

because, if the defenders' posterior rights had not been granted, or diligence done thereupon, the pursuer could have had no access to the rents of the lands adjudged by the defenders.

It was answered: Inhibitions are good titles of reduction for reducing all posterior voluntary rights in prejudice of the pursuer's debt and diligence that may follow thereupon; and it were of no advantage to the defender, nor any ways reasonable, to put the inhibitor to the expense of real diligence, until the effect of his inhibition were first tried; and this case was determined *in terminis*, as is observed by Spottiswood, INHIBITION, No. 18. p. 6947. where the same allegiance being proponed for the defenders, who stood infest upon comprisings, and seven years in possession, and alleged the legal was expired, yet the Lords repelled the allegiance, in respect the inhibition gives a good interest to reduce any posterior deed in prejudice of the inhibitor; and it happens frequently in rankings, that inhibitors do compear, and are admitted summarily to reduce; and it would occasion a great delay if it were otherwise.

It was replied: That the later practice hath not allowed inhibitors to reduce real diligence upon the forementioned reason, that they cannot affect the rents upon their inhibitions; and albeit in rankings there be an indulgence as to this point, for the expedition of sales, yet that is not to be extended to other cases.

“ The Lords sustained the pursuer's title to insist in a reduction *ex capite inhibitionis* without an adjudication.”

*Dalrymple, No. 99. p. 140.*

1713. July 22.

JAMES DOUGLAS of Hisleside *against* WILLIAM SOMERVEL of Kennocks.

In the action of proving the tenor at the instance of Hisleside, the Lords having, 10th July instant, found, That Grissil Stuart's general service, and the renunciation granted by her, was such a mid-impediment as hindered the superior's confirmation to operate in favours of the pursuer, so as to make the infestment *a me* valid, from the date thereof, the pursuer repeated a reduction of the renunciation, upon the head of fraud and circumvention.

Alleged for the defender: *Actio de dolo*, or upon fraud and circumvention, not being a popular action competent to any person, but only to the person overreached thereby, or his representatives, Hisleside hath no title to insist in such a reduction, unless he were served heir to, or did represent, the granter of the deed quarrelled, that he might have the benefit of the reduction, in case he prevailed.

Replied for the pursuer: He hath good interest to remove Grissil Stuart's renunciation out of the way; because, *1mo*, Had not that been granted, his confirmation would have drawn back, and made the infestment *a me* a valid right of

No. 52.

Not competent to an apparent heir to quarrel a deed elicited from his predecessor, upon fraud and circumvention, until he be served heir to the person alleged to be circumvented.

No. 52. property. *2do*, He hath undoubted title to reduce any right flowing from James Stuart, whom he represents; and this renunciation doth flow mediately, though not immediately, from James Stuart, the pursuer's author. *3tio*, An apparent heir hath title to reduce all deeds that stop his service to his predecessor; and this renunciation is the only thing could have stopped his service before he was served, or hinder his service to be effectual, now that it is expedite. *4to*, Suppose Hisleside could not *via actionis* pursue directly a reduction of this renunciation, he hath a title to object any nullity by way of reply against it, now when obtruded by the defender to elide the pursuer's action, *qui excipiendo fit reus*.

Duplied for the defender: Albeit taking away the discharge would be effectual to revive the pursuer's right, yet that consequential benefit is no title to reduce the deed of another, upon the special reason of fraud and circumvention, without representing the granter; for none can quarrel a deed upon the head of fraud or lesion, but he who subjects himself to perform whatever the granter would have been liable to in the event of its being annulled, which the pursuer is not, unless he represent Grizel Stuart; and an absolvitor in the defender's favours in this process would not secure him from being unquieted by the like action at the instance of other heirs. Apparent heirs are indeed allowed to reduce deeds on death-bed, for removing any stops to their service, as being null in themselves, and made *tempore inhabili*; but no such objection lies against the discharge in question, which Grizel Stuart had no doubt power to grant, and no person can quarrel it upon any special reason, as in this case, but an heir served. And even where reduction is intended for removing a deed that hinders the reducer to establish a right to the subject, the Lords never allow the reduction to proceed, till the pursuer hath made up in his person all the right to his predecessor that he could. *V. G.* They oblige apparent heirs to serve in general, in order to reduce infeftments granted by their predecessors.

The Lords found, That Hisleside could not found upon the reason of fraud and circumvention, unless he represent Grizel Stuart, the person alleged to be circumvented; and therefore found, That he had no title in his person to quarrel the discharge and renunciation by Grizel Stuart, he not being served heir to her.

*Forbes, p. 706.*

No. 53.

The Lords found adjudication without infeftment of a bankrupt estate, for bygone feu-duties resting to the superior, a sufficient title in a process of sale at his instance.

1714. January 27. DUKE of GORDON *against* M<sup>r</sup>PERSON of Clunie.

The Lords sustained an adjudication of Clunie's estate, without infeftment, obtained by the Duke of Gordon, superior thereof, for bygone feu-duties resting to his Grace, as a sufficient title to pursue a sale of the bankrupt debtor's estate, albeit the act 17. Parliament 3. Cha. II. requires the pursuer of such a sale to be a creditor having a real right, in respect the vassal's infeftment is the superior's infeftment as to feu-duties.

*Forbes MS. p. 18.*