

No 9.  
must follow  
it, and ac-  
crease to the  
minor.

lesion; because the foresaid assignation was, for an equivalent cause, onerous. *2dly*, There is neither law nor obligation upon the defender, to assign his right to this pursuer, but only to repon her; for he might have torn, or burnt, his apprising, or discharged the debtor for nothing; which would not have hurt the pursuer; for the reduction would take off his discharge, as falling in consequence.—The pursuer *answered* to the *first*, That it was incompetent now, after liti-contestation, and that it was not relevant; for though, in reductions of heritable rights, authors, liable in warrandice, must be called, that holds not in personal rights; but the defender ought to have intimated the plea to his author. *2dly*, The assignee's right being a procuratory, *in rem suam*, the reduction doth only take away that member of it; that it is not *in rem suam*; but it remains still a procuratory; so that, what was done by the assignee, as procurator, accretes to the constituent, as if he had used inhibition, or interruption; and generally, the Lords have ever ordained parties to assign their rights, where the assignation is not hurtful to them, and profitable to the other party.

THE LORDS repelled the defences; and ordained the defender to dispone a proportionable part of the lands; but the defender having offered to prove, that there was no lesion, because there was an equivalent sum paid for the assignation: THE LORDS would not sustain the same, unless it were offered to be proven, that the sum was profitably employed for the minor's use.

*Fol. Dic. v. 1. p. 2. Stair, v. 2. p. 107.*

1684. February 15.

LORD PITSLIGO *against* HILSTONE and her HUSBAND.

No 10.

A bond is granted to a man and his wife, in conjunct fee, and to their children. An apprising is led on it, at the instance of the wife and her second husband.—Found effectual, and to accrete to the children of the first marriage.

IN a reduction, pursued at the instance of Lord Pitligo, and Robert Miln, his assignee, of a comprising, deduced at the instance of Isabel Hilstone, and Mr William Hog, her husband, for his interest, of the estate of Ludquhairn; upon this reason: That the comprising was null, being led upon a bond granted by Ludquhairn, to Patrick Hodge, and the said Isabel Hilstone, then his spouse, in conjunct fee, and the heirs to be procreate betwixt them; in which bond, the said Isabel Hilstone was only liferentrix, and so could not comprise for the fee of the sum: And *2dly*, That albeit she, and her husband, Mr William Hog, could have comprised for the sum; yet she behoved to comprise in terms of the bond, viz. In favours of the heirs of the marriage betwixt her and Patrick Hodge; but could not comprise for herself and her second husband:

*It was answered:* That she was conjunct fiar by the bond, and so had power to suit execution, and had *jus exigendi*; and albeit the comprising was not in terms of the bond, yet the bond did regulate the comprising, which did accrete to the heirs of the first marriage, mentioned in the bond: Likeas the defender had right from Mary Hodge, heir of the first marriage; and also my Lord Harcarfe was heir of the second marriage, between Isabel Hilstone and Mr William Hog, who compeared and concurred in this process.

THE LORDS found, that Isabel, being conjunct fiar, had *jus exigendi*, and therefore might warrantably lead the comprising; which, being led by her and her second husband, did accresce to the heir of the first marriage, mentioned in the bond: And therefore, sustained the comprising against my Lord Pitfligo, albeit but a singular successor, likewise in the lands.\*

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*President Falconer, p. 56.*

1691. July 8.

CREDITORS of LANGTON.

OLD Langton, having given a public infestment to his son, for relief of cautionry, not for the payment of creditors, without any enumeration of creditors; it was found, That the creditors have not the privilege and right of the infestment; so that young Langton might prefer some; or renounce the whole again to his father; or one creditor might prevent another by diligence; but young Langton being insolvent, could not grant voluntary rights, in prejudice of anterior diligence.

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*Fol. Dic. v. 1. p. 2. Harcarfe, p. 171.*

1696. January 24.

EARL of CASSILLIS against MONTGOMERY of Lainshaw.

PHESDO reported the competition betwixt the Earl of Cassillis, and James Montgomery of Lainshaw. The *first* point was, Having once produced his tack of the teinds in the process, he might not take it up again when he found the Earl, who had newly raised and cast in a reduction of the said tack, on this head, that it was set before a prior one had expired, was going to hold the production satisfied.—THE LORDS found a party might take up any writ, (not quarrelled as false,) before allegiances were proponed thereon, or litis-contestation made in the cause. The *next* point was; during Lainshaw's forfeiture, Strathallan, donator thereto, had obtained a decret of preference, on Lainshaw's tack of these teinds of Kirkmichell, before Cassillis's right; and Lainshaw, now founding on that decret, as *res judicata*, to exclude Cassillis; still he alleged Lainshaw had no right to the same, the forfeiture being *funditus*, rescinded, and all following thereon taken away.—*Answered*, That is only so far as the restored persons were lesed; but it

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Found that a person forfeited and restored, *per modum justitie*, might use any benefit the donator had obtained, during the forfeiture; such as a decret of preference, &c.

\* The same case is noticed by Lord Fountainhall, vol. 1. p. 262, under date 18th January 1684, thus:—In a case between Forbes Lord Pitfligo, and Robert and Alexander Milns; The Lords, *in presentia*, find in an apprising, led by Mary Hillstains, my Lord Harcarfe's mother, on a bond wherein she was only conjunct fiar of the sum, and her daughter, Mary Hog, was by the bond, *per expressum*, fiar, but led by the liferentrix, for the principal sum, as if she had been fiar; That the said apprising was effectual, and accresced to the fiar, as if it had been also led and deduced at her instance, for her interest and right of fee; though her name was not in the comprising, but that the mother's security became her's, seeing she was conjunct fiar, and had power to uplift upon caution.—*Nota*, The Milns being paid off their debt, the benefit of this cause was for the behoof of Keith of Ludquhairn.