

1771.

WILLIAM HUTCHISON, late Merchant in
Leith, *Appellant.*

THE REPRESENTATIVES of JAMES YOUNG
and Dr ROBERT MACKINLAY, *Respondents.*

HUTCHISON
v.
REPRESENTA-
TIVES OF JAMES
YOUNG, &C.

House of Lords, 15th February 1771.

ADJUDICATION—DECREE OF EXPIRY OF THE LEGAL—PLURIS PETITIO.—Held it incompetent to reduce a decree of expiry of the legal of an adjudication to which the objection of *pluris petitio* was stated, to the effect of redeeming the lands from a purchaser, but that it was competent to open up the same to the effect of making the adjudger and seller of the lands account for the price received.

The appellant purchased for £366, 13s. 4d. sterling, a farm called *Woodside*, having a coal-mine in it.

On 11th February, the appellant borrowed from Allan Lockhart £155, 1s. 1½d., for which he gave him an heritable bond upon this estate.

In February 1742, he paid Mr Lockhart £15, 11s. 1d., per receipt; being two years' interest on his bond.

Upon this bond Lockhart adjudged the appellant's lands of *Woodside*, for the accumulated sum of £204, 10s., giving credit only for £12, received on account, instead of £15, 11s. 1½d.

Thereafter, the appellant borrowed a further sum of £60 sterling upon his bond, 10th December 1744; and some time thereafter the appellant made payment to Lockhart of the sum of £44, 5s. on account.

Upon this last mentioned bond, Lockhart obtained an adjudication of the lands of *Woodside* for the accumulated sum of £85, 5s., so that of £215, 11s. 1d., the amount of the whole original sums borrowed from Mr Lockhart, £44 having been paid by the appellant to account, there only remained, the appellant stated, a debt of £171, 6s. 1d. charged by the adjudication upon the estate for which the appellant had paid the purchase money of £366, 13s. 4d., and had laid out as much more on improvements.

James Shearer acquired right from Lockhart to these two adjudications; and he subsequently managed to obtain a lease of these lands from the appellant's brother in favour of one Gordon, but he being ejected from possession, Shearer then procured possession of the lands under his adjudication.

In January 1754, he brought an action of declarator

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- Jan. 21, 1758. against the appellant for having the legal of the first-men-
 tioned adjudication, declared to be expired.
 The appellant, on his part, brought an action for count and
 reckoning against Shearer, and for reducing his adjudication
 and debts. These two actions were conjoined, and of this
 date, it was found that Shearer was not entitled to decree of
 expiry of the legal.
- June 22, 1758. Thereafter, however, the respondent obtained decree decern-
 ing “in the declarator of the expiration of the legal in
 terms of the libel, and assoilzies the said James Shearer
 from Hutchison’s reduction and hail conclusions thereof,
 and decerns.”
- The lands were then sold to James Young; and in a few
 years thereafter they were again sold to the other respondent,
 Dr Mackinlay.
- The appellant then brought the present action of reduction
 of the above decree, stating the following reasons:—1st, That
 Lockhart, the original creditor, having neglected to give
 credit for the whole of the payments received by him, a
pluris petitio rendered the adjudication unavailable to be the
 ground of an expired legal, it being an established rule of
 law, that adjudications liable to the objection of a *pluris*
petitio, though permitted to stand as a security for principal
 and interest, are held to be unavailable for carrying off the
 absolute ownership of an estate upon decree of an expired
 legal. 2d, That the appellant had suffered great loss by the
 lease impetrated from his mother to Gordon, Shearer’s confi-
 dent, because the lands were let at a rent far below their
 value. 3d, By the interlocutor of the Court of 20th January
 1758, finding Shearer not entitled to the benefit of an expired
 legal, and that the appellant had right to redeem his lands
 upon payment of the sums that should be found due to
 Shearer, he had a clear right to open up the decree of expiry
 of the legal, if not to the effect of redeeming the lands, at least
 to the effect of making his heirs account for the price at
 which the lands were sold to Mr Young.
- Dec. 1, 1768. The Court, of this date, pronounced this interlocutor:
 “Find that it is not competent to open up the decree of de-
 clarator of the expiry of the legal of the lands of Woodside,
 in the year 1758, in so far as it concerns the interest of Dr
 Mackinlay, the last purchaser; but find it competent to
 open up the said decret *ad hunc effectum*, to make the heirs
 of James Shearer liable to account to the appellant for the
 price at which the lands in question were sold to James

“ Young, and remit to the Lord Ordinary to proceed accordingly. On reclaiming petition, the Court adhered.

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From these interlocutors, so far as they refused to open up the decree under reduction as to the interest of Dr Mackinlay and James Young, and so far as they did not find the appellant entitled to redeem and recover his estate, the present appeal was brought to the House of Lords.

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After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Jas. Williamson, Robt. M^cQueen, H. Dalrymple, Jas. Boswell.*

For the Respondents, *Al. Wedderburn.*

[Barholm Entail. Hailes, Dec., Vol. i., p. 432.]

1772.

JAMES DEWAR, Esq. of Vogrie; JOHN MACCULLOCH, the Elder; and JOHN MACCULLOCH, the Younger of Barholm, } *Appellants.*

MACCULLOCH,
&c.
v.
MACCULLOCH.

JEAN MACCULLOCH, eldest Daughter of the said John Macculloch of Barholm, the Elder, } *Respondent.*

House of Lords, 18th May 1772.

ENTAIL—REVOCATION—CONTRACT AND DISCHARGE.—John Macculloch executed an entail in favour of himself in liferent, and John Macculloch, the younger, his eldest son, and the heirs-male of his body; remainder to the heirs-female of his body; and remainder to other heirs-male named. The entail was recorded, and charter and infestment followed upon it. Some time thereafter, he, with consent of his son, revoked this entail and sold the estate. Held that the father and son could not, by their joint act and deed of revocation, recall and rescind the entail, or sell the estate of Barholm.

John Macculloch the elder, executed an entail in 1762, of the estate of Barholm in favour of himself for life, and to John Macculloch the younger, his eldest lawful son, and the heirs-male of his body; remainder to the heirs-female of his body, remainder to William Macculloch, his second lawful son, and the heirs-male of his body, and this entail was duly recorded, and charter and infestment followed.

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There had been a previous entail (1742), but which was brought under reduction; and by a contract in 1751, between John Macculloch of Barholm, on the one part, and Isobel

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