

No 107.

As the deed was clearly in favour of the father, who could not be *actor in rem suam*, the COURT adhered to the judgment of the Lord Ordinary, "sustaining the reasons of reduction."

Lord Ordinary, *Kennet.* Act. *Cha. Hay.* Alt. *D. Armstrong.* Clerk, *Colquhoun.*  
L. *Fol. Dic. v. 4. p. 7. Fac. Col. No 64. p. 104.*

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S E C T. VII.

Lesion in extrajudicial proceedings.

1614. *January.* EDGAR *against* EXECUTORS of EDGAR.

No 108.

IN an action pursued betwixt John Edgar and the Executors of umquhile Edward Edgar, the LORDS found, that John Edgar minor could not be restored *in integrum* against a bond, in respect he qualified no lesion, but that the gear had made shipwreck after the date of the bond.

*Fol. Dic. v. 1. p. 580. Kerse, MS. fol. 146.*

1631. *January 25.* HOUSTON *against* MAXWELL.

No 109.

In a reduction of an assignation upon minority and lesion, it was not sustained that an equivalent sum was paid for the right, unless it were also offered to be proved, that the sum was profitably employed for the minor's use.

HOUSTON, as heir to umquhile Helen Murdoch, pursuing Maxwell for reduction of an heritable alienation of some land, made to the said Maxwell by the said Helen Murdoch, upon this reason, because at the time of the said disposition, she was minor, and received not a competent price for the said alienation, neither was there any just or lawful cause, which may sustain the said alienation, nor no sentence of any sovereign Judge interponed finding the said alienation necessary, and to be a warrant to authorise the same, without which the same cannot be sustained, the woman being within 14 years of age, and greatly prejudged; and it being excepted for the defender, that this reason ought not to be sustained, in respect of the bond of alienation produced, which bears the woman's receipt of the money therein contained, for the alienation, and which is more than the just worth thereof, and so she could never allege lesion, no more can her heir do; seeing he offered to prove by witnesses in fortification of the bond of alienation, that he had really paid the sum upon her great and instant desire, when she was travelling to England; so that there needed no decret, it being given to her truly, as said is. THE LORDS found the reason relevant,

and repelled the exception; for the LORDS found the alienation could not be sustained, albeit it bore payment of the true price of the land, and albeit the defender offered to prove the real delivery thereof to her; seeing the payment made to herself being then of 14 years at most, neither being authorised with the sentence of a Judge, and noways qualified converted to her utility, nor consigned to be given to her, as a judge should appoint, nor given to her curators, if she any had, could not exoner defender; but the minor was found thereby circumvened, and so the alienation could not be sustained in law; this is conform to the L. 24. § Restitutio D. De min. 25. annis, Si adversus venditionem minor restituitur, emptori præmium esse reddendum, nisi emptor tunc præmium ei dederit, cum eum perditurum non ignoraret, nam sicut pecuniam mutuans minori eam consumpturo, non postest pro pecunia agere, sic emptor non agit pro præmio sic soluto, nisi quod parcius hoc servetur in venditione, quia ibi æs alienum solvitur, quodolvere necesse est, credere autem non est necesse, quare si necesse fuit præmium solvi, non omnino talis emptor damno est afficiendus, sed in casu prædicto non potest doceri de præmio vere soluto, et utcunque fuerit solutum, tamen communiter tenetur, ut est in glossa in dicto § Si pecunia pro præmio minori soluta salva sit, tum est restituenda emptori, alias non. And the LORDS also found, that this disposition should be reduced, from the beginning, and not from the time of litiscontestation only, as the defender desired, seeing this reduction and restitution is the restoring of the cause and the party, to the same estate wherein they were before the alienation.

Clerk, Hay.

*Fol. Dic. v. 1. p. 580. Durie, p. 558.*

\* \* \* Auchinleck reports this case:

1631. January 22.—UMQUHILE Helen Mudie in Dumfries being scarce past 12 years of years of age, disposes to Captain Maxwell a tenement in Dumfries, wherein she was infest as heir to his goodsire's brother; and a discharge by her and her curators grants a receipt of 500 merks for the said tenement, which was the full price of the same. After his decease, within a year after her disposition, she dies, and John Houston serves himself heir to her, and intents reduction of the said alienation, by reason it was made by a minor *ex nulla causa debiti* and *sui judicis aut causæ cognitione*, and to her enorm hurt, seeing she received no competent price therefor, but about L. 40 or L. 50 given her, wherewith she past to England and spent the same yearly; and so thereby the heir is prejudged, and has good reason to seek restitution, and offer to restore the money received by her, the defender making count and reckoning of the mails of the tenements intromitted with by him. To which it was *answered*, That the reasons of reduction ought to be repelled, because it is offered to be proven in fortification of the said disposition, that the defender delivered to the

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said Helen the sum of 500 merks which is equivalent to the price of the land, and for proving thereof produce an acquittance subscribed by her and her curators of the said sum delivered to her for the said disposition, that she might travel into England. To which it is *replied*, the reason is relevant notwithstanding of the exception, because a minor *sine causa cognita et decreto judicis* may not sell lands, and far less take money therefor, and spend it yearly to her own prejudice; and although she, by the said acquittance, grants the receipt of a greater sum than she received indeed, yet the granting of the acquittance prejudices not the heir to reduce the disposition made, and to seek restitution. THE LORDS repelled the exception notwithstanding of the acquittance produced.

*Auchinleck, MS. p. 134.*

See similar decision, 19th July 1672, Ruthven against Gray, No 9. p. 31.

No 110.

1632. July 4.

DAVIDSON *against* HAMILTON.

A husband provided his wife in life-rent of his whole means and conquest, and bound himself to pay 5000 merks to her father. He brought a reduction on minority, and lesion because he had got only 1000 merks of tocher. The contract reduced as to the obligation to the father-in-law, but not as to the wife's provision, altho' there might have been an eventual prejudice to the children.

IN a reduction of a contract of marriage, at the instance of Alexander Davidson, made betwixt him and Robert Hamilton, and the said Robert's daughter, wife to the said Alexander, whereby the said Alexander was obliged to infest his said future spouse in all his lands and estate, and in all which he should thereafter conquest *stante matrimonio*, during her lifetime, which the said Alexander desired to be restricted to a competent provision, seeing there was only conditioned to him in tocher by the contract 1000 merks, and seeing the bairns, if the wife survived him, would be destitute of all means to live by; and also by the contract he was obliged to pay to his said father-in-law 5000 merks, and to do sundry other particulars to him, if there were no bairns of the marriage, which should live while they were married, which contract he desired to be reduced, because he was then minor and greatly hurt. THE LORDS sustained the reason of minority and lesion, for reducing of the contract, in so far as the pursuer was thereby obliged to his father-in-law, as said is; but the LORDS found not the reason relevant to reduce the contract, so far as concerns the provision therein, introduced in favours of the minor's wife, for her life-rent of the pursuers whole estate; for the LORDS found, that any either major or minor, might provide his future spouse to his whole means, and that such provisions are valid by the laws of this realm; howsoever by the Roman law there was required an equal proportion *inter dotem et donationem propter nuptias*, neither was the minor esteemed to be prejudged by such provisions, in such sort that he should be restored against the same, especially where there was no creditor to the pursuer insisting in this reduction, nor complaining of this provision, *quo casu* if the wife had been provided to her life-rent, and the bairns