

No 39. reducer had no necessity to know the same, neither had he necessity to reduce these subaltern base rights; for if he should be put to reduce these subaltern rights, it should be endless labour; for such rights might pass from hand to hand, that it might prove impossible for any pursuer to find them all out; and therefore these base rights, not being acknowledged by the pursuer's self, nor becoming public, the pursuer needed not to know them, and so could not defend the excipient.

Act. *Nicolson.*Alt. *Mowat.*Clerk, *Gibson.**Fol. Dic. v. 2. p. 350. Durie, p. 570.*

1664. November 18.

LOCHS, and the EARL OF KINCARDINE, *against* HAMILTON.

No 40.

Minors restored against a decree *in foro.*

HAMILTON, and her Authors, having obtained decret against Lochs, as heirs to their father, for a sum of money, and annuals thereof, after count and reckoning, and being thrice suspended, there are still decreets *in foro*: Lochs, and the Earl of Kincardine, now suspend again, and *alleged*, That in the count and reckoning there were several receipts of annualrent, which were not at that time in Loch's hands, but in the Earl of Kincardine's, whose father was co-principal, bound conjunctly and severally with Loch's father. The charger opposed her decreets *in foro*, and *alleged*, That Kincardine had no interest; for neither could the letters be found orderly proceeded, nor yet suspended against him; and whereas it was *alleged*, That the clause of mutual relief would force him to relieve the Lochs *pro rata*, he had a good defence, that they had not intimated to him the plea, and thereby had prejudged themselves of the defence upon the ticket in his hands. The suspenders *answered*, They were minors, and that Kincardine, having a clear interest, might chuse whether to defend them, or defend himself against them.

THE LORDS reponed them to the tickets now gotten out of my Lord Kincardine's hands; but declared there should be expense granted against them for all the decreets to which the chargers were put.

Stair, v. 1. p. 226.

. Newbyth reports this case :

GEORGE BRUCE, father to the Earl of Kincardine, James Loch, and three other persons, having granted bond for L. 10,000 to the Lady Tulleallan, in life-rent, and to her children, James, Alexander, and Anna Blackadder, in fee; in *anno* 1641, James did assign his part, which is 6000 merks, to Anthony Boswall, who having obtained decret against the Executors of James Loch, they did suspend, upon this reason, that the Earl had paid to the Lady Tulleallan the sum charged for before the granting of the assignations; but the letters being

found orderly proceeded, the said Anthony assigns the decret of suspension to Helen Hamilton, who having charged *de novo*; and the Executors *defending* upon the former reason, and with them the Earl of Kincardine, albeit he was not charged, nor no decret recovered against him, yet the LORDS found he had good interest to compear and suspend the decret upon reason of payment; and which reason being instantly verified, they would now receive, notwithstanding there were terms taken in the former decret to produce the same, and were circumduced; it being against law and reason, that payment being once made, it should be again sought; especially seeing the time of recovering of the former debts Helen Hamilton was ordained to find caution to warrant the-executors at all hands, in case any thing were found to be paid.

Newbyth, MS. p. 3.

No 40.

1665. January 6. ——— against EDMISTOUN of Carden.

EDMISTOUN of Carden being pursued by a Creditor of his father's, as lucrative successor to his father, by accepting of a disposition of his father's lands, after contracting of the pursuer's debt, *alleged*, Absolvitor, because, being pursued before by another creditor of his father's, he did then allege, that his disposition was not lucrative, but for a cause onerous, equivalent to the worth of the land which he proved, by instructing the rental and rate of the land at the time of the disposition by witnesses, and the sums undertaken for it by writ, whereupon he was assoilzied, and can never be again convened upon that ground; *nam obest exceptio rei judicate*; for if he had been condemned as lucrative successor, upon the other creditors' probation, it would now have proved against him, and therefore, his being assoilzied must be profitable to him against others, unless collusion were alleged and instructed. The pursuer *answered*, That this absolvitor was *res inter alios acta*; and albeit a condemnator would have been effectual against the defender, *non sequitur*, that an absolvitor should also be effectual for him; because he was called to that condemnator, but this creditor was not at all called to the absolvitor. *2do*, Even in a condemnator, if the defender had omitted any thing that he might have alleged in the one case, competent and omitted would not hinder him to propone the same against another creditor. Therefore, the defender can only repeat the grounds of that absolvitor; which, if he do, the pursuer will allege, that whereas, in the absolvitor, the defender was admitted to prove the rental, the pursuer omitted to crave the benefit of probation, which he would have gotten; and this pursuer offers him to prove, that whereas the rental was proved to be but 18 chalders of victual, the true rental was worth 30 chalders. *3tio*, A part of the onerous cause was the portion of the defunct's children, which would not prejudice the pursuer, being an anterior creditor.

No 41.

A party was sued as lucrative successor, and assoilzied on proving an onerous cause. This found not to affect another creditor suing on the same grounds.