

1729. January. NEWTON *against* ANDERSON.

No. 59.

A process of sale of a bankrupt estate being intended upon an adjudication, with a charge against the superior, it was objected, That an adjudication without infertment was no real right, and yet the act 1681, authorising processes of sale of bankrupt estates, allows only such a process to be carried on at the instance of a creditor having a real right. Answered, The words *real right* are here taken in a lax signification; and that an adjudication is designed also, is pretty evident from the preamble of the statute, which runs in these terms, "Considering that when estates and lands of bankrupts are affected with comprisings, adjudications, and other real rights," &c. The objection was repelled, and an adjudication with a charge found a sufficient title to carry on this process.—See APPENDIX.

*Fol. Dic. v. 2. p. 473.*

1731. January 26. FEA *against* TRAIL.

No. 60.

A declarator of terce being obtained against the deceased husband's heir, action for the third part of the mails and duties was sustained against possessors of the lands wherein the husband died last infert, though the relict was not kened, nay not even served to her terce.—See APPENDIX.

*Fol. Dic. v. 2. p. 472.*

1738. February 7. OCHTERLONY *against* M'KENZIE.

No. 61.

An adjudication without either infertment or a charge against the superior, was sustained as a sufficient title for carrying on a process of sale.

*C. Home.*

\* \* \* This case is No. 38. p. 11985. *voce* PROCESS.

1738. November 7.

INOLIS *against* JEAN MIRRIE, and LOCKHART, her Husband.

A debtor having made a partial payment to one of four co-executor creditors, but within the fourth part of the bond, the same was objected to as exceeding the sum to which the said co-executor's claim extended; which the Lords "Sustained, and found the payment was in so far unlawfully made."

No. 62.  
Whether co-executors have action *pro rata*, or must all con-

No. 62.  
 occur in pursu-  
 ing and dis-  
 charging?

It was the unanimous opinion of the Court, that co-executors must all concur in pursuing or discharging, because they have but one office, are one body, and represent the defunct as one person; and therefore, any one making payment to a co-executor, without concurrence of the rest, does it at his peril. It is true, the danger is not great where the co-executors are nearest of kin, who have an equal interest, in case the payment do not exceed the co-executor's share; but the case of co-executor creditors is different; a voluntary payment to one of them will be sustained or not, according as the person receiving payment shall in the event be found entitled to the extent of the sum he receives.

*Kilkerran, (EXECUTOR) No. 3. p. 171.*

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1739. *January 23.* KEITH *against* LORD BRACO.

No. 63.

An adjudication proceeding upon a charge to enter heir, though no infetment had followed on it, found a good title in a reduction and improbation to force production of all writs flowing from the person to whom the party was charged to enter, or from his predecessors; but not to force production of writs flowing from the authors of said person or of their predecessors, unless the pursuer should first condescend upon such authors, and give reasonable evidence that they were his authors.

*Kilkerran, (TITLE TO PURSUE) No. 1. p. 578.*

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1739. *November 2.* GRAHAMS *against* WILSON.

No. 64.

A precept of *clare constat* is a sufficient title to pursue, where neither the granter is refused to be superior, nor the receiver to be heir upon a colourable ground.

*Kilkerran, (PRECEPT OF CLARE CONSTAT) No. 1. p. 413.*

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1740. *February 19.* SPRUEL *against* SPRUEL CRAWFORD.

No. 65.  
 General ser-  
 vice to an  
 apparent heir,  
 against whom  
 an adjudica-  
 tion was led,  
 a sufficient  
 title to quar-  
 rel the adju-  
 dication.

Where an adjudication proceeds against an apparent heir upon a special charge, the next heir needs no other title to quarrel the adjudication than a general service to the former apparent heir, against whom the adjudication was led: And of this there is no doubt, so far as concerns his title to quarrel the decree of constitution, being himself liable to the debt in the decree, by his service to the person against whom it was obtained. But it was not so clear, that supposing no objection to lie to the decree of constitution, he could quarrel the adjudication upon nullities, until he served in special to the person last infet in the lands.