

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.