

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.*

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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.*

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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.*

\* \* \* Sir P. Home reports this case :

JAMES CRAICK, as assignee by Marion Maxwell, relict of the deceased John Maxwell of Middlebee to her right of terce of the lands of Middlebee, having obtained a decret against John Maxwell, as representing Robert Maxwell his father, upon the passive titles, for payment of the third of the rent of the land of Middlebee, due to the relict by virtue of a terce, from the year 1640 to the year 1663; upon which, there being a comprising led of the lands, and assigned to the Earl of Queensberry, John Maxwell raised a reduction of the decret and comprising following thereupon, upon this reason, that he was minor, and lesed, in so far as the years of his father's intromission are not proved; as also, he is decerned for several years, as intromitted with by his father; whereas his father was then deceased, as appears by the charge by which he is charged to enter heir to his father, which is dated in the year 1663; so that his father behoved to be deceased before that time, and yet he is decerned for the third of the rents, the years 1663, 1664, and 1665, as intromitted with by his father. *Answered*, That Gordon of Spedoch having apprised the lands, and having pursued a reduction upon that ground, that the father's intromission was not proved, and the LORDS, notwithstanding, sustained the decret and comprising in respect of the decret *in foro*, and that there was probation led upon the father's intromission in general; for if that pretence were allowed, then all the decreets might be quarrelled upon that ground, and the Lords behoved to re-consider the probation, and so process should never have an end; and albeit the said John Maxwell be decerned for some years rent, as intromitted with by his father, who was then deceased, yet in the comprising there is as much of the sum deduced as these years rent will extend to; and albeit there had not so much been deduced, yet that cannot annul the apprising, but only to be a ground to restrict, *nam utile per inutile non vitiatur*. THE LORDS sustained the decret at Craick's instance, and comprising thereon, as to the years of the terce, except the 1663, 1664, and 1665 years, which were prior to Robert Maxwell the pursuer's father's decease, and that in favour of the Earl of Queensberry, who acquired right after a decret *in foro*, upon probation by witnesses, and comprising following thereon, albeit the same was against a minor, reserving action against Craick the recoverer of the decret, for repetition of what years of the terce the pursuer's father could not possess, or that the lands were possessed by the tercer herself, as accords of the law, and the parties to count and reckon. And the Lords would not re-consider the depositions after so long a time, to the prejudice of the Earl of Queensberry, who is a singular successor, being assigned to the comprising, but they restricted the comprising, as to the years the decret did bear that Robert Maxwell intromitted with the rents.

*Sir P. Home, MS. v. I. No. 38..*