No 32.

only competent by way of reduction; some representing Doors his author being called. 2*do*, The defence is no way competent to this defender, unless he allege upon a better right than the pursuer's; for the pursuer hath done all that is requisite to instruct his declarator, by production of his infeftments, and his author's rights are presumed, and need not be instructed; and albeit the defender be called, yet he cannot quarrel the pursuer's author's right, or hinder his declator, unless he allege upon a more valid right in his own person. 3*tio*, The defence ought to be repelled, as proponed by this defender, because he represents Frazer of Phillorth his grandfather, who disponed the lands in question to Doors, and was obliged to infeft him, and did *de facto* resign in the King's hands in his favour, and so *personali objectione*, umquhile Phillorth Door's author, would be for ever excluded from objecting against Door's right which flowed from him; so neither can the defender, who represents him, object against the pursuer, who is successor in Doors' rights. The defender *answered*, That being called, albeit he had no right in his person, he might propone a defence upon a nullity in the pursuer's right, viz. that it is *a non habente potestatem*, which is very competent here by exception, this declarator being *judicium petitorium*, wherein he may well repeat this defence, without necessity to call Doors; because Doors being called in the improbation, all infeftments in his person are improven for not production, and so the reason is instantly verified; and albeit he were successor to his grandfather, (which he denies) yet he may well allege that any right flowing from his grandfather is personal and incomplete, and can be no ground of declarator of property.

"THE LORDS repelled the defences, and found it not competent to the defender to quarrel the pursuer's author's right, unless he had a better right."

Fol. Dic. v. 1. *p.* 519. *Stair, v.* 1. *p.* 128.

1668. *July* 21. JOHNSTON *against* ARNOT.

No 33.
In a competition between two apprisers, it was objected by the one, that the other, being an assignee, produced no assignation. This plea found not *jus tertii*.

MR SAMUEL JOHNSTON having comprised certain lands belonging to John Arnot, and having assigned the Laird of Collington thereto to his own behoof, infeftment was taken in Collington's name; after which, Mary Arnot, daughter to the said John, having comprised a part of the said lands, and having been many years in possession, James Johnston, son to the said Mr Samuel, being infeft upon Collington's resignation, and pursuing a reduction of the said Mary's comprising, it being *a non habente potestatem*, the father being denuded by the first comprising; there was likewise a reduction raised at the said Mary's instance, of the foresaid comprising, and infeftment following thereupon, which was repeated, by way of defence, against the pursuer's title upon two reasons; *First*, That the infeftment, taken in the name of Collington, was null, being without any warrant, the assignation and disposition made by Mr

No 33. Samuel to Collington not being produced. This reason was not sustained, because of this answer; that albeit the pursuer had nothing but a naked comprising, yet it being for a lawful debt, long prior to the bond of provision granted to the said Mary by her father, whereupon they might reduce her bond and comprising, she could not quarrel Collington's infeftment. The *second* reason was, That the comprising was for more than was due, in so far as Mr Samuel had comprised, not only for his own debt, but as assignee by Ingliston, to whom John Aiton was bound for relief of a debt paid by him, they being conjunct cautioners; whereas there being a mutual clause of relief, Ingliston could only seek his relief for the half of the sum. This reason was likewise repelled, the pursuer offering to restrict to the half of the sum, and declaring the legal reversion of the comprising not to be expired.

Gosford, MS. No 42. p. 15.

*** See Stair's report of this case, No 77. p. 958, *voce* BANKRUPT.

1669. *January* 19. EARL of ATHOL *against* ROBERTSON of STRUAN.

No 34.
An heritor being pursued for his teinds upon a tack let by a parson, it was found competent for him to plead that the tack wanted the patron's consent.

MR WALTER STUART, as parson of the kirk of Blair in Athole, whereof Tullibairn was patron, gave a tack to Tullibairn's brother of the whole teinds of the parish; which tack he (within a few days) assigned to Tullibairn, the patron himself. Tullibairn's escheat and liferent having fallen, the Viscount of Stormont obtained the gift thereof, and as donatar assigned the right of this tack to the Earl of Athole, who now pursues Robertson of Struan for the teinds of his lands for many more than 40 years from the date of the tack. The defender *alleged, first*, That the tack is null, being set for more nor three years without consent of the patron, contrary to the act of Parliament 1594. The pursuer *answered*, That the allegeance was *jus tertii* to the defender, and was only competent to the pursuer, or some deriving right from him, for the defender being liable for his whole teind, had no interest to quarrel the pursuer's tack. *2dly*, Albeit the consent of the patron be necessary, yet it is not necessary to be in the very tack itself, but a subsequent consent is sufficient; and here the patron has given a subsequent consent, in so far as within a few days after the granting of the tack, he accepted an assignation thereof himself, and did obtain a decreet of prorogation of the same. The defender *answered*, That the patron's consent being a solemnity requisite in law, behoved to be in the tack itself; and not being then adhibited, the tack of itself was null *ab initio*, and a subsequent consent, not by subscription, but by acceptance or homologation, was not sufficient, and the defender had good interest to propone the nullity, not being founded *super jure tertii*, but simply *exclusive juris agentis*, as wanting the essential solemnities, and also because the defender has paid the mini-