

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

could infer no passive title against him ; which the law never extends but to clear deeds, and not to presumptions, as being most unfavourable : whereas, if the creditors had pursued any possessory judgment, then, undoubtedly, they would have obtained to the possession ; and, if the Lady had defended upon his right of apprising, they might have reduced the same.

It was ANSWERED for the creditors, That the Lady, having entered to the possession by that only right she had from the Lord Couper, which was reduced *ex capite lecti*, and likewise at the creditors' instance *ex capite inhibitionis*, her possession ought to be ascribed to the Lord Balmerrinoch his right ; which flowing from him, being apparent heir, and that for a most onerous cause, the law does always interpret the possession of any having right from apparent heirs to be theirs, seeing it cannot be ascribed to any other right : and the creditors were not obliged to pursue a possessory judgment, seeing they would have been secluded until they had reduced Balmerrinoch's apprising ; and, if this were allowed, it would open a door to prejudice all lawful creditors.

The Lords did repel the allegiance, and adhered to their former interlocutor ; upon that ground of law,—That where the title whereby any person enters to the possession is reduced, they, having another title, must of necessity ascribe the continuance of their possession, after reduction, to the supervenient title : as likewise, whoever grants a title of possession to another, their possession is his, and makes him liable as if he had possessed himself : so that the creditors, having an undoubted ground in law to make the apparent heir liable to their debts, as successor *titulo lucrativo*, they needed not pursue a possessory judgment against any having right from him ; which were indeed to give great advantages to contrivances, thereby to enjoy an opulent estate and not to be liable to the debts.

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1677. January 26. ALEXANDER LEVINGSTON *against* The EARL of NEWBURGH.

ALEXANDER Levingston, having obtained a precept from the deceased Earl of Newburgh, for the payment of £30 sterling yearly out of his pay, as captain of the King's Guard ; which sum was ordered to be paid by John Will, his quarter-master,—did pursue the Earl of Newburgh, as representing his father, for payment of the yearly annuities resting before his decease, extending to 2000 merks.

It was ALLEGED, That the precept could not be sustained ; because it wanted both the writer's name, and no witnesses were inserted ; and, the body not being holograph, it was null by our law. *2d.* It could not be obligatory ; because it was never a delivered evident to the pursuer ; but, being in the hands of the Earl of Newburgh's servant, was recovered, by an incident diligence, at the instance of Balmagies, for instructing a reason of compensation against Sir John Strachan, who had charged him, as cautioner for the Earl of Newburgh, Sir John being a trustee himself.

It was REPLIED to the *first*, That the subscription being true, and not denied, and granted by Newburgh when he was captain of the King's Guard, and attending that office here, and drawn upon his own quarter-master, who received