

No 96.

whole sum out of the part occupied by the adjudger who has not an inhibition ; nay, must do so, because he is barred from attacking the inhibiting adjudger. But the *answer* was obvious, *imo*, That this argument proceeds upon a fallacy, as if each adjudger possessed a separate tenement, and as if the annualrent were a burden upon both tenements ; whereas, there is but one subject, viz. the estate of Tofts, over the whole of which, each adjudger has a right *pro indiviso*. This shows the emptiness of the objector's argument ; for there can be no partition of the land, or of the price, betwixt the two adjudgers, till the burdens that affect their joint-property, and in particular the annualrent-right, be discharged, leaving the remainder clear to be divided equally betwixt the adjudgers ; *2do*, *Esto* the objector's rule were to take place, viz. first to divide the common subject betwixt the two adjudgers as joint proprietors ; the next thing to be done, would be to divide the common burdens also ; by which means no more but the one half of the annualrent-right would fall upon the simple adjudger. It is true, the annualrenter might, notwithstanding, draw his whole sum from the simple adjudger ; but then, this adjudger would, without controversy, be entitled to recover from the co-adjudger the half of the said sum, for which he, the co-adjudger, was ultimately liable. And this comes to the same with what is determined by the Court.

' The bill was refused without answers.'

*Fol. Dic. v. 1. p. 184. Rem. Dec. v. 2. No 1. p. 1.*

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1739. February 7.

HOGG and the Other CREDITORS of the EARL of BUCHAN, *against* COLONEL GAIRDNER.

No 97.

WHERE, in a competition of creditors, one has a preferable security over two subjects, from both of which he debars a secondary creditor till he recover his payment, not only will he be obliged to assign to the secondary creditor upon payment made to him by the secondary creditor, but he will even be obliged to assign when he debars the secondary creditor, and draws his payment out of the subject ; for though that may appear an extinction of his debt, as no doubt it is in strict law, yet in practice it is considered as if the debt had been extinguished by the money of the secondary and postponed creditor.

*Kilkerran, (COMPETITION.) No 1. p. 136.*

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1739. February 7.

A. *against* B.

No 98.

IN a competition of creditors for the rents of an entailed estate, where one of them had a debt, which also affected the fee, he was found not obliged to assign to those whose debts did not affect the fee.

In no case is one entitled to an assignation to a diligence affecting a subject which he has not himself affected.

No 98.

*Kilkerran, (COMPETITION.) No 2. p. 136.*

1739. December. CREDITORS of KIRKCONNEL Competing.

JOHN GORDON purchased the lands of Kirkconnel at a public sale; and, before he himself was infeft upon his decret of sale, granted several heritable bonds, upon which the creditors took infeftment at different times. In a competition of his creditors, it was *pleaded* for the latest annualrenters, That the annualrent-rights, being originally ineffectual as to any real right upon the land, were validated by the common debtor's infeftment, and no sooner; and therefore, that they ought all to be ranked *pari passu*; as no creditor can maintain that his real right is of an earlier date than that of his competitor.

'THE COURT, notwithstanding, preferred the creditors according to the dates of their infeftments, in the same manner as when granted by a debtor infeft.'

*Rem. Dec. v. 2. No 11. p. 24.*

No 99.  
Annualrent rights, granted by a debtor before his infeftment, are ranked according to their dates, as if the debtor had been first infeft.

1745. February 21. ARCHIBALD BONTEIN *against* BONTEIN of Mildovan.

ROBERT BONTEIN of Mildovan, by an agreement with Archibald, his eldest son, settled upon him L. 20 Sterling yearly in name of aliment.

Afterwards, falling into bad circumstances, and being incarcerated for debt, he *pleaded* against his son, who was in a good way, the *beneficium competentiae*; the LORD ORDINARY, 14th January 1744, found that the father was entitled to the *beneficium competentiae*?

*Pleaded* in a reclaiming bill, That this benefit was no part of our law, William Dick against Sir Andrew Dick, No 40. p. 409.; 24th February 1669, between the same parties, No 1. p. 1389.; and Harcarse, title SUMMONS, July 1687, Cairns against Cairns of Bellamore, No 2. p. 1389.

2dly, The present aliment was not *in constituendo*, but was already constitute.

And, 3dly, The action was founded on a contract, not solely on the *pietas paterna*.

*Answered*, Wherever an action for aliment would be competent, there this defence behoved to be sustained. There could be few decisions of aliments decreed to parents, because few children would stand pursuits of this sort; but one was condescended on, viz. Brown of Thornydykes against his two Sons, No 82. p. 448. though here, out of regard to the sons, it behoved to be noticed, that the dispute was rather, which of them should be charged with their father's aliment, than if he should be alimented.

THE LORDS adhered.

No 100.  
A father, debtor to his son, having been freed of the debt on account of the *beneficium competentiae*; it was made a question, but not decided, whether the son might charge his claim on his father's estate, so as to compete with his other creditors.