No 19. creditor on the estate purchased, a certain sum, upon his granting a conveyance of his debts. One of these debts was an adjudication, led by a third party, which had been paid by this creditor, who, in place of taking a conveyance, had granted a discharge. The adjudication, grounds thereof, and discharge having been lost, the creditor was ordained to raise an improbation of the adjudication, in name of the purchaser, to disburden the estate thereof.

In the year 1740, Belnain adjudged the lands of Shian for that sum, and charged the superior; but no infeftment followed.

Macdonell of Glengary paid the debt for Shian; but, instead of a conveyance being given to him to the debt and adjudication, a discharge was given by Belnain to Shian; and Shian granted an heritable bond to Glengary, in which, among others, this sum was comprehended.

In the year 1751, Shian sold his estate to Macpherson of Killichuntly; at the same time, by contract of agreement, Killichuntly bound himself to pay to Glengary a certain sum, upon Glengary his granting to Killichuntly a sufficient conveyance of the said debts.

Glengary pursued for the sum; Killichuntly refused to pay till Shian's bill to the deceased Belnain, and the adjudication, were conveyed to him, in terms of his obligation, which did not bind him till he had a conveyance of the debts.

The bill, and discharge, and adjudication, had all been lost; and Belnain's son, not entering heir to his father, refused to grant a conveyance of the adjudication, lest he should involve himself in a passive title; but Glengary offered caution to Killichuntly, that the bill or adjudication should not affect the estate: Killichuntly *answered*, That caution would not protect the estate against an expired legal.

The precise meaning of parties, as to the necessity of the conveyance in question, was not clear from the terms of the agreement; neither was a parole proof offered, with precision to fix it.

Observed on the Bench, That Killichuntly was in no danger from the expired legal, as no infeftment had followed on the adjudication; his danger, too, was the less, especially after so long delay.

But it being likewise *observed*, That the charge against the superior might be considered as equal to an inhibition, and thereby render the adjudication effectual even against a purchaser; the LORDS took a middle course, and

'ORDAINED Glengary to raise an improbation, in name of Killichuntly, against the adjudication in question; and, in the mean time, ordained Killichuntly to pay the annualrents of the debt to the pursuer.'

For Glengary, *Lockhart*, *J. Dalrymple*. For Killichuntly, *Macdowal*, *Hamilton Gordon*. Clerk, *Forbes*.

J. D. *Fac. Coll. No* 110. *p.* 161.

No 20. An heir of provision, who succeeded as nearest

1756. *June* 16. JOHN M'KINNON *against* CHARLES M'KINNON.

NEIL M'KINNON had, in the year 1731, disponed the estate of M'Kinnon to John M'Kinnon younger, and the heirs-male of his body; whom failing, to the

heirs-male to be procreated of the body of John M'Kinnon elder; whom failing, to John M'Kinnon tacksman of Messinish.

No 20. heir at the time the succession opened, was obliged to denude on the existence of a nearer heir, though the entail contained no denuding clause in that event.

A few years after, John M'Kinnon younger died, but without heirs-male of his body; and at that time there were no heirs-male of the body of John M'Kinnon elder; for which reason John M'Kinnon tacksman of Messinish served himself heir to John M'Kinnon younger, and took up the estate.

After this, in the year 1753, John M'Kinnon elder had a son named Charles.

The tutors of Charles brought an action against John tacksman of Messinish, to denude of the estate in favour of Charles.

' *Pleaded* for John of Messinish; Ever since the decision Lord Mountstewart against Sir James M'Kenzie, 2d January 1708, *voce* SUCCESSION, it had been a point fixed in the law of Scotland, that the nearest heir to the deceased at the time might serve heir to him, notwithstanding the possibility of a nearer one; and in consequence of that it follows, that as the entering heir is a *modus acquirendi dominii*, it must be perpetual in its effects, and no contingency happening afterwards will overturn it.

Answered for Charles; By the disposition, the estate was plainly to be in the heir-male of the body of John the elder, upon the failure of heirs-male of the body of John the younger; but as, when this last event happened, the law, to avoid the inconveniency of leaving the fee *in pendenti*, had allowed it to be vested in the nearest heir for the time, so, when a nearer, the true heir, appeared, the inconveniency of leaving the fee *in pendenti* ceased, and the original disposition was enabled to have its effect. *Vide* decision 13th November 1707, George M'Kenzie against Lord Mountstewart, *voce* SUCCESSION; and Corehouse against Wier, cited in Bruce against Melville, 22d Feb. 1677, *voce* SUCCESSION, and Stair, B. 3. T. 5. § 50.

' THE LORDS found, That the pursuer has right to the estate of M'Kinnon from the time of his birth; and that the defender is obliged to denude thereof in his favour.'

Reporter, *Justice-Clerk*. Act. *Ferguson*. Alt. *Lockhart*.

J. D. *Fac. Col. No* 204. *p.* 302.

*** Lord Kames reports this case:

IN the memorable case M'Kenzie *contra* Lord Mountstewart, abridged), *See* SYNOPSIS.) under the title SUCCESSION, it was found in the *first* place, That the heir in existence when the succession opens is entitled to enter, notwithstanding a nearer in hope; and in the *next* place, That the heir thus served is bound to denude in favour of the nearest heir when he exists. This last was again found in the present cause; and the reasoning follows: To clear the case, a preliminary question was stated, namely, in a destination of succession what is precisely intended by the clause *quibus deficientibus*. Is the person substituted in that event entitled to enter when there is no nearer heir in existence; or must he

No 20.

have patience till the whole persons called before him be exhausted? The latter is no doubt the natural construction; for a man must be whimsical who would chuse to have the succession to his estate governed by chance. A man, for example, dies leaving a daughter born, and a son *in utero*. He certainly intends not that the daughter in this case should succeed more than if he had survived the birth of his son. According to this construction, there is no place for a substitute while there is a nearer in hope, though not existing. And the same rule, founded on the same presumption, obtains also in successions *ab intestato*. This rule, however, must yield to the constitution of the feudal law. A superior is entitled to have a vassal, and if none offer, he is entitled to have back his land. Hence it is, that with a view to the superior, and not the point of right, the next heir in existence when the succession opens, is entitled to serve. But then, he can be considered in no other light than as a fiduciary heir, holding the estate for behoof of the nearer heir. Upon the principles of the feudal law, he is entitled to the rents for his service while he acts as vassal; but he is not proprietor in any view so as to have the power of alienation or of contracting debt. For he is in effect but a trustee; and in that character he is bound to surrender the estate to the nearer heir. See SUCCESSION.

Sel. Dec. No 108. *p.* 153.

1758. *January* 27.
KING'S COLLEGE of Aberdeen *against* LORD FALCONER of Halkerton and Others.

No 21.
Heritors subjected to parsonage teind, are not bound to carry it to the titular.

LORD HALKERTON and other heritors of the parish of Marykirk, being charged to make payment to the King's College of Aberdeen, titulars of the teinds of that parish of certain quantities of teind-corn, the College *insisted*, That the heritors were bound to make their tenants transport the corn to any place at the option of the titulars, provided it be at no greater distance than the tenants by tack or custom are bound to transport the farm-corn payable to their landlords. The heritors having the victual ready to be delivered upon the ground, but refusing any carriage, the matter was brought before the Court of Session. The point of favour was chiefly *insisted* on for the chargers, That it would be a small matter to the heritors to carry their teind-corn to the next port, but great charge and trouble to the College. The heritors, on the other hand, *contended*, That if this claim were well-founded, they themselves must be at the expense of carriage, their tenants not being bound to carry any corn but what belonged to their landlords. They observed, that there is no difference betwixt payment of money and payment of corn: A debtor by a bond of borrowed money, wanting to make payment, must indeed carry the money to the creditor; but if the creditor demand payment, he must apply to the debtor, and take the money where the debtor resides. The case is the same in the payment of corn. If the heritors want to get free of the teind corn, they must carry it to Aber-