

No 96.

The like was decided with regard to other irritancies:—November 1686, Nisbet against Creditors of Dryburgh, No 83. p. 7260. *voce* IRRITANCY; and 29th December 1703, Earl of Southesk against Arnot, No 85. p. 7262. *IBIDEM*.

1666. February 20.

Lord SALTON against The Laird of PARK and ROTHIMAY.

No 97.

A person interdicted having disposed lands, a creditor of his who had comprised the same lands, was found entitled to insist in a reduction *ex sapite inhibitionis*.

THE Lord Ochiltree having a disposition of the estate of Salton from the umquhile Lord Salton *in anno* 1612, disposed the same to Park, Gordon, Rothimay, and others; this Lord Salton having granted a bond to Sir Archibald Stewart of Blackhall, he thereupon apprised all right that could be competent to the Lord Salton of that estate; which right being now retrocessed to the Lord Salton, he pursues reduction of the Lord Ochiltree's disposition, and of all these rights founded thereupon in consequence. The reason of reduction is founded upon an interdiction against the Lord Salton, disponer, before his disposition; and there having been a process formerly depending at the instance of umquhile Sir Archibald Stewart, and being transferred after his death, the Lords allowed the process to proceed upon the minute of transference, without extracting the decret of transference, which behoved to include the process and hail minutes, which could not be done for a long time; whereupon the Lord Salton, now insisting in the principal cause, it was *alleged, first*, No process till the principal cause were wakened; for, albeit the principal cause be transferred, yet it is but *in statu quo*, and therefore being sleeping, there can be no process till after the transference there be a wakening. THE LORDS repelled this allegiance, and found the transference sufficient without any wakening.——It was further *alleged* absolvitor, because the pursuer's title being an apprising, the defender has an anterior apprising, which does exclude the pursuer ay and while it be reduced or redeemed. It was *answered*, That the ground of this pursuit being a reduction upon interdiction, the interdiction cannot be directly apprised, but only the lands belonging to the person interdicted being apprised, all apprisers or other singular successors coming in the place of the heirs of the person interdicted may pursue on their rights, and thereupon reduce voluntary dispositions made contrary to the interdiction; which interdiction is not a right itself, but *medium impedimentum* exclusive of another right, as an inhibition; and as a first appriser cannot hinder a second appriser to make use of his right, except in prejudice of the first appriser, so he cannot hinder him to make use of the interdiction to take away a voluntary disposition but prejudice of the first appriser's apprising, as accords; and, in the same way, a second appriser or any creditor might pursue upon an interdiction or inhibition against a creditor.

Which the LORDS found relevant, and declared the pursuer might reduce this voluntary disposition upon the interdiction but prejudice of the defender's apprising. See REDUCTION.

No 97.

*Fol. Dic. v. 2. p. 80. Stair, v. 1. p. 359.*

1669. February 16.

The CREDITORS OF BALMERINO and COUPER *against* My Lady COUPER.

THE deceased Lord Couper having disposed his estate to his Lady, some of his creditors, and some of Balmerino's creditors, who was his heir apparent, did raise reduction of the said disposition, as done on death-bed; and, before the day of compearance, they give in a supplication desiring witnesses to be examined, and to remain *in retentis*, that Couper had contracted his disease, whereof he died, before the subscribing of this disposition, and that he never went out thereafter, but once to the kirk, and market of Couper, which times he was supported and fell down dead, a swoon, before he was gotten home. It was answered for the Lady Couper; *first*, That witnesses ought not to be examined until the relevancy of the libel were discussed, unless they were old or valetudinary, or penury of witnesses, whereas there are here fotty witnesses craved to be examined, and the coming to kirk and market being public deeds, there would be no hazard of wanting witnesses; *2dly*, The creditors or apparent heir have no interest unless the heir were entered, or they had apprised or had a real right; neither can the creditors be prejudged by the disposition, as being on death-bed, because they may reduce the same as being posterior to their debts, upon the act 1621, and the reason of death-bed is only competent to heirs and to those having real rights from the heir, and not to their personal creditors.

THE LORDS ordained the witnesses to be examined, to remain *in retentis*, concerning my Lord Couper's condition the time of subscribing the disposition, and of his coming abroad; and allowed my Lady also witnesses, if she pleased, for proving what his condition was at these times, reserving all the defences and allegiances of either party in the cause; for they found that the creditors of Balmerino, as apparent heir, had interest to declare that their debts might, by legal diligences, affect the estate of Couper unprejudged by this disposition, as being made by Couper on death-bed, and that the reduction, in so far as might contain such a declarator, would be sustained; for no party can be hindered to declare any point of right competent to him; and it was also thought, that though there were many witnesses called to find out who truly knew the defunct's condition, yet there might be few who truly knew the same, and these might be removed out of the way, either by death or by collusion. See PROCESS,

*Fol. Dic. v. 2. p. 79. Stair, v. 2. p. 605.*

No 98.

A reduction of a disposition on death-bed sustained at the instance of the personal creditors of the apparent heir, even without necessity of adjudging.