No 37.

is. *Item*, THE LORDS found, that the payment made to the pursuer, who had a pension of certain bolls to be paid out of the teind-sheaves libelled, did not import liberation to the defenders, who made the said payment, of the action for the rest of the avail of the said teind-sheaves, and their wrongous intromission was not totally purged thereby; but allowed only the said payment *pro tanto* in the first end of the quantity of the said teind-sheaves, seeing the pensioner had not the teind-sheaves assigned to him for payment of his pension, but the pension was only of certain bolls to be paid out of the teind-sheaves.

Fol. Dic. v. 1. *p.* 433. *Durie, p.* 363. & 369.

1633. *February* 20. LENOX *against* M'MORAN.

No 38.
A feu charter empowered the superior to poind for double the feu-duty, upon failure of payment. Found that this did not prevent him from reducing the feu in terms of the act 1597, cap. 250.

ONE Lenox pursuing M'Moran, who was minor, for reduction of a feu infeftment, granted to the defender's father, upon the act 1597, cap. 250, for not paying of the feu-duties many years bypast; and the defender *alleging*, That he was minor, *et sic de jure non tenebatur placitare super hæreditate paterna*, this exception was repelled, in respect he was convened for his father's fault, and also the minor's self was holden to answer, in respect of the act of Parliament, from which minors are not excepted. And it being further *alleged*, That in the feu-infeftment, called to be reduced, it was specially provided, and set down therein, 'That if the party failed to pay the feu-duty at the term 'appointed, then it should be leisome to the giver of the feu, and his heirs, to 'poind the land for the double of the feu-duty;' by the which conventional condition agreed upon betwixt the parties, which they had convened upon as an express penalty, set down to supply the failzie of not payment of the feu-duty, the said pursuer could never have recourse to claim any other thing, which might ensue upon that failzie, neither by the act of Parliament, nor by any other ground, but only that which was agreed to come in place of the failzie, as said is, and therefore could never be heard to reduce this right; this allegeance was repelled also, for the LORDS found, that that condition convened betwixt the parties did not derogate, but that the pursuer might seek the benefit of the act of Parliament, from the which he was not secluded by that clause of the infeftment, seeing the party might seek any of them as he pleased, specially also the act of Parliament being since the infeftment. *See* MINOR NON TENETUR, &c.

Fol. Dic. v. 1. *p.* 433. *Durie, p.* 675.

No 38.

*** Auchinleck reports the same case:

1633. *Feb.* 19.—JOHN LENOX of Kelly, superior of the lands of Kirk ——, pursues the feuers to hear and see their feus reduced for not payment of their feu-duties, resting unpaid for the space of two years, conform to the act of Parliament, which feu-duties were resting unpaid for 40 years. It was *alleged*, 1*mo*, That the defenders were minors, and a minor *non tenet placitare de hæreditate*. To which it was *answered*, That this only admits an exception (*nisi in dolo paterno*). 2*do*, This rule has no place against the said act of Parliament, wherein minors are not excepted. THE LORDS repelled the allegeance upon minority. It was further *alleged*, That seeing there was an irritant clause contained in the defender's infeftment, whereby it was provided, that in case of not payment of the feu-duty, the superior should have liberty to poind for the duties, so the most that can be craved is the double of the feu-duty. To which it was *replied*, That the pursuer has it in his option, either to pursue upon the act of Parliament, or upon the clause contained in the feuer's charter, seeing the charter is prior to the act of Parliament. THE LORDS found that the pursuer may either use the benefit of the act of Parliament or clause.

Auchinleck, MS. p. 82.

No 39.
After a decree-arbitral had been pronounced on a submission, the parties of new submitted the matter. Neither party expressly renounced the former decree, and the last submission expired before decree was pronounced. The former decree was found to be still valid.

1634. *March* 22. L. HARTWOODMIRES *against* TURNBULL.

A SUBMISSION being made betwixt these parties to arbitrators, anent either of their rights of the lands of Philiphaugh and Hadden, the Judges decerned Turnbull to dispone to Hartwoodmires, with consent of Turnbull his son, his right of the said lands heritably, and Hartwoodmires to pay therefor to Turnbull 7000 merks; whereupon Turnbull being charged, he suspends, that the decreet is null, being *ultra vires compromissi*, seeing he had submitted all his right that he had to the lands, and took no burden for his son, so that the Judges had no power to decern him to dispone with consent of his son, but his own right only. THE LORDS found this reason noways sufficient, but sustained the decreet, seeing it was a base fee, which the son had acquired from the father, which right coming to the arbitrator's knowledge, after the submission, they shewed to the suspender, that they behoved to decern him to obtain his son's consent to that disposition of the land, without which he could not have a perfect right, whereunto the suspender acquiesced, and was content therewith, and which the charger offered to prove by the declaration of the arbitrators. The LORDS sustained the same to be so proved, for they found it unjust, that the heritable right of the lands should subsist in the son's person, and that the father should receive from the charger, as the decreet-arbitral appointed,