

No 38. course of his Majesty's Advocate. It was *replied*, that *rei persecutoria* he had interest to pursue for what was *indebite* paid.

THE LORDS found, that the process could not be sustained without consent of his Majesty's Advocate; the act of parliament being express, that the creditor cannot repeat the exorescence above the annualrent, unless he concur with the Advocate to reduce; which appeareth to be provided of purpose to oblige the creditor to inform and concur with the Advocate for reducing so unlawful pactions.

Dirleton, No 56. p. 23.

1667. June 12. DALRYMPLE against _____

No 39.

A REDUCTION of a testament being pursued, *ex eo capite*, that the defunct was *fatuus & incompos mentis*, and the relevancy being questioned, because no act or circumstance or qualification was libelled, inferring the defunct to be in that condition,

THE LORDS, ordained the pursuer to condescend.

Dirleton, No 76. p. 31.

Alt. *Wallace.*

Hog. _____

No 40.

1667. December 11. RODGER HOG against THE COUNTESS of HOME.

MR RODGER HOG insisting in his reduction, mentioned yesterday, No 109. p. 7039. *voce* INHIBITION, upon his inhibition the Countess of Home alleged, that she had right from apprisers, who would exclude the pursuer's right and inhibition, and would defend herself thereupon, and not suffer her right to be reduced *ex capite inhibitionis*, and might thereby exclude the pursuer from any interest. It was answered, that the reduction being only upon an inhibition, there are no rights called for, but rights posterior thereto, and it cannot prejudice any prior right, which the pursuer is content shall be reserved.

Yet the Lords admitted the defender to defend, upon any prior right, that might exclude the pursuers right,

Fol. Dic. v. 2. p. 327. Stair, v. 1. p. 492.

1672. June 21.

CREDITORS of the LAIRD of CRAIG against THE HERITORS of the Lands.

No 41.
In a reduction, calling for rights made to the

IN a reduction at the instance of some Creditors of the Laird of Craig, for reduction of a disposition granted by the Laird of Craig and Earl of Dundee.

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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No 41.

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

No 42.

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.