

Countess of Caithness, and Lady Dorothea Primrose, against Creditors-Adjudgers of the Earl of Roseberry, No 103. p. 10288. No 105.

THE COURT, on a hearing in presence, ' Found, That the adjudication, and infestment following upon it, are preferable to the personal disposition founded on by Fergusson.'

Lord Ordinary, *Monbodo*.
Clerk, *Colquhoun*.

Act. *Rae, G. Fergusson*.

Alt. *M^cLaurine, M^cCormick*.

Fol. Dic. v. 4. p. 72. Fac. Col. No 35. p. 60.

1786. November 15.

THOMSON *against* DOUGLAS, HERON, & COMPANY.

A PARTY having acquired a right to lands under trust, but fraudulently omitting the trust in his infestment, his adjudging creditors were thought liable to the objection which lay against him, their rights not being completed by infestment. No 106.

N. B. This point, though stated in the report, No 52. p. 10229, was little discussed, as the fund was said to be exhausted by preferable debts; and the Court did not mean to lay down the rule in general, that adjudgers must take *tantum et tale*.

Fol. Dic. v. 4. p. 72.

1787. August 8.

CREDITORS of SIR JOHN SINCLAIR *against* Captain JAMES SUTHERLAND.

IN consequence of a stipulation contained in a lease granted by Sir John Sinclair of Mey to Captain Sutherland, the latter, after the death of the former, made several payments to Sir John's Creditors.

Several years afterwards, the other creditors deduced adjudications *contra hereditatem jacentem*, and sued the tenant for the whole rents which arose after that period, as being all attached by such adjudications.

The defender *pleaded*; If, before the death of the landlord, and after the payments made by the defender, a creditor of the former had adjudged his estate, the latter would have been entitled to plead, that by such payments, made under the authority of the landlord, the posterior rents were so far actually extinguished; and that, therefore, he could not be liable for them; although, perhaps, the same plea could not be maintained against a *bona fide*

VOL. XXIV.

57 G

No 107.
Payment of rents by a tenant, after his landlord's death, in virtue of a special authority contained in his lease, found effectual against the creditors of the landlord, who afterwards attached the lands, by adjudications *contra hereditatem jacentem*.

No 107.

purchaser. The effect of adjudication *contra hæreditatem jacentem*, is clearly at least no stronger than that of other adjudications. If the heir of Sir John Sinclair had not renounced, the adjudication of the creditors would not have been *contra hæreditatem jacentem*; in which case, they would not have competed with the defender; and it would be strange, if the renunciation of the heir should bestow the preference upon them. It is clear, they thus come into the place of the heir; and the same obligation which he would have lain under must fall upon them.

Answered; By adjudication *contra hæreditatem jacentem*, not only lands themselves, 'but the bygone rents and the duties thereof, preceding the adjudication and after the defunct's death, may be adjudged;' Stair, b. 3. tit. 2. § 48. Accordingly, such adjudication was found preferable to an assignation of mails and duties, with respect to the rents falling due between the proprietor's death and the date of the adjudications. Nothing less than a real right can be effectual, either against singular successors, or against creditors by whom real diligence has been used.

THE LORDS at first found, "That the defender was not entitled to plead retention of the rents of the unentailed lands, which fell due after the death of Sir John Sinclair, and to apply said rents in payment of debts due by Sir John, to the prejudice of those creditors of Sir John who have obtained decreets of adjudication *cognitionis causa* against Sir John's heir."

But this interlocutor being brought under review,

The Court "found, That the defender is entitled to take credit for the rents falling due between the death of Sir John Sinclair and the adjudications led *contra hæreditatem jacentem*, to the extent of the debts paid by him."

To this judgment the Court adhered, after advising a reclaiming petition and answers.

Lord Ordinary, *Alva*. Act. Dean of Faculty. Alt. Honyman. Clerk, Orme.
S. *Fol. Dic. v. 4. p. 73. Fac. Col. No 346. p. 535.*

1792. January 31.

JOHN RUSSELL, HUGH ROSS, and Others, *against* CREDITORS of HUGH ROSS of Kerse.

No 108.

An entail not followed by infestment, not effectual, though recorded, against the real diligence of the creditors of the institute, he being also heir of line.

THE father of Hugh Ross, who stood infest in the lands of Kerse, executed an entail of them, containing the usual clauses, in favour of him as institute, and of a series of substitutes.

The deed was recorded in the register of tailzies; but sasine did not follow upon it.

Mr Ross, after his father's death, expedè a general service as his heir of line; but made up no titles under the entail.