1748. *November* 22.

JAMES SUTHERLAND apparent Heir of Kinminity *against* His Father's CREDITORS.

No 28.
A debtor died in apparency, and decrees of constitution and adjudication were deduced againſt his infant ſon, charged to enter heir, without renouncing. This diligence found only to affect land to which the debtor had titles established in his person.

ALEXANDER SUTHERLAND late of Kinminity, after contracting great debts upon the faith of his two estates of Clyne and Kinminity, died in the state of apparency as to the estate of Clyne. The discovery was made after his death that he was insolvent; and the creditors followed the ordinary course of processes upon the passive titles against the heir apparent; some of them having got decrees of constitution, deduced adjudications of both estates upon special charges to enter heir. Others, who proceeded afterward to execution, were met with a renunciation by the heir; which obliged them to content themselves with adjudications *cognitionis causa* of the estate of Kinminity; for they could not by that execution affect the estate of Clyne in which their debtor was never infeft.

In the name of the heir apparent, who was an infant, a reduction was brought, on the head of minority and lesion, of the decrees of constitution and adjudication taken against him. He was reponed against the personal decerniture, and *quoad* any separate estate to which his father the deceased debtor had no title. But this did not answer the purpose intended by this process, which was to possess the estate of Clyne without being liable for the father's debts; it being understood to be law, according to several late decisions, that the act 1695, providing for the debts of the heir apparent who has been three years in possession, does not subject the next heir apparent, if he only possess without making up titles. And therefore it was *contended* for the pursuer, That the adjudications ought to be set aside altogether *quoad* the estate of Clyne, upon this medium, that a renunciation given in *debito tempore*, must have confined the whole creditors to adjudications *cognitionis causa*, affecting the estate of Kinminity only; and that by this neglect, the infant was barred from possessing the estate of Clyne, which was his right *qua* heir apparent. 2*do*, It was *argued* for him, abstracting from the lesion, that being reponed against the decrees of constitution, these decrees are reduced in effect to be decrees of cognition; consequently that the adjudications founded upon these decrees must be considered as adjudications *cognitionis causa*, which cannot carry any subject but what was the debtor's property.

Answered to the *first*, The creditors trusted Kinminity upon the faith of his being proprietor of his whole estate; and it was betraying the trust reposed in him to prefer his heir before his creditors, by forbearing to complete his titles; and the pursuer who endeavours to take advantage of this wrong is *particeps fraudis*. The statute 1695 considers him in that light, and common sense considers him in that light. The Court cannot listen to such a reduction, when the pursuer can show no lesion but the suffering adjudications to be led upon

No 28. special charges, which deprives him of the opportunity to commit a palpable fraud; a lesion of this kind will never entitle a minor to a *restitutio in integrum*. Let us suppose that this pursuer, passing by his father, had obtained infeftment in the estate of Clyne as heir to his grandfather, which, by the act 1695, would have subjected him to his father's debts *in valorem* of the subject; Would he be entitled, upon minority and lesion, to reduce this service and infeftment, in order to possess the estate of Clyne, without acknowledging any of his father's debts? It is hardly thought this would be a pleadable point. Perhaps the Court might so far repone him as to protect him against being personally liable to the value of the subject; but he would be held fast upon the passive title introduced by the act 1695, so far as to afford real diligence against the estate; and there is equal good reason to sustain the decrees of constitution in the present case, so far as to support the adjudications already deduced. These adjudications being unexceptionable in point of form, ought not to be reduced if the pursuer cannot specify lesion, which he cannot specify; for he can never say that he suffers unjustly in being barred from an opportunity of defrauding his father's creditors.

Answered to the *second*, The diligence prosecuted by the creditors is strictly formal. A general discharge was proper to found a process of constitution; and since there was no renunciation offered in name of the infant defender, the creditors had no choice but to take decrees of constitution. After obtaining these decrees, they proceeded in the common and known method, to adjudge the estate of Clyne, as well as Kinminity, upon special charges. Thus the estate of Clyne, as well as of Kinminity, became the property of the creditors, subjected only to a redemption of ten years. Here is as good a title to the estate as is known in the law of Scotland; and the question is, How comes this estate to be torn from them without their consent, and without a crime? The minor pleads, that he was lesed by omitting to give in a renunciation, whereby he comes to be subjected to all his predecessor's debts. Extremely well so far; and the creditors, sensible of the lesion, do not oppose the reduction of these decrees, so far as the foundation of personal diligence. But then, why should not these decrees continue effectual so far as to be the foundation of real diligence against the estate, which substantially belonged to the debtor, though not formally? They must stand to have that effect in strict law, as well as in equity; for what is the purpose of a reduction upon minority and lesion, other than to restore the minor against the deed or diligence so far as prejudicial to him? The decrees, as to all other purposes, stand good in law, because there lies no objection of nullity against them. Thus an heir *cum beneficio* is *ipso jure* liable for the whole debts; and the benefit of inventory has no effect but to furnish an extrinsic exception, when payment is demanded from him *ultra valorem*. Thus *beneficium minorennitatis*, *beneficium inventarii*, and *beneficium competentiæ*, are all alike; they save the person of the debtor, but do not invalidate the debt, less or more; it remains good though it be suspended *quoad* certain effects.

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Here is no sort of incongruity in spliting a decree or a bond *quoad* the effects, and giving it the effect of real diligence, and not of personal; or *e contra*. This can be done without controversy by consent of parties; and it may be equally done by the judgment of a court.

'Found, that the decrees of constitution can have no other effect than as decrees of cognition, and therefore can only affect those lands to which the debtor had titles established in his person.'

Elchies *urged* the old practice, that decrees of constitution against infants were always turned into decrees *cognitionis causa*, when challenged on the head of minority and lesion. Arniston inveighed against the act 1695, and insisted that it was a lesion to the minor to be barred the possesion of the estate of Clyne when that possession did not subject him to any passive title. He said, it was also a lesion that the heir apparent was barred by these adjudications from contracting debt, to be made effectual upon the estate of Clyne, by the intervention of a special charge. This I could not relish; for the act 1695 certainly intended to provide for the debts of the interjected heir apparent, by subjecting the next heir *in valorem*; and it is *fraudem facere legi*, to lay hold of a defect in the words in order to disappoint the intention of the statute.

This cause was carried by appeal to the House of Lords, and was debated two full days. THE CHANCELLOR *observed*, That their notions in England about what we call correctory laws, differ widely from ours. Penal laws, he admitted, are to be strictly interpreted; but where a remedy is provided by a statute to supply a wrong or defect in common law, it was, he said, an established rule in England, that the Judges ought to supply every defect in such a statute, and to compleat the remedy intended by the legislature; that they ought to regulate their judgments by the spirit and meaning of the statute without allowing themselves to be limited by the precise words.

According to this rule of interpreting correctory laws, which appears exceedingly rational, our judges have done wrong in refusing to apply the act 1695 against an heir apparent, who, in order to evade the law, contents himself with possession without passing by and making up titles. The legislature undoubtedly intended a complete remedy for the disease; and the remedy is imperfect if the apparent heir can possess the estate without acknowledging the debts of the interjected heir apparent. According to the said rule, our judges may and ought to supply what is defective in the words of the statute, and to complete the remedy according to its spirit and intention.

The decree was reversed, and the decrees of constitution and adjudication were sustained with regard to the estate of Clyne, as well as with regard to the estate of Kinminity. It was the opinion of the house, that the heir of Kinminity was not entitled to possess the estate of Clyne without being liable for his father's debts; and therefore that he could not specify lesion, in suffering the estate of Clyne to be adjudged by his father's creditors.

The above judgment was afterwards reversed.

Rem. Dec. v. 2. *No* 97. *p.* 172.

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*** D. Falconer reports the same case:

ALEXANDER SUTHERLAND of Kinminity possest, as apparent heir to his father, the estate of Clyne for three years and more; and dying, left his son James an infant, who was pursued as representing his father; and no renunciation being given in, as he had no tutor, decreets were recovered against him, and thereon not only his father's estate of Kinminity adjudged, but the lands of Clyne also, on a charge to enter heir to his grandfather.

He thereupon insisted in a reduction of the decreets, on the head of minority, and craved to be reponed to renounce: And the Lord Ordinary, 24th December 1747, 'repelled the reasons of reduction against the decreets of constitution and adjudication, obtained at the instance of the defenders against the pursuer; by which the lands and estate of Clyne, and others in them mentioned, pertaining to his predecessors, had been adjudged by the defenders, for payment of his predecessors debts, and that in so far as concerned the said lands allenarly; but reponed the pursuer, and sustained the said reasons of reduction *quoad* the pursuer's person and separate estate, in respect of the pursuer's minority, and of his renunciation produced.'

Pleaded in a reclaiming bill, The pursuer is undoubtedly entitled to reduce the decreets of constitution, obtained against him when he was an infant undefended; and if they be taken away, the adjudications founded upon them cannot subsist: The creditors can only pretend to have them sustained as decreets of cognition, and thereon support their diligence against the estate of their debtor, but they can never be the foundation of affecting that estate, to which he made not up titles; and even if the pursuer should, by making up his titles, subject himself, in virtue of the statute 1695, to his father's debts, still this diligence could not be sustained; but it would be competent to the whole creditors to use diligence as should accord.

Answered, The pursuer ought to be reponed only in so far as he is lesed by the decreets; that is, in so far as they may be put in execution against his person, or affect any estate not descendible to him from his predecessors, and which consequently ought not to be subject to the payment of his father's debts, which the estate of Clyne, being possest more than three years, ought to be: And he ought not to be heard insisting on this as lesion, that by decreet being recovered against him, he is prevented from eluding the law, in possessing without making up titles, which whenever he shall do, he must be subject to his father's debts; and from all other lesion he is relieved by the Lord Ordinary's interlocutor.

THE LORDS found, that the decreets of constitution, no renunciation being produced, could have no other effect than as decreets *cognitionis causa*, and therefore could only affect those lands to which the debtor had a title established in his person.

N. B. This was reversed, and the Lord Ordinary's interlocutor, 24th December 1747, affirmed by the House of Peers; where the arguments pleaded upon, as is related from good authority, were not those pleaded before the Court of Session; but that to possess an estate, without making up titles, subjected the possessor, in virtue of the act 1695, to the debts of a former apparent heir who had possest for three years. No 28.

Act. *Ferguson.* Alt. *H. Home.* Clerk, *Gibson.*

D. Falconer, v. 2. *No* 13. *p.* 14.

*** The same is likewise reported by Kilkerran:

ALEXANDER SUTHERLAND of Kinminity having contracted many debts, his creditors pursued his infant heir, and obtained decrees of constitution in absence, and thereupon adjudged his two estates of Kinminity and Clyne: But as he died uninfeft in the estate of Clyne, a reduction was brought at the instance of the heir, of the adjudications, so far as concerned the estate of Clyne, on the head of minority and lesion, in so far as he had suffered himself to be decerned against personally; when, had he renounced, as his person would have been free, so notwithstanding any adjudication on a decree *cognitionis causa*, he might have possessed the estate of Clyne, in which his father had not been infeft.

The creditors gave way to the reduction, so far as might concern his person, but contended that the adjudications were effectual, so far as concerned the estate; as it is not every deed whereby a minor's patrimony is diminished that comes under the notion of lesion; but that to make lesion in the sense of law, it must proceed from an act irrational on the part of the minor, procured by the art of another, or proceeding from his own weakness: Whereas, a minor's not renouncing in such a case as this, is an honest and rational act, as he only thereby gives up an undue advantage which he might have taken of the creditors through a defect in the law, and which in a major would be laudable. Or to take the matter in another light, the restitution of a minor is founded in equity; and it cannot be equitable to restore him to a subject which in equity he ought not to have with-held from the creditors.

And accordingly the Ordinary, by his interlocutor, 'repelled the reasons of reduction of the decrees of constitution and adjudication, by which the estate and lands of Clyne have been adjudged for the predecessor's debts; but sustained the reasons of reduction *quoad* the pursuer's person, in respect of his minority and renunciation now produced.'

But the minor having reclaimed, the LORDS found, 'That the decrees of constitution could have no other effect than as decrees *cognitionis causa*; and therefore can only affect those lands to which the debtor had titles established in his person.'

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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