null, and therefore the interlocutor ought to be recalled. No 29.

2*dly*, Although there were a proper process of reduction brought, yet John Lowdon and the other creditors could not insist therein, because they are not infeft; and creditors not infeft cannot challenge a tacksman whose right is real by possession.

3*dly*, The tack is not null, as flowing *a non habente*; for it was set by an apparent heir, who, as he was entitled to continue his predecessor's possession, of course was entitled to substitute another person in his own place, by granting him a tack of the lands; for this, amongst other reasons, that the lands might not lie waste. At least, seeing the apparent heir was more than three years in possession, this tack must be valid by act 24th, Parl. 1695.

Answered for John Lowdon and the other creditors; That, in a process of this nature, creditors are entitled to object to any interest founded on in competition with them, and to remove all the incumbrances that stand in the way of their payment, as the tack in question does; for though the lands may be set for the old rent, yet as the tack is for the space of 19 years, it must occasion the lands to sell at a lower price. And supposing that the certification would not have struck against the tack if not produced, yet seeing the tacksman compeared with his tack, and founded upon it, it surely was competent for the creditors to object to the validity of the tack; his own acting subjected himself to a trial of his title; and as he, no doubt, expected to avail himself of the judgment had it been in his favour, so of course it follows, that he cannot now complain of the incompetency of the process when judgment has gone against him.

With respect to the objection to the pursuers title to reduce, because they are not infeft,

Answered, That as the tacksman *provocavit ad judicium* by insisting on a preference in virtue of his tack, and thereby gave rise to their objecting, he must stand or fall by the judgment given.

And as to the power of an apparent heir to set tacks, it is *tritissimi juris*, that he has no such power, having no right in himself further than to continue his predecessor's possession; and though a tack, set by an apparent heir three years in possession, might be good against a subsequent heir upon the act 1695, yet it cannot avail the tacksman in a question with creditors, or with a singular successor.

No 29. But it is needless to insist further on these points; for, as the days for reclaiming were run long before the defender applied against the Lord Ordinary's interlocutor, the Court cannot now consider the pursuer's title, nor enter into the merits of the reasons of reduction.

'THE LORDS were of opinion, that, had the tack not been produced, the certification in the reduction and improbation would not have struck against it; but the Lords, in regard of the production of the tack, found the tack void and null; and therefore adhered to the Lord Ordinary's interlocutor.'

Act. *Ro. Pringle.* Alt. *Jo. Dalrymple.* Clerk, *Kirkpatrick.*
B. *Fol. Dic. v.* 3. *p.* 258. *Fac. Col. No* 14. *p.* 28.

*** Kilkerran reports the same case:

'THE Creditors of Murray of Drumstinchal having, upon the title of their adjudications, pursued a sale of the estate, they, as usual, insisted in a concomitant process of reduction and improbation; in which Gideon Murray, a tenant of a part of the said estate, having produced the tack by which he possessed, it was thereto objected, that it was granted by an apparent heir, and therefore void; which the Ordinary 'sustained, and reduced the tack.'

Against this interlocutor, the tenant reclaimed on this ground, that there was no proper process in Court, in which this tack could be reduced, as tenants are not obliged to produce their tacks in such processes of improbation; and it ought not to make any difference, that, in this case, the tenant had ignorantly produced his tack, which he was not obliged to have produced.

And so far the Lords were of opinion, that he had no occasion to produce his tack; but in respect he had produced it, 'adhered:' And so the interlocutor was expressed, that a general improbation attending a sale might not be thought to extend to tacks.

The tenant again reclaimed, on the following grounds, *1mo*, That as his tack, clothed with possession, was a real right, it could not be reduced at the instance of the pursuers of the sale, who were only adjudgers not infeft. *2do*, That a tack granted by an apparent heir, who had been three years in possession, which was the present case, being an onerous deed, was effectual upon the act 1695.

THE LORDS 'refused the bill without answers.' It is *triti juris* that an adjudication without infeftment, when used as the title in a ranking and sale, will be sustained even to reduce an infeftment. And as to the argument from the act 1695, *1st*, Though a tack by an apparent heir, three years in possession, should be good against another heir passing by, it would not follow that it would be good against an adjudger; there is no consequence from the one to the other, as in the one case there is an act of Parliament, and not in the other. *2dly*, It was even thought, that a tack set by an apparent heir would not be good against

a subsequent heir passing by, as that heir is only made liable to the extent of the value of the subject, which shows that it concerned only *debita*, or deeds that were resolvable into *debita*, and therefore there was no argument from the case, *e. g.* of an heritable bond to a tack. No 29.

Kilkerran, (HEIR APPARENT.) *No* 2. *p.* 238.

1757. *December* 15. THOMAS PATON *against* JOHN MACINTOSH.

No 30.
An apparent heir cannot remove tenants.

THE Sheriff of Angus having decerned in a removing at the instance of John Macintosh, an apparent heir, against Thomas Paton; Paton suspended, on this ground, that an apparent heir could not sue in a removing; and quoted a late case, Robert Boyd of Penkill against Macgarva,* which had been the subject of Lord Chesterhall's report, when upon his trials, in which the Court had unanimously found so.

'THE LORDS suspended the letters.' *See* REMOVING.

For Charger, *Mackintosh*. For Suspender, *J. Dalrymple*.

J. D. *Fol. Dic. v.* 3. *p.* 258. *Fac. Col. No* 69. *p.* 118.

1758. *July* 4. JAMES BURNS *against* ARCHIBALD PICKENS.

No 31.
An onerous purchase from an apparent heir three years in possesion, cannot be defeated by an adjudication upon a gratuitous bond of a second apparent heir, though deduced for behoof of the gratuitous creditor in the bond, and not of the second apparent heir.

JAMES KNOX, when apparent heir to his brother John, sold several subjects in which John had been infeft, but in which he himself was not infeft. He lived more than three years after the sales so made by him. One of these subjects came into the hands of Archibald Pickens.

George Knox, the brother of James, granted a gratuitous bond to James Burns, to be the foundation of an adjudication of these subjects, for the behoof of Burns; and accordingly Burns obtained adjudication against George, as charged to enter heir to his father John in these subjects; and upon that title brought a reduction of the above sales against the several possessors; and among others against Pickens.

The ground of the reduction was, that the sales had been made by an apparent heir; and therefore flowed *a non habente potestatem*. The defence for Pickens was, that as James Knox, the apparent heir, had been three years in possession, George Knox, the next apparent heir of James, was therefore bound by his onerous deeds; and Burns, on a gratuitous bond from George, could not quarrel those sales which George himself could not quarrel.

The abstract question came therefore to be, whether an onerous purchase from an apparent heir who had been three years in possession, can be defeated by an adjudication upon a gratuitous bond of a subsequent apparent heir, de-

* Examine General List of Names.