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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.

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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.

He had contracted considerable debts, as his father also had done ; and some of his creditors having charged him to enter heir of line in special to his father, led adjudication, which was completed by infeftment.

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A process of sale having being raised, the estate was purchased by Mr Russell ; after which a doubt was entertained, whether or not the entail, personal as it was, precluded the above mentioned diligence. In order to try this point, on which the right of the purchaser depended, an action of reduction, at the instance of the Creditors, was raised, in which the purchaser, together with Mr Ross, and the other heirs of entail, were called as defenders. On the part of the pursuers it was

Pleaded ; No personal right, such as that resulting from the entail in question, could ever be placed in opposition to the real right of a creditor-adjudger completed by adjudication, if proper attention were given to the distinction between those different kinds of right.

The first is that by which a person is vested in the property of a subject ; the other that which gives a title or claim to become so vested, but does not transfer the property. Thus, if any one infeft in lands convey them to a party, who postpones the taking of sasine, and if, in the mean time, he again dispoise them to a different person, by whom infeftment is immediately obtained, the latter alone becomes proprietor, or is vested with the property, while nothing remains to the former but a personal action against the fraudulent dispoiser. In like manner, before a dispoinee be infeft, he may be cut out by an adjudging creditor of the dispoiser's, whose right is completed by sasine ; June 1737, *Bell contra Garthshore*, No 80. p. 2849. ; 13th February 1781, *Mitchels contra Ferguson*, No 105. p. 10296.

Now Mr Ross's father, who was infeft in the estate, granted a disposition in favour of a series of heirs of entail, on which, however, sasine did not follow. The granter, therefore, during his life, continued vested in the property of the estate ; and at his death, it was *in hæreditate jacente* of him, being then subject to a twofold claim or personal right ; first, that of the heirs of line, and next that of the heirs of entail. Both these rights belonged to Mr Ross, and under either of them he could become vested in the fee. If he did so as heir of line, by special service and infeftment, a claim of forfeiture, no doubt, against him would thence accrue to other heirs of entail ; but it is perfectly obvious, that this presupposes him, in the first instance, to have acquired the unlimited right of property. Hence, being fully vested, he could dispoise with effect ; and the right of the dispoinee would be unchallengeable, when clothed with infeftment. For the same reason, his creditors could adjudge with effect, the special charge, authorised by act of Parliament 1540, being equivalent to a special service.

For farther illustration, let it be supposed, that Mr Ross's father, instead of a deed of entail, had executed a conveyance to an onerous purchaser, which

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The registration of this entail is nothing at all to the purpose. The statute of 1685 superadded that new requisite for the safety of creditors and of purchasers; but has no tendency to render a personal right a real one, which alone could have effect against the complete real diligence in question.

Nor could creditors or purchasers derive any advantage from this registration in the record of tailzies, when that of sasines gave them no information of the existence of such a restraint on the property.

These observations received the sanction of the Court, in the case of the Creditors of Douglas of Kelhead, in 1765. (Not reported.)

Answered; Mr Ross's right is subject to forfeiture, in virtue of the irritant and resolute conditions of the entail; so that a declarator of irritancy, at the suit of the substitute heirs, would entitle them to hold the estate unburdened with debts, and should seem to lay the subjects purchased open to eviction.

For the argument founded on the want of sasine seems to be obviated by the statute of 1685. It requires, indeed, the insertion of the irritant and resolute clauses in the instruments of sasine; and if there had been infestment, this requisite would here have been essential; but as there was not, it is enough that the limitations appear on record in the procuratory of resignation.

Accordingly, in the case of Denham of Westshiels, *voce* TAILZIE, it having been found, that a personal entail was ineffectual against creditors, that decision was reversed on appeal.

THE LORD ORDINARY reported the cause on informations, when a hearing in presence was appointed; and it was ordered, that the informations in the case of Kelhead should be reprinted, for the perusal of the Court.

On advising the question, however, the Court were unanimously of opinion, that the personal entail could have no effect against the real right of the creditors, and that this was a point which admitted of no doubt. And it was observed, that what had given occasion to so ample a discussion, was an opinion expressed on the Bench in the case of Thomson against Douglas, Heron, and Company, (No 52. p. 10299.) "That adjudging creditors stand in a different predicament from disponees, as they must take the right of their debtor *tantum et tale*, as it is in his person;" an opinion now stated to have been erroneous.

Reporter, Lord Swinton.

For the Creditors, Rolland et alii.
Clerk, Sinclair.

Alt. Wight et alii.

S.

Fol. Dic. v. 4. p. 73. Fac. Col. No 200. p. 4211.

**** N. B.** The Court had pronounced a similar judgment in the case of Stewart and others, Creditors of Sir John Douglas of Kelhead *contra* Douglas, in 1765, which is omitted in the reports of that year. See APPENDIX.

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S E C T. VIII.

Effect of Irritancies, &c. not ingrossed in the Infertment.

1664. December 1. EARL OF SUTHERLAND *against* GORDON.

AN irritant clause, *ob non solutum canonem*, contained in the disposition of feu, but neither in the charter nor sasine following thereupon, is not real, nor effectual against an appriser. It is otherwise, if sasine follow directly upon the disposition, in which case the disposition serves for a charter.

Fol. Dic. v. 2. p. 70.

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****** This case is No 61. p. 7229. *voce* IRRITANCY.

1706. July 7.

SIR HUGH CAMPBELL of Calder *against* The CREDITORS of HAY of Park.

IN the ranking of the Creditors of Park Hay, Sir Hugh Campbell of Calder founded upon an heritable bond of relief for several cautionaries he stood engaged in for Park, whereupon he had taken the first infertment; and craved preference, not only for the principal sums, annualrents, and expenses paid by him to the common debtor's creditors, and these annualrents and debursements stated as a principal sum bearing annualrent from the time of payment; but also sought to be preferred for the expenses of expeding his infertment, and making it effectual against the other competing creditors; because, his bond of relief doth expressly provide that his infertment shall not be redeemable till he be reimbursed, not only of all charges and damages in general, but also of the expense of his infertment; and his charter under the Great Seal repeats these obligements, and both it and his sasine expressly relate to the reversion in the way and manner as the same is contained in the bond of relief registered and made publick.

Answered for the other Creditors, However the expense of Sir Hugh Campbell's infertment might be the foundation of an action against Park Hay, it is inconceivable upon what ground it can be real against the estate, to the exclu-

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An heritable bond of relief provided, that the infertment to be expeded on it should not be redeemable till the cautioner should be reimbursed of all charges and damages in general. He was found preferable only for sums, annualrents, and expenses paid by him to the creditors of the common debtor, not for the expenses of his infertment, or of supporting his right in the competition.