

It was *alleged* no process, because there was none called representing Dundee, whose heirs would be liable in warrandice, and especially the Lord Haltoun was not called, who is *ultimus hæres* to Dundee, neither the heir of line; for though his estate being tailzied to heirs male, there is none that could serve heir to him, yet there are persons near of blood, that are heirs of line.

THE LORDS found, that the heir of line behoved to be called, but found no necessity to call any heir of tailzie, or provision, or the donatar by the King as *ultimus hæres*; albeit these might compear for their interests, or might reduce, if they were hurt upon the matter, yet they were not such parties as the pursuer was obliged to know or call in this process.

Stair, v. 2. p. 88.

* * * Gosford reports this case.

IN a reduction of a right made by the Earl of Dundee, *ex capite inhibitionis*, wherein the party receiver of the right was called, and the heirs of line of the Earl, it was *alleged*, that all parties having interest were not cited, viz, the Lord Haltoun, who was *ultimus hæres* to the Earl, by the failure of the heirs male, in whose favours only the estate was settled by a charter under the Great Seal. It was *replied*, that the being apparent heirs of line alive who were cited, the pursuer was not obliged to know, if the estate was tailzied by a charter, or if by the failure it belonged to the donatar by a gift of *ultimus hæres*.

THE LORDS did repel the defence in respect of the reply.

Gosford, MS. p. 257.

1673. July 11. STREET and MASON *against* THE LORD TORPHICHEN.

STREET and MASON merchants at London, having reduced a disposition, granted by James Mason merchant in Edinburgh to his son an infant, as being most fraudulent, to ensnare them who were stranger merchants, and had begun, and did continue a correspondence with Mason before, and did continue the same after compearance was made for the Lord Torphichen, who had formerly obtained a reduction of the said fraudulent disposition upon debts anterior to the disposition, and who alleged that the reduction of these pursuers behoved to be with reservation and preference of his reduction, and his apprising and infestment thereon, because his debt being anterior to Mason's disposition, he had reduced upon the act of parliament 1621, being a known and ordinary remedy; and these pursuers' debts being posterior to the disposition, they had reduced the same disposition, upon an extraordinary remeid, which heretofore was never known, that dispositions should be reduced upon posterior debts, which though it be just against the son, yet should not prejudge other creditors, who rested upon the act of Parliament 1621, and did not crave any infestment from

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defender, or his author, process was not sustained, till the heirs of line of that author were called.

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An infestment of annual-rent, granted by a father after he was denuded, in favour of his son, was not sustained in a competition with other lawful diligence, the creditors having reduced the disposition as fraudulent.

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Mason the father, but were *in bona fide* to trust to a known statute, and though both parties have reduced, the effect of the reductions must be for using posterior legal diligence by apprising, and there ought no respect to be had to the base infeftment granted to these pursuers by old Mason, but they must yet apprise; for these reductions are in the same case as if either party had pursued declarator, that the lands should be burdened with their debt, in the same way as if they had been contained in the fraudulent disposition; in which case Torphichen as having first reduced and apprised would be preferred. *2do*, Seing the pursuers have reduced the son's right, and do build their security by the infeftment of annualrent granted by the father, they must make use of the father's right *cum omni jure*; and the father's liferent escheat being fallen in Torphichen's hands as superior, the same ought to be preferred to their base infeftment of annualrent, in the same way as if the son's right had never been. It was *answered* for the pursuers to the first allegiance, that albeit they have reduced upon a different *medium* from the act of Parliament 1621, yet it is not upon a new law, although the case and decision be new; for it is a common law of this and other nations, that fraudulent deeds are null as to the creditors defrauded; and albeit they had proceeded by way of declarator, to effect the son's right, it would not have been to affect it simply with the personal debt, but to affect it by pointing of the ground upon the infeftment of annualrent, which being clad with possession, is preferable to the Lord Torphichen's posterior infeftment upon his apprising. As to the second allegiance, if the son's right were reduced *simpliciter*, because the granter thereof was denuded, or it wanted an essential solemnity, the father's infeftment would revive, and his liferent fall to the superior; but these reductions being only *ad effectum*, they do not annul but burden the son's right, who remains still vassal, and not the father, and who by satisfying of these debts would purge the fraud, and make his right clear; and it is in the same case with a reduction upon inhibition, so that Torphichen the superior, having received young Mason, he remains his vassal, and his father never returns to be vassal.

THE LORDS repelled both these allegiances, and found, that after both reductions, the reducers behoved to come in according to the validity, and anteriority of these rights, viz. the pursuer's infeftment of annualrent, which was prior and clad with possession, and so was preferred to Torphichen's posterior infeftment on his apprising.

Fol. Dic. v. 2. p. 327. Stair, v. 2. p. 210.

. Gosford reports this case :

IN the forementioned action of reduction of young Mason's right, at the instance of the Lord Torphichen, and the Englishmen, as being creditors to the father, No 32. p. 4911, *voce* FRAUD; it being declared, that it should be without prejudice of the Lord Torphichen's right, as accords. It was *alleged*

for the Lord Torphichen, That old Mason being year and day at the horn, his son's right being now reduced as null, the estate must be looked upon as in the person of the father, *quo casu* his liferent escheat falling to the Lord Torphichen, as superior, by an annual rebellion, before any of the creditors' rights, he ought to be preferred to the rights of the lands during the father's lifetime. It was *answered*, That the son's right not being simply declared null, but only in so far as it was done in defraud of creditors, the right did not revive so as to put it in the person of the father; but as to him, or the superior, who, upon his resignation did infeft the son, it remains a valid right in the person of the son, so that the superior, by receiving him his vassal, can never pretend to any casualty of the superiority by the deed of the father. THE LORDS did repel the allegiance founded upon the father's escheat, who was denuded; and found, that except as to creditors, the son's infeftment could not be quarrelled, upon these reasons, That if the son should be year and day at the horn, his liferent escheat would fall to the superior; and if the son should die, none could be infeft in those lands but as heir to the son, and not to the father. *2do*, It was *alleged* for my Lord Torphichen, That he being a prior creditor to the said Englishmen, by a subscribed bond of borrowed money, whereupon he was secured by the act of Parliament from doing any diligence by inhibition, in which case, he would have been undoubtedly preferred, that by this late practique and decision, finding young Mason's right to be null, as done in prejudice of a subsequent creditor, albeit their debt was contracted after the son's right, yet the said decision ought not to be extended in prejudice of the Lord Torphichen, who was *tutus* by the law and express act of Parliament, so as by a private infeftment, granted by the father, to frustrate him of his whole debt and comprising, albeit posterior to the said Englishmens' infeftment, which was base. It was *answered*, That it being now founded upon the common law, that the son's right was fraudulent, and so reduced, fraud and circumvention being a real exception, and so competent against a singular successor, the Lord Torphichen's right and theirs ought to be looked upon without regard to young Mason's infeftment, and, as if the fee of the estate had been renounced in the person of the father, who was common debtor, *quo casu*, the said Englishmen having the first infeftment and security, ought to be preferred, as having done the first diligence. THE LORDS did prefer Mr Street and Jackson; and found, That their right ought to be considered according to their priority of diligence, as if the father had not been denuded, albeit it was totally to exclude the Lord Torphichen, and that, upon debates among the Lords, it was *urged*, That both parties' rights and diligences being done against the father, were null of themselves, as being *a non habente potestatem*, and that the son's right not being simply null, but only in so far as it was reduced by decreets of the Lords, as done *in fraudem*, as they were alike in diligence in their reduction, and obtained decreets at one time, so both their rights depend-

No 42. ing upon these decreets, the estate was alike liable to them both, which seems to be founded in law as well as equity, yet it was otherways decided.

Gosford, MS. p. 359.

No 43.

In a reduction, the defender producing a right exclusive of the pursuer's right, this was found to stop certification.

1678. July 4.

CUTHBERT *against* LADY RATTAR.

ALEXANDER CUTHBERT having appraised the barony of Mey from Sinclair of Mey, pursues reduction and improbation against the Lady Rattar and others. The Lady produceth two other appraisings, and an infestment upon one of them, granted by the Bishop to Caithness, with Mey the common debtor's own infestment, held of the Bishop, and *allegeth*, No certification *contra non producta*, because she instantly verifies a right exclusive of the pursuer's title, who, though he have a prior apprising, yet hath unwarrantably taken infestment of the King, who is not immediate superior. It was *answered*, That the competition of rights was only proper at the discussing of the reasons of reduction.

THE LORDS sustained the defence, being exclusive of the pursuer's title, and instantly verified.

Stair, v. 2. p. 627.

1681. December 9.

JOHN MAXWELL of Spedoch *against* The EARL of QUEENSBERRY.

No 44.

IN a reduction pursued at the instance of John Maxwell of Spedoch against the Earl of Queensberry, of a decret recovered against the said John Maxwell, as representing Robert Maxwell his father, who was intromitter with certain terce lands belonging to his mother's husband Craik of Stewartoun, and upon which decret there was a comprising deduced, to which the Earl had right; the reason of reduction was minority and lesion, in so far as the decret bore that Robert was intromitter, whereas Robert was an infant at the time, and also that there were three years duty decerned after John was charged to enter heir to Robert. THE LORDS repelled the first reason, and found that the decret bearing that Robert's intromission was proved, they would not reconsider the depositions after so long a time, to the prejudice of the Earl of Queensberry, who was assignee to the comprising, and so a singular successor, but they restricted the comprising as to the years that the decret bears Robert's intromission.

P. Falconer, No 7. p. 3.