

—*loco facti imprestabilis succedit damnum et interesse*; and the sum deduced being more than a year's duty, which the superior could only crave if he had been charged upon a comprising, which did supply the condition.

It was ANSWERED for the creditors; 1st. Because all their bonds and securities being reduced by a decret of the Lords, *ex capite inhibitionis*; they were forced to agree with the Lady, and pay her the whole sums that were due to her; whereupon, having gotten a right ratified by the pursuer, he could never quarrel their rights. 2d. The pursuer had concurred with Lady Lucia Hamilton to reduce their rights, and had consulted her advocates and clerks, and so was *in pessima fide*.

It was REPLIED to the *first*, That the ratification made, by the pursuer, of the creditors' rights could not prejudge the reduction; because, when he subscribed the same, he was lying prisoner in the tolbooth, and had been prisoner for the space of a whole year and more, during the time of the surcease of all justice and government, before the King's restoration, when there was no remedy, by a suspension or act, to be set at liberty. And, as to the *second*, it was denied that ever he did concur with the Lady to reduce the creditor's rights.

The Lords, having considered this case, and finding Lady Lucia's comprising to be long since expired, and so would take away the right to the whole estate, did sustain the reduction; but so that the comprising should be effectual for the true sums due her by the decret, and to the creditors who had gotten a right, notwithstanding of the ratification of the creditors' right, so that Mountcastle might redeem upon payment thereof: but likewise, they found, That it was relevant for them to prove that Mountcastle did concur with the Lady to reduce their rights, by informing and agenting; which being proven, that their right should stand as to the whole sums due to them, until they were redeemed.

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1677. January 23. SIR ALEXANDER BRUCE of BROOMHALL *against* JOHN MUIR, and ISOBELL BOSWALL, his Spouse.

IN a multiplepointing, raised at the instance of the creditors of Munquhannie, against the said Sir Alexander and John Muir; who were competitors as to the preference of the fourth part of the sum of 9000 merks, upon a contract, whereby Craigtoun, for the said sum, did grant an heritable right of an annualrent effeiring to the said principal, out of the lands of Munquhannie; and whereby he was obliged to infest David Wemyss in liferent, for all the days of his lifetime, and, after his decease, Elizabeth Wemyss, his daughter, spouse to John Boswall, in liferent; and Mause, Janet, Margaret, and Geills Boswalls, in fee; heritably, and equally amongst them, and their heirs lawfully to be gotten of their bodies; which failyieing, the heirs to be gotten of the said Elizabeth Wemyss; which failyieing, to return to the said David Wemyss, his nearest and lawful heirs whatsoever: Two of the said sisters, *viz.* Mause and Geills, having died without heirs of their body, after the said infestment; and the other two sisters having children, and thereafter the said Elizabeth having daughters, whereof one was married to John Muir; did crave to be preferred to Broomhall as to the fourth part of the said principal sum, by a right from Elizabeth

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Wemyss, the mother, as succeeding thereto by the death of two of the daughters, *viz.* Mause and Geills, who died without heirs of their own body. There was also compearance made for Sir Alexander Bruce, as having right from Robert Geddie, son to the deceased Margaret Boswall; who was served heir of provision to the deceased Geills and Mause, and infeft in the fourth part of the said sums, which belonged to the two deceased sisters, who, by the contract, were two of the four sisters who were infeft in the fee by the father; and craved to be preferred upon this ground,—That the two deceased sisters being infeft in fee, and in the annualrent foresaid, and their mother being only a liferenter, and his author, Robert Geddie, being retoured heir and infeft, none could grant a renunciation of the said annualrent to the creditors, who had right to the reversion, but a person infeft; whereas the mother, Elizabeth Wemyss, was never infeft; and, by the contract, had only right to a liferent, never being provided to the fee, to which he could only pretend by a substitution and declarator.

It was REPLIED for John Muir, That, albeit the mother was only liferenter, by the contract and infeftment, and the four daughters fiars, yet it was expressly provided, that, failyieing of heirs of their body, the fee should belong to the mother and the heirs of her body; and so, two of the sisters dying without heirs, she had right, by substitution, to their full parts; and Broomhall could crave no right to a fourth part, by right from Robert Geddie, as son to Margaret.

The Lords did find, That the creditors having used an order of redemption, Broomhall, as having right from a person infeft, could only grant a renunciation to purge the lands of the annualrent; but did not decide as to that question,—If two of the sisters, dying without heirs of their body, the mother, or any having right from her, taking a legal course, and being infeft, could have right; but reserved to them, after they should establish a lawful title in their persons, to pursue for that sum Robert Geddie, or those having right from them.

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1677. *January 26.* DOCTOR HALYBURTON, MARGARET NEVOY, and other CREDITORS of the deceased LORD COUPER, *against* The LORD and MASTER of BALMERRINCH.

IN the forementioned action, at the instance of the creditors of the Lord Couper, against the Lord Balmerrinloch; notwithstanding the Lords had found, by their interlocutor, that the Lord Balmerrinloch, being apparent heir, and having apprised for his own debt the Lord Couper's estate, by himself or others, to his behoof; and having ratified the Lady Couper's additional jointure for an onerous cause, and thereby had possessed the whole land; it was sufficient, in law, to infer a passive title, to make him liable to the Lord Couper's true creditors: Yet, being allowed to be farther heard, he did ALLEGE, That the Lady's possession could never be a sufficient ground to infer that passive title; because the creditors never having intended a removing, or an action for maills and duties; the Lady did only possess *suo periculo*, and might be pursued, not having ascribed her possession to any right flowing from the apparent heir, it