1804. *June* 29. GRIEVE *against* CUNNINGHAME.

No. 9.

THIS case, which is No. 176. p. 15298. having been appealed, The House of Lords, (29th June 1804,) 'ORDERED and ADJUDGED, That the cause be remitted back to the Court of Session in Scotland, generally to review the several interlocutors complained of, and to consider how far the meaning of the word '*heirs*,' as that word occurs in the several parts of the lease of the 18th January 1759, and the general contents of that lease, may affect the construction to be given in this case to the words, 'William Grieve and his heirs;' and the words, 'the heir or heirs of the said William Grieve, who shall, at 'the end of the thirty-eight years, have entered to, and shall then be in pos-'session of the said lands;' and whether any rent has been received by or for the respondent in this case, under such circumstances as ought to affect his right to succeed in the process of removing, and how far such right may be affected by any claim which the eldest son and heir of line of the said William Grieve may have to the possession of the farm, if the appellant hath not right thereto.

When the cause came back to the Court, it was remitted, in the usual manner, to the Lord Ordinary, who appointed memorials, which were reported, and an interlocutor pronounced (21st November 1805,) adhering to the interlocutors appealed from.

Adam Grieve, the eldest son, had appeared for his interest in the cause, and claimed the benefit of the lease, by likewise raising an action of reduction of the father's settlement, against his brother, and by bringing a declaratory action against Colonel Cunninghame. These two last processes were conjoined, and the Court (21st November 1805) reduced, decerned, and declared, in terms of the rescissory and declaratory conclusions of the libel against both defenders, and decerned in the removing against William Grieve.

A transaction was now entered into, by which Colonel Cunninghame, who gave his consent to the assignation by the father, in favour of the second son William, receiving him as his tenant, upon which the Court pronounced these interlocutors: In the original process (25th February 1806) it was found, 'That Adam Grieve, as the eldest son and heir-at-law of the deceased Wil-'liam Grieve, was entitled, by the terms of the lease in question, to succeed as 'tacksman on the death of his father, and that he could not be deprived of 'his said right by any deed executed by his father without consent of the land-'lord, and so far adhere to the interlocutor under review; but in respect that 'the said Colonel Cunninghame the landlord, by his petition, dated 4th De-'cember 1805, judicially declared, that he consents to William the second 'son's being continued in possession of the farm, and to his being assoilzied 'from the action brought against him; they do assoilzie him accordingly, re-

No. 9. 'serving all other questions which may arise upon the terms or effect of the 'agreement referred to in the said petition.'

And, in the conjoined actions, a similar interlocutor was pronounced, and the defenders assoilzied on the same grounds.

Fac. Coll. (APPENDIX,) p. 7.

1805. *November* 21 LOWDEN *against* ADAM.

No. 10.
In a lease to a tenant, his heirs and executors, secluding assignees and subtenants, the right of the heir-at-law cannot be defeated by the tenant.

JOHN BROWN of Glasswell, on the 16th November 1771, 'sets, and in 'tack and assedation lets to the said Andrew Adam, *his heirs and executors*, se-'cluding assignees and subtenants, all and haill,' &c. for the full space of thirty-eight years complete, and for the lifetime of the said Andrew Adam, after the expiry of the said thirty-eight years, if then in life, or in case he be dead, for the lifetime of his nearest heir or executor then in possession of the farm.

Andrew Adam entered into possession, but died, leaving an only son Andrew, who also died without issue, leaving a settlement in favour of his mother Jean Lowden, her heirs and successors, of 'all lands, tenements, tacks, 'heritable bonds, and infeftments of annualrent, and in general all heritable 'subjects whatsoever.' It contains also a particular disposition of the tack which had been granted to his father; and it also contains a general disposition in favour of Jean Lowden, of all his personal property, and nominates her his executrix, thus excluding his heir-at-law.

Jean Lowden entered into possession in 1795, on the death of her son. She died in 1802, and was succeeded by John Lowden, her brother and heir-at-law.

A summary action of removing was brought against him before the Sheriff of Forfar, at the instance of Peter Adam, as the heir-at-law of Andrew Adam, the original tacksman, with the consent of the trustees of the landlord.

The Sheriff decerned in the removing.

A bill of advocation having been passed and discussed, the Lord Ordinary (10th June 1803) repelled the reasons of advocation, and remitted the cause *simpliciter*.

The Court (12th June 1804) upon advising a petition, with answers, 'ad-'hered.'

Lowden again reclaimed, and

Pleaded: When a tack excludes *assignees*, the parties can only have intended to exclude assignees *inter vivos*; but by it the tenant cannot be supposed to prevent himself from nominating his heir in this subject, as in every other which belongs to him. The *delectus personæ* might have induced the landlord to prevent the tenant he had selected from putting in another who was not of his choice; but it is not for the landlord's interest that it should descend to