

SECT. XIX.

Superiority IN PENDENTI.

1772. February 14.

JAMES BRODIE of Brodie *against* SIR JOHN SINCLAIR of Murkle.

No. 90.

Title to insist
in a reduction
of a decree of
tinsel of super-
iority, and
casualties
thereof.

Upon the death of Alexander Brodie of Brodie, Lord Lyon, in 1754, leaving a son, Alexander, and a daughter, Emilia, married to the late Captain John M'Leod, younger of M'Leod, Alexander was served heir of line, and of entail, to his father. As heir of entail, he carried right to the estate of Brodie. As heir of line, he took up an unentailed estate, whereof the superiority of Wester Brimms was a part, and the property of which then belonged to Lord Murkle.

Upon the death of Alexander, last mentioned, in 1759, the succession divided. The entailed estate came to James Brodie, now of Brodie. The unentailed estate, whereof the superiority of Wester Brimms was a part, devolved upon Mrs. M'Leod, the heir of line.

The property of the said lands of Wester Brimms, belonging now to Sir John Sinclair, in virtue of a settlement executed by the late Earl of Caithness, he brought a declarator of tinsel of superiority, wherein he obtained a decree in absence against Mr. Brodie, as heir of entail, and Mrs. M'Leod, as heir of line, of the deceased Alexander Brodie, declaring, that they had lost the superiority of the said lands of Wester Brimms, and the casualties thereof, during their life-time; and decerning the said Sir John Sinclair to be infest and seised in the said lands of Wester Brimms, by the King's Majesty, to be holden of him in the usual manner, by composition, and signature in the Exchequer.

Mr. Brodie brought an action, concluding for reducing this decree, and that Sir John might still be obliged to take an entry from him, when his titles to the superiority of Wester Brimms should be completed; which, he alleged, were then *in cursu* of being done, and hitherto had been retarded from circumstances not arguing any undue *mora* on his part.

The defender, in justification of the step he had taken, stated, that it was of necessity, for that he had made repeated applications to the doers of the family of Brodie to take the proper steps to give him a valid and effectual entry in the lands; and that it was become a matter of importance to him to complete his titles to the property, in order to remove tenants, &c. And under the uncertainty, in which of them the right of apparençy of the said superiority was, he had therefore executed letters of special charge, *ad hunc effectum*, and thereon instituted the action of declarator, both against the heir of line and the heir of entail. And, in bar of

the reduction now brought at the instance of the latter, objected to his title to reduce this decree of tinsel upon his own state of the fact, viz. that though he was heir of entail of the estate of Brodie, yet he was not in the right of apparen- cy of the superiority of Wester Brimns; for that this superiority was no part of the entailed estate, but devolved upon the heir of line; and that the pursuer's only title thereto, was a right of adjudging it for payment and relief of the debts of Lord Lyon, for which the lineal succession was, *prima instantia*, liable. Hence the defender contended, that the pursuer's title is totally defective for supporting him in a reduction of the decree now under challenge, as he falls to be considered as an entire stranger to the lands of Wester Brimns, and has no better title to insist in any action respecting these lands than any other person in the kingdom.

Answered: Though the heir of line had the primary right to this superiority, yet, by her renouncing, the right thereof belongs to the pursuer, as heir of entail; for that the debts affecting the estate of Brodie were such as the heir of line was, in the first place, bound to pay, were she entered; and, therefore, when she renounced, the unentailed estate went to the pursuer for his relief, in the same manner as if he had been both heir of entail and heir of line.

Replied: The answer proceeds upon an erroneous hypothesis in point of law, viz. that, by the renunciation of the heir of line, the right belonged to the pursuer as heir of entail; whereas, it is perfectly clear, that the right opens to no person whatever by the renunciation of the heir of line, as long as the heir of line is alive. It does not even open to the next heir of line, far less to the pursuer, who is a perfect stranger *quoad* the superiority in question.

The pursuer may, indeed, be creditor in relief to the heir of line, as primarily liable for the debts with which his estate has been affected; and, in consequence thereof, it may be in his power to adjudge this superiority: But hitherto no such step has been taken by the pursuer; and, till that is done, he is in no other situation than any other mere personal creditor of the heir of line: And it is impossible to maintain, that a mere personal creditor of Mrs. M'Leod can insist in a reduction of the decree under challenge.

“ The Lords found, That Brodie has no title to insist in this action.”

Act, Cosmo Gordon.

Alt. Ro. M'Queen.

Clerk, Pringle.

Fol. Dic. v. 4. p: 315. Fac. Coll. No. 7. p. 11.