

comprising, he being infest; after the decease of the said Rowan his debtor, another Rowan brother to the defunct, as general heir to their father, who was infest in the same lands, pursues for reduction of Mr. David Wardlaw's comprising and infestment: And the defender alleging, that the pursuer by virtue of this title of general retour, as heir to his father, could not have interest to pursue for reduction of his real right of comprising and infestment, except he had been specially served and infest *per expressum* in these lands; the Lords repelled this allegiance, and found this general retour of the pursuer, as general heir, was sufficient to give the pursuer a title and interest to reduce the said real right, and sustained the same.

Act. Bruce.

Alt. Macgil.

Clerk, Gibson.

Durie, p. 785.

No. 23.
title to sue
reduction of
real rights.

1637. March 16.

EDMONSTON against EDMONSTONS.

The Laird of Edmonston having a feu of the lands of given to himself, and to the heirs-male gotten of his body, which failzying, to his eldest heir female without division; the first feu's son dying without heirs-male gotten of his body, and leaving behind him three sisters, and having before his decease disponed the heritable right of the lands to his two youngest sisters, the eldest sister as apparent heir of provision, by the condition of the said feu, pursues reduction of the said right, made to the other sisters, as done *in lecto ægritudinis*, and to her prejudice; wherein the defenders alledging, that this action of reduction cannot be sustained at the instance of an apparent heir, except she were served and retoured heir of provision to these lands, according to the condition of the infestment, without which were done, she can never be heard to reduce as apparent heir, especially seeing she cannot be general heir, being but one of three sisters; as also, this right is competent only to the heir of provision, and not to an apparent heir of provision, the condition of the security being so conceived; and the pursuer answering, that the process ought to be sustained at her instance as apparent heir, in respect of the great hazard she runs if she should enter heir; for then *eo casu* she behoved to be liable to all the defunct's debts, how great soever they were, and she has but an uncertain action wherein she may succumb; and it were against all conscience and reason, that if she win not this cause, yet she should be liable to the defunct's whole debts, seeing she is content, if she prevail here, to serve herself heir; the Lords found the allegiance relevant, in respect of the tenor of the infestment, the benefit whereof could not be acclaimed by any, but by an heir retoured; and found that the apparent heir, specially an apparent heir of provision, could not be heard to pursue this reduction, before she were retoured heir of provision.

Act. Johnston.

Clerk, Hay.

Durie, p. 838.

No. 24.
Found in
conformity
with Muire
against Muire,
No. 21. *supra*.