1731. *December.* DRUMMOND of Gairdrum *against* ALEXANDER JACKSON. No 10.

AN adjudication, upon a decreet *cognitionis cauſa*, is effectual, though the heir happened to be ſerved, and could not validly renounce upon being charged to enter heir.

'Tis no objection to an adjudication *cognitionis cauſa*, deduced before the ſheriff, that there was no abbreviate thereof ſigned by the judge, nor recorded in terms of the articles of regulation 1695; becauſe theſe articles concern the Seſſion only.

Fol. Dic. v. 1. p. 3.

1753. *August* 3.
TRUSTEES of MUNGO GRAHAM'S CREDITORS *against* JOHN HYSLOP.

No 11.
An adjudication, *contra hereditatem jacentem*, may be led before the ſheriff, if the lands be within his juriſdiction.

DAVID Viſcount of Stormonth, anno 1662, granted an heritable bond for 4000 merks, to John Carmichael, and the heirs therein named, obliging himſelf to grant infeftment, 'in all and ſundry his lands, heritages, and others whatſoever, pertaining to him, wherever the ſame lie in this kingdom, for an annualrent of 240 merks yearly, to be uplifted and taken furth of the readieſt mails, profits, and duties thereof, at Whitſunday and Martinmas, by equal portions:' And the bond contains a precept of ſaſine, in the ſame indefinite terms. This bond, upon which infeftment never was expede, was veſted, by progreſs, in Mr Robert Richardſon, writer to the ſignet; who, having died inſolvent, Patrick Chalmers, one of his creditors, having charged the apparent heir to enter, brought a proceſs upon the paſſive titles, before the ſheriff of Edinburgh; and, upon the renunciation of the apparent heir, obtained firſt a decreet *cognitionis cauſa*; and thereafter, October 1701, a decreet of adjudication *contra hæreditatem jacentem*, in the ſame court. And, according to the practice of the ſheriff-court of Edinburgh, an abbreviate of

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your bonds of proviſion are poſterior to my mother's contract-matrimonial; by which a ſpecific ſum of 12,000 merks is the proviſion of the bairns of that marriage, of which I am the only child; and the Lords have found, that obligements to bairns of a firſt marriage, do not hinder a father to do rational deeds, no way immoderate, in favours of a ſecond wife and children of that marriage, as was found 16th June 1676, Catharine Mitchell againſt the heirs of Thomas Littlejohn: And though you have one tye on the father, viz. his natural obligation to provide his children; yet I have another ſuperadded one, viz. the proviſion in my mother's contract of marriage; ſo that I have both a *debitum naturale et civile* on my ſide; whereas the children of the firſt marriage, (their mother having no contract) have only the firſt.—*Replied*, In cognoſcing you to be the only child of the marriage, you are found to be heir of proviſion; ſo after diſcuſſing the other heirs, you are liable *ſubſidiarie* to warrant your father's deed in our bonds of proviſion, though poſterior to your mother's contract, as was found of late betwixt Sir Patrick and Sir Robert Homes. Some were for bringing the children of the two marriages in *pari paſſu*; but the caſe being new, the Lords reſolved to hear it argued in their own preſence. If Suſanna's curators have cognoſced her heir of proviſion, ſhe being ſtill minor, may revoke it, as being to her leſion, if the contract alone will be a good title. (*See* PROVISIONS to HEIRS and CHILDREN, for the caſes above referred to.)

No 11. this adjudication, ſigned by the judge, was recorded by the clerk to the bills, in the ſame manner, as is obſerved with reſpect to abbreviates of adjudications, pronounced by the Court of Seſſion, purſuant to the regulations 1695 and 1696. Under this adjudication, the truſtees for the creditors of Mungo Graham, claimed the debt contained in the foreſaid heritable bond, due by the Viſcount of Stormonth.

On the other hand, John Pringle, upon a charge to enter, brought a proceſs upon the paſſive titles, againſt the apparent heir, before the Court of Seſſion; and, upon a renunciation, obtained a decreet *cognitionis cauſa*; and thereafter, a decreet of adjudication *contra hæreditatem jacentem*, anno 1703; under which adjudication, John Hiſlop claimed.

The Viſcount of Stormonth brought the parties to debate their intereſt, by a multiplepoinding; where it was objected by Hiſlop, againſt his competitor, 1*mo*, That the ſheriff has no power to pronounce an adjudication *cognitionis cauſa*; which is an extraordinary remedy, introduced by the ſovereign court, and competent only there. 2*do*, That the Viſcount of Stormonth having no lands within the ſhire of Edinburgh, the ſheriff had no power to adjudge this heritable bond, which has an eſpecial reference to the debtor's lands, more than he could adjudge the lands themſelves. It was anſwered to the *firſt*, That a juriſdiction is, *de praxi*, eſtabliſhed in the ſheriff of Edinburgh, to pronounce decreets of adjudication *cognitionis cauſa*. To the *ſecond*, two anſwers were made: 1*mo*, That the precept of ſaſine, contained in this heritable bond, is informal and null; becauſe, an order to give infeftment in all the debtor's lands in general, is not ſufficient for giving infeftment of any lands in particular; and therefore, this bond is to be conſidered in no other light than as a perſonal bond, like a bond heritable by deſtination, or a bond ſecluding executors. 2*do*, Suppoſing the precept of ſaſine to be formal, the bond, however, before infeftment, continues to be a perſonal right; and for that reaſon, might regularly be adjudged from the apparent heir, renouncing within that juriſdiction where the apparent heir had a *forum*.

THE LORDS were all of opinion, That a precept, to give infeftment in lands, deſcribed in general to belong to the granter of the precept, is a ſufficient warrant to give infeftment in every particular tenement; which, by production of the granter's infeftment, is vouched to come under the general deſcription. They were alſo of opinion, That the heritable bond in queſtion, being a *jus ad rem*, granted for no other end than to eſtabliſh a land ſecurity, muſt be ſubjected to the ſame juriſdiction, to which the lands are ſubjected. And accordingly, the following interloeutor was pronounced: 'THE LORDS ſuſtain the objection to the 'decreet of adjudication, obtained before the ſheriff of Edinburgh; viz. That 'the lands of the debtor, in the heritable bond, lay all out of the ſheriff's juriſ-'diction.'

With regard to the preliminary point, of the power of a ſheriff to pronounce an adjudication *contra hæreditatem jacentem*, the following argument will evince that he has this privilege. A general charge to enter heir, bears, 'That where

No 11.

'the complainer has ſundry actions to intent at his inſtance, as well before the 'Lords of Seſſion, as other inferior judges, &c.' *Ergo*, a decreet *cognitionis cauſa*, before the ſheriff, upon the heir's renunciation, is valid. And, of conſequence, the ſheriff muſt have a power to put ſuch a decreet in execution, in the only manner poſſible; which is by an adjudication *cognitionis cauſa*. Nor is this an extenſion of the power, which the ſheriff has by the common law. By the act 36, Parl. 1469, it appears, that the ſheriff, after pronouncing decreet upon the brieve of diſtreſs, proceeded, by his own authority, not only to poind the moveables, but alſo to appriſe the land.

With regard to the *ſecond* point; what ſettled my opinion, was the caſe of a purchaſer entering into poſſeſſion upon a diſpoſition, containing procuratory and precept, without actual infeftment. The lands lie within one county, and the purchaſer dies in another county, where he had his domicile. It appears evident, in this caſe, that the ſheriff, within whoſe juriſdiction the lands lie, is the only inferior judge competent in this caſe to pronounce a decreet of adjudication *cognitionis cauſa*; for the diſpoſition, which has no other operation or effect, than merely to be a title to the lands, cannot be conſidered as a ſeparate and independent ſubject, to be attached by any ſort of execution, but that which affects the land. In general, title-deeds are not a ſubject for execution. The land is taken in execution, which belongs to the debtor; and the ſame right is conveyed to the creditor, which the debtor had, complete or incomplete; and with the land, the debtor's title is conveyed, as an acceſſory, of whatever nature the title be. The point would be more doubtful, in the caſe of an obligation to grant infeftment without a precept. (*See* JURISDICTION.—SASINE.)

Select Dec. p. 65.

ADJUDICATION IN IMPLEMENT.

1663. *June* 24. M'DOWGAL *againſt* LAIRD GENTORCHY.

No 1.
In an adjudication in implement, the ſuperior is not obliged to receive the adjudger, unleſs he inſtruct his author's title.

M'NEIL having diſponed certain lands to M'Dowgal, wherein he was heir apparent to his goodſir's brother, obliged himſelf, to infeft himſelf as heir therein, and to infeft M'Dowgal; at leaſt, to renounce to be heir, to the effect M'Dowgal might obtain the lands adjudged; whereupon, M'Dowgal having raiſed a charge to enter heir, M'Neil renounces; and thereupon, M'Dowgal craves the land to be adjudged; and Glentorchy decerned to receive and infeft him.—Glentorchy *alleged*, That he could not receive him, becauſe he had right to the property himſelf; unleſs the purſuer condeſcend and inſtruct his authors (in whoſe place he