No 134. law, and of itself effectual to produce an action, till it be taken out of the way by the sentence of a judge. Challenges of the first sort are proponable by exception or objection; challenges of the latter sort cannot be proponed but by a process. Hence all objections which resolve into grounds of reduction, are the subject matter of prescription; for an action of reduction is not privileged against prescription, more than an ordinary action. If a party have no occasion to reduce, the objection or exception competent to him may be effectual, at whatever distance of time the action be brought; but if a reduction be necessary, he must bring it within 40 years, otherwise give up his claim. In the present case, were it the intention of Mrs Halyburton to subject the pupil or his representatives personally, the foregoing objection proponed by them against a process for payment at her instance, would undoubtedly be sustained; but the present case is an objection against an adjudication which has stood 40 years without challenge; and such an objection, of whatever sort it be, is not competent but in the form of reduction; it is the privilege of all decrees that are *ex facie* formal, not to be voided by way of exception, nor otherways than by a proper reduction; and therefore the objection ought to be repelled, even upon the argument urged for the creditors.

'And accordingly the Lords adhered to the Ordinary's interlocutor.'

Fol. Dic. v. 4. p. 8. Rem. Dec. v. 2. No 39. p. 62.

1749. *June 9.* Seton *against* Seton.

No 135. Tutors of a minor had made up his titles to an estate, in a particular way. The minor having died in minority, the next heir brought a reduction within the *anni utiles*. The action was dismissed, as in so far as the pursuer had been prejudiced, there was another remedy.

Archibald Seton of Touch, did, in his contract of marriage in 1721, dispone his lands and barony of Touch Seton 'to himself, and the heirs-male of 'the marriage; whom failing, to the heirs-male of his body of any other mar-'riage; whom failing, to the eldest heir-female of that marriage; whom fail-'ing, to the eldest heir-female of any other marriage,'

Archibald Seton died, leaving a son and daughter, both infants; and the tutors of the son made up his titles by a service as heir-male to his father upon the old investitures.

The son having died in minority, the daughter was served heir of provision in general to her father in virtue of the destination contained in his contract of marrige, and expede a charter thereon under the Great Seal. And she being still minor, at least within the *anni utiles*, pursued a reduction against Sir Harry Seton the heir-male, of the special retour precept and infeftment in favour of her brother while minor, upon the head of minority and lesion; and the lesion condescended on was, that his tutors, in place of serving him heir of provision to the procuratory contained in the contract of marriage, had expede a service as heir-male upon the old investitures, whereby they had varied the course of succession established by his father, which the father himself could not have done in prejudice of the settlement in his contract of marriage; and

that as it was a prejudice to the last minor, her brother, to vary the succession his father had settled, so it was a prejudice to the pursuer to be put to the trouble of denuding the collateral heirs by process; not to mention that as the settlements stand, it is in the power of the creditors of the collateral heir to affect the estate, in case they should do diligence before the pursuer. No 135.

There was no compearance for the heir-male, to whom it was a matter indifferent; but the LORDS having reasoned the case among themselves, 'Refused to reduce, leaving the pursuer to make up her titles as she should be advised.'

As it was competent for the pursuer's deceased brother to make up his titles, either upon the contract of marriage, or upon the ancient investitures, he was thought to suffer no lesion by his tutors making up his titles upon the ancient investitures, and the reduction pursued could only lie upon his lesion; nor was it thought that even the pursuer was prejudiced by it, as it was still competent to her to make up her titles upon the contract of marriage by adjudication against the heir-male; for though in the case of Edgar *contra* Johnston *alias* Maxwell, to be found *voce* CONSOLIDATION, No 9. p. 3089, it was found, that the heir making up the titles upon the ancient investitures, and thereon conveying away the estate, the subsequent heir could not take up the estate upon the predecessor's contract of marriage, and thereon quarrel that conveyance; yet had there been no such conveyance made, it would have been entire for the subsequent heir to take up the estate, as in this case upon the contract of marriage.

N. B. Some were of opinion, that the charter which the pursuer had expede upon the procuratory in the contract of marriage was effectual, without necessity of any process against the heir-male; but this was a singular notion? for after the heir had made up his title on the old investiture, another infeftment could not proceed on the predecessor's resignation, and therefore an action was necessary against the heir-male.

Others of the LORDS thought, that however it was competent for the pursuer's deceased brother to have made up his titles either way, yet, being minor, his tutors had not that election, and that it was a lesion to a minor to vary the succession his father had established; but still, as the effect of the reduction would be to make him die unentered, the remedy was thought worse than the disease.

Fol. Dic. v. 4. *p.* 8. *Kilkerran*, (MINOR.) *No* 11. *p.* 352.