

With respect to the intrinsic impropriety, or incongruity, of offices being held in different respects, by different persons, or by any other than those nominated *ob delectum personæ*, such a topic might have been properly urged against their being considered as patrimonial subjects; but now, when this is admitted, that, being its necessary consequence, as already observed, must follow of course.

The Court considered this last conclusion as unavoidable, and decisive of the question; a feudal subject's being *in commercio* implying that it is transmissible by base infestment.

THE LORDS, therefore, upon advising a reclaiming petition and answers, adhered to a former interlocutor of the Court, thereby brought under review, which was as follows: ' Upon report of the Lord Westhall, Ordinary, and having advised the mutual memorials for John Stewart, Esq; and Lieutenant-Colonel Archibald Campbell, and heard parties procurators in their own presence, upon what is above represented; the LORDS repel the objection to the said John Stewart's interest, and prefer Captain Archibald Stewart, his brother-german, and heir therein, to the sums now in the hands of the raiser of the multiplepinding, and to the sums to fall due in time coming; and remit to the Lord Ordinary to proceed accordingly.'

Reporter, *Lord Westhall.* For Mr Stewart, *Wight, Blair.*

For Colonel Campbell, *Ilay Campbell, Rolland.* Clerk, *Robertson.*

Fol. Dic. v. 3. p. 318. Fac. Coll. No 21. p. 39.

S.

1782. *March 1.* MARSHALL & RUTHVEN *against* JEAN WIGHT.

CUMING having right by disposition, containing procuratory of resignation, to a house in Edinburgh, disposed it, in the year 1771, to Beveridge; and, for completing his right, assigned to him the unexecuted procuratory.

Messrs Marshall and Ruthven, creditors of Cuming, in the year 1777, deduced an adjudication against this subject, and thereon obtained infestment from the Magistrates of Edinburgh.

In the year 1779, Mrs Wight, as representing Beveridge, the disponee, executed the procuratory, and was infest. A process for selling Cuming's subjects, including this house, having been commenced, Mrs Wight insisted that it should be excepted; and

Pleaded, The common debtor's right to this house was only personal, consisting of a disposition, and an unexecuted procuratory. An adjudication against him could only carry that right, and could no more warrant the infestment which followed, than a disposition containing a procuratory could entitle the disponee to take infestment, without resigning on the procuratory. The

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How an adjudger of a disposition, containing a procuratory of resignation, but no precept of sasine, must obtain infestment.

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infestment was, therefore, inept and void ; and the adjudication being thus reduced to a personal right, cannot compete with the complete feudal title in the person of Mrs Wight. The proper steps to have been pursued by Marshall and Ruthven, in this case, for completing their diligence, were, to have recovered the procuratory in favour of the debtor, and, upon their adjudication, and that evident, to have made resignation in the hands of the Magistrates ; or, in consequence of the personal right vested in them by the adjudication, to have led an adjudication in implement against the author last infest.

Answered for Marshall and Ruthven, A creditor obtaining a general adjudication is never in possession of his debtor's title-deeds ; and without these he cannot, like a voluntary disponee, perfect his right, according to strict feudal principles, by executing unexecuted procuratories, and completing his title to other personal rights, on which the subject adjudged may have been possessed for centuries, and by a variety of proprietors. Nor can the expedients suggested by Mrs Wight remove these difficulties. It has been found, Spottiswood, *voce* Exhibition *, that a debtor is not obliged to produce a progress ; neither is it probable, that he would readily fulfill an obligation of this kind to a creditor adjudging his estate. And, as a pursuer in an action of adjudication in implement, must libel the titles of the person last infest, the same obstacles would there occur to an adjudger of a personal right, which have obliged the creditors in this case to take an infestment directly from the Magistrates.

But there must be a mode known in law, by which real rights, whether complete or not, may be attached by the diligence of creditors ; and the feudal forms, in this matter, as in all others, must be accommodated to the exigencies of the country where it is introduced. Hence, although a voluntary disponee in a burgage tenement must make up feudal titles by resignation ; yet an adjudger may obtain infestment upon the title of his adjudication alone. Indeed, there appears no greater stretch in the law's authorising an adjudger from a person not infest to obtain infestment without the circuit of resignation, than where the debtor was actually infest. In both cases, the law does for the debtor what the debtor ought, but declines to perform ; and the interposition in both is absolutely necessary for the satisfaction of creditors. This argument is supported by the uniform stile of decreets of adjudication, which, without regarding whether the debtor was infest or not, directs ' the adjudger ' to be infest by the immediate lawful superior, on a charge of twenty-one ' days, in the same way as the debtor, and his predecessors and authors, have ' holden, or might have holden the same.' And it is likewise confirmed by the constant practice in such cases, proved by certificates from the Clerk of Chancery, and one of the Principal Clerks of the City of Edinburgh, bearing, that charters of adjudication, which, by the form of these writings in bur-

* See TITLE TO PURSUE.

gage tenures, contain both charter and infestment, are exped in the manner followed in the present instance, whether the debtor's right was personal or otherwise.

Replied for Mrs Wight, A creditor, trusting to one in the personal right of a feudal estate, is, no doubt, in a worse situation than one whose debtor is infest. But that is an inconveniency to which he has exposed himself, and from which he can no more be relieved, on principles of equity, than a creditor of an apparent heir, who, without the formalities required by law, has attempted to attach an estate not vested in his debtor by service. The certificates produced have been obtained from persons who are ministerially employed in expediting charter of adjudication and resignation, but who have no access to know in what manner parties obtaining these charters have completed their rights. Far less can these certificates go the length of establishing, that an infestment, taken in the manner here adopted, would be sustained in a Court of law.

THE LORDS sustained the objection to the infestment, founded on by Marshall and Ruthven.

Reporter, *Lord Alva.* For Mrs Wight, *Ilay Campbell.*
For Marshall and Ruthven, *Rae, Mat. Ross.* Clerk, *Orme.*

Fol. Dic. v. 3. p. 318. Fac. Coll. No 41. p. 67.

G.

1796. February 26. LINDSAY-CARNEGIE against ROBERTSON-SCOTT.

AN infestment, taken upon an exhausted precept of sasine, is null.

Fac. Coll.

* * See this case, *voce* MEMBER OF PARLIAMENT.

SECT. VII.

Precept and Instrument of Sasine disconform to the Disposition.—
Charter disconform to its Warrant.

1750. June 19. Sir ARCHIBALD GRANT against GRANTS.

ROBERT GRANT of Tilliefour, by three heritable bonds, granted to several of his creditors, annualrents effeiring to their respective sums, commanding his

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A sasine was sustained, bearing one

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