

to the father is not debtor to his creditors : but, in the present case, Robert, by his intromitting with his father's effects, and disposing upon part thereof, thereby represented him ; and so *in tantum*, became debtor to his creditors.

The Lords preferred Robert Sutherland.

*No. 70. page 116.*

1738. *January 6.* ALEXANDER WATSON of Glentarky, *against* PATRICK DAVIDSON.

WATSON of Glentarky settled his estate upon Margaret Watson his only daughter, whom failing to the said Alexander Watson, second son to Watson of Aithernie ; he likewise nominated Aithernie, and Jean Watson his spouse, &c. to be tutors to his daughter. After his decease, the tutors took upon them the administration of the pupil's affairs ; during which, the said Jean Watson intromitted with several moveable subjects belonging to her daughter, extending to above 4000 merks ; and afterwards she married Provost Davidson in Perth, in whose house the pupil stayed for about nine years, and then died : whereupon Provost Davidson applied to Aithernie for payment of Margaret Watson's aliment, while she lived with him ; and he, as tutor to his son, who succeeded to the estate of Glentarky, in virtue of the above settlement, granted a bond of 4000 merks for the aliment. Which bond the said Alexander Watson corroborated in his minority ; but, so soon as he came to be major, he intented a reduction thereof, upon the head of minority and lesion, insisting chiefly on this ground : That no bond ought to have been given to Provost Davidson ; seeing his claim for the aliment might have been set aside by compensation, in so far as his lady was debtor to the minor in a sum exceeding the value of the aliment, and that he was liable for her intromissions.

ANSWERED for the defender,—The bond was granted for a most just and onerous debt, and to which the pursuer, as heir to Margaret Watson his predecessor, would have been liable ; consequently, he was not lesed by granting a security for the same. And, with respect to the reason of reduction insisted on, it was observed, that there was no ground of compensation competent either to the pursuer, as heir to Margaret Watson, or to her executor, on account of the provost's lady's intromission ; seeing the same was not liquid, and afforded only a ground for intending an action of count and reckoning against the provost's lady ; which could not affect or make him debtor therein, until the debt was constituted against him. Neither has any action been hitherto brought for that purpose ; of course, the omission to propone this *No* compensation, is no lesion at all.

REPLIED,—The lesion here is obvious ; seeing the pursuer had a clear and relevant objection against granting these bonds, in so far as the aliment might and ought to have been satisfied by the sums due by the tutrix and her husband, as liable for her debts. And, in all such questions as the present, the only thing inquired into, is, if the minor be lesed ; not what was the condition of the other party : yea, even where the agreement is never so fair on the other side, if the minor

be lesed, such transaction must be set aside, in so far as he is prejudged. Thus, if a minor should *adire hæreditatem damnosam*, and pay the creditors thereon, there could be no doubt, if he could show that he was hurt thereby, but that he would be restored against the same, however just the creditors' debts, to whom the payments were made: so, in the present case, however just the claim of aliment; if the minor had a good defence, which would liberate him from payment, he ought to be restored against any security therefore, which cut off his objection to it.

The Lords sustained the reason of reduction upon minority and lesion; reserving to Provost Davidson to insist against the heir or executor for the aliment, as accords.

*No. 79. page 127.*

[See Davidson against Watson, 16 Nov. 1739; and Swinton's Appeals, page 41.]

1738. February 10. Competition betwixt ROBERT CLELAND, Kirk-treasurer of Edinburgh, and Captain WILLIAM CRAWFURD.

THOMAS FISHER disposed certain houses in Edinburgh, under the reservation of his own and his wife's liferent, to Johnston, kirk-treasurer in Edinburgh, and his successors in office, for behoof of the poor in fee. After the dispositive clause this deed assigned the maills and duties of the tenements, in the following words: "And that, after the first term of Martinmas or Whitsunday next after my decease and the decease of my spouse, and the longest liver of us two allenary: surrogating and substituting them in my full right and place of the premises, under the provisions above and after mentioned allenary, and no otherwise, for now and ever; with full power to them to possess the said houses, uplift and discharge the maills and duties thereof, after the decease of me and my said spouse, and the longest liver of us two, as said is, and to do all other things that I might have done before the granting thereof."

Fisher having died without any known heirs, his relict obtained a gift of *ultimus hæres*, which she conveyed to Mr. David Crawford, her second husband: and, in April, 1736, she died. Whereupon a tripartite question arose, concerning the half-year's rent of the tenements which fell due at the Whitsunday thereafter, between the executors of the relict, the donator to the *ultimus hæres* of the husband, and the kirk-treasurer fiar of the subjects. The interest of the relict's executors was put an end to by a reference; but the claims of the other two being litigated.

It was ARGUED for the kirk-treasurer, that if the disposition had contained no assignation to the maills and duties, the right of fee behoved to carry all the rents not falling under the liferents. Nor could the restriction in the grant vary the question; for, if that was to have any influence, it behoved to lie in this, that, in so far as the donor has not granted the said subjects, they are still in him and his heirs, by an implied reservation: or, *2do*, in this, that Fisher's will appears, by the clause, to prefer some body else. As to the first of these, it is true, there is a difference between a constituted and a reserved liferenter;