No. 15.

Answered: The necessity of a decree of expiry of the legal, to transfer the property to the creditor, is an innovation on our original law, introduced for the benefit of the debtor. This declarator, however, is not of the nature of a petitory action. It is enough for the creditor to shew that the debt is not paid, to entitle him to a decree. It is not denied, that a balance of this debt remained due when the decree under reduction was pronounced. There could not, therefore, have been any relevant defence, even if compearance had been made.

A pursuer has no mode by which he can oblige a defender to appear and to obtain a decree *in foro*. All he can do is, to cite him to appear. But if a decree in absence might be opened up at any time within the period of prescription, it would be the interest of every debtor who had not the means of immediate payment, to allow such a decree to go out against him. He would thus have an alternative of paying the debt, or relinquishing the property, while the adjudger had no alternative, being obliged to hold the estate as full payment. This doctrine would, in effect, protract the legal for forty years from the date of the declarator, besides deductions on account of minority, which might extend it still further, and would place adjudging creditors in a state of great uncertainty. And it is clearly repugnant to legal authorities; Erskine, B. 2. Tit. 12. § 19.; Livingston against Goodlet, February 22d, 1704, No. 14. p. 73. The cases quoted by the pursuer, occurred where there had been a *pluris petitio* in the adjudication, which is not alleged in the present case, as the creditor has barely recovered a sum equal to the balance of the debt, with the necessary expenses.

The Lords adhered to the interlocutor of the Lord Ordinary, found the petitioner entitled to be reponed against the decree of declarator of expiry of the legal, and remitted to the Lord Ordinary to proceed accordingly.

Several of the Judges, however, expressed their opinion against opening up this decree, in a case where it was not alleged that the adjudging creditor had, in any particular, transgressed the law, or omitted the regular steps necessary for attaching the property in payment of his debt.

Lord Ordinary, *Justice-Clerk.* Act. *Robinson.* Agents, *Macritchie & Little.*
Alt. *Macfarlan.* Agent, *Geo. Tod.* Clerk, *Pringle.*

J. *Fac. Coll. No.* 333. *p.* 527.

1808. *January* 19.

ROBERT CRAIGIE and JAMES HORNE, Trustees of SIR JAMES NORCLIFFE INNES KER, *against* SIR JAMES NORCLIFFE INNES KER, and *against* GENERAL WALTER KER, and JOHN BELLENDEN KER.

No. 16.

An alledged heir may, for the purpose of making up a title, grant

THE report of the case Sir James Norcliffe, &c. 23d June 1807, APPENDIX, PART I. *voce* TAILZIE, must be read as the narrative of this case.

Sir James Norcliffe Innes having obtained the last interlocutor mentioned in that report, which is there dated the 7th July 1807, on the day following at-

No 16.
a bond to trustees, and, on that bond, they may charge him to enter, adjudge the estate, and convey the adjudication to him,—
1. Tho' the same alleged heir has already attempted to serve, and his service has been suspended by the effect of an appeal to the House of Lords,—
2. Tho' the right of the truster to the estate be disputed *in toto*, and be under trial in the House of Lords,—
3. Tho' he be heir of a strict entail.

tempted to complete his service. But Bellenden Ker appeared in it, and objected, that he had already intimated a petition of appeal to the House of Lords, against the interlocutor 13th January 1807, and the interlocutor 23d June 1807, adhering to it: That therefore the service being suspended by the interlocutor of the macers, 17th February 1806, till a direction on the point of law should be obtained from the Court of Session, avizandum being made to the Court, with the case, for this purpose; the case then being carried from the Court of Session to the House of Lords by appeal against the interlocutor pronounced on that report, and that appeal being in dependence, so that no direction could be obtained; it was impossible for the service to proceed. The question arising on this objection was reported by one of the Lords, assessors to the macers, which on that report pronounced this interlocutor, 10th July 1807,—"In respect of the said appeal, remit to the "macers, with this instruction, that they suspend, *in hoc statu*, further proceed-"ings in the said service."

Soon after it was pronounced, General Ker intimated to Sir James Norcliffe Innes a petition of appeal to the House of Lords, at his instance, against the interlocutor 7th July 1807.

Sir James, aware that it might be out of his power to make up a title to the estate by service, without much delay, had already determined to do it in another way, to wit, by adjudication on a trust-bond. For this purpose he granted, 14th March 1807, to Robert Craigie and James Horne, a bond for £1,500,000 Sterling. Upon this bond they charged him to enter heir in general and in special to the late Duke of Roxburgh and his predecessor Duke John, in the estate of Roxburgh; and on the expiration of the days of charge, they raised a summons against him for adjudication of this estate in payment of the above sum. The Lord Ordinary ordered intimation of the process to be made in the Minute-Book, and on the walls, in ordinary form *.

General Ker and Bellenden Ker then came forward as defenders in the process of adjudication, by representations against this interlocutor. After some procedure, the Lord Ordinary reported the case, on minutes and answers. The Court appointed a hearing in presence. On hearing counsel, the interlocutor of the Court was,—15th Dec. 1807, "Remit to the Lord Ordinary to "repel the objections, to call the case without an hour, and to decern in the "adjudication." The Lord Ordinary accordingly called the cause the same day, and his interlocutor was,—"Repels the objections, refuses the represen-"tations for Brigadier-General Ker and his attorney, and for John Bellenden "Ker; and adjudges, decerns, and declares in terms of the libel."

Against this interlocutor General Ker reclaimed, and his petition was answered.

* The Court afterward expressed an opinion, that this form was superfluous in this case.

Argument for General Ker. No. 16.

I. The present action, according to the account given of it by the pursuers, is intended to make up titles to the estate of Roxburgh, in the person of Sir James Norcliffe Innes.

But the very same thing was the object of the service; and the interlocutor, July 7, 1807, found that Sir James was entitled to succeed in it. This interlocutor is now under appeal; and, accordingly, it seems clear that, even if the service were not suspended by the appeal at the instance of Bellenden Ker, it could not proceed now till this appeal at the instance of General Ker were determined. But as little can Sir James Norcliffe Innes make up a title by another form, while these interlocutors are under appeal. The order of the House of Lords, 19th April 1709, prohibits a sentence or decree appealed against from being carried into execution, "by any process whatever." But if Sir James Norcliffe Innes makes up a title by adjudication, he just carries into execution, by a different process, that interlocutor which finds him entitled to make up a title by service.

II. Supposing the order of the House of Lords out of the question, this adjudication cannot proceed, because the right of Sir James Norcliffe Innes the truster, as heir, is *sub judice*. No instance can be produced of an adjudication of this sort being attempted in such a situation. The acts of Parliament 1540, ch. 106. and 1621, ch. 27.—Act of Sederunt, 28th Feb. 1662,—and act of Parliament 1695, ch. 24. all speak of heritors or heirs apparent as the persons who may be charged to enter,—evidently regarding them as persons whose right to enter was clear. In the same way, Bankton, B. 3. Tit. 5. § 101. and Stair, B. 3. Tit. 5. § 23. speak of this form as equivalent to service, and of course requiring a similar right in the heir. In short, the person who is charged to enter is presumed to have served. But how can a person be charged to enter, and held to have served, who cannot serve, because his right as heir is *sub judice*. If it be said that he is not presumed to have served, then he is at least presumed to have wrongously refused to serve; but neither is there any room for this presumption.

The case of Beveridge against Coutts and Crawford, 10th July 1793, No. 41. p. 5296. was decided on the ground, that the heir making up a title by adjudication was entitled to have served,—see observation on Bench in that case. Indeed, if persons notoriously destitute of right to serve were entitled to make up a title by adjudication, then any body who pleases, even a perfect stranger, may make up such a title. But the contrary was found, Gordon against Forbes, 7th February 1699, No. 9. p. 194;—and the case Dow against Don, 28th Nov. 1712, No. 13. p. 14425. was decided on a similar principle. No person can be more notoriously destitute of a right to serve than Sir James Norcliffe Innes is at present, since his service is stopt by a final interlocutor, on a ground since rendered much stronger.

No. 16. III. Supposing the order of the House of Lords out of the question, and that Sir James Norcliffe Innes was undoubted heir, yet as this estate is entailed, General Ker, who is at least a subsequent heir of entail, has a right to prevent a trust-adjudication of it, since the clauses of entail render this mode of making up a title inapplicable to an entailed estate. It is impossible to adjudge such an estate, because, by these clauses sanctioned by statute, all contractions of debt on which it may be adjudged are prohibited, voided, and made grounds of forfeiture. The right arising from these clauses is in the heirs of entail subsequent to the heir having right to possession; and whenever, upon a debt contracted, an adjudication is attempted, any one of these subsequent heirs of entail may prevent it, by insisting, in terms of these clauses, that the contraction of debt is void in relation to the entailed estate, and that no adjudication of that estate can proceed upon it. The right of the subsequent heirs of entail to maintain the clauses of the entail, is notorious, and was lately sustained in the case of Turner against Turner, Nov. 17, 1807, APPENDIX, PART I. *voce* TAILZIE, where they were found entitled to set aside a lease granted in contravention of the entail. There is no exception in the entailing clauses in favour of adjudications intended for any particular purpose. There is no room, therefore, for that fiction of law on which this mode of making up a title depends, viz. that the trustee is a creditor of the heir, and has adjudged the estate; for no creditor of the heir can adjudge the estate.

Nor can it be said with truth, that the subsequent heirs of entail have no interest to oppose such an adjudication; for the adjudication must be just like any other adjudication, otherwise it would have no effect by the act 1540 or 1621. These acts never authorised heirs to charge themselves, and to adjudge in their own persons the estates of their predecessors. If, therefore, the pursuer of the adjudication were, *ex facie* of the bond and summons, a mere trustee for the heir, the process would be inept. He must, *ex facie* of the bond and summons, be a real creditor. Whether back-bonds exist or not is nothing to the subsequent heirs of entail, since these must be wholly in the power of the first heir, who may discharge them when he pleases by a secret deed.

In this situation the subsequent heirs of entail have just the same interest to oppose the adjudication that they ever can have to oppose any adjudication, with this only difference, that they have an assurance from the first heir of entail and his trustees, that neither of these parties will make any use of it, except for giving a title to the heir. But this still leaves it in their power to use the adjudication as an ordinary one, and to prevent the risk of an evil is equally a legal interest, whether that risk be greater or smaller. The subsequent heirs of entail are nowise obliged to relinquish the absolute security arising from the entail, and betake themselves to a reliance on the good faith of the truster and his trustees.

But, besides these objections to the form and procedure in this adjudication, the necessary and ultimate effect of it, if completed, must be contrary to the

entail. For the entail provides, that there shall be a regular transmission of the proper fee of this estate to a certain order of substitutes without interruption. But by this operation a new right must be created different from the original fee, and that must be transmitted through the persons of Messrs. Craigie and Horne, who were not in the line of the entail. It is obvious that the adjudication must create a new right, not merely transmit the fee, for the right under it is not an absolute right at all, but redeemable on payment of a certain sum, which a change in the value of money might bring below the value of the estate. Accordingly this point was distinctly recognised in the case of Hepburn against Scott, 25th July 1781, No. 35. p. 14487. See observations on the Bench in that case. In the case of a fee simple, the change of right is of no moment, but in the case of an entailed estate, it cannot be admitted without violating the entail. Indeed, if the entailing clauses be inserted in the conveyances of this new right to Sir James Norcliffe Innes, this will create a new entail altogether, requiring new registration, and exposing the estate to be carried off while it is unregistered. Such being the effect of this operation, supposing it *bona fide* carried through, a subsequent heir of entail is entitled to object to it on this ground. No. 16.

Lastly, No instance can be produced in which this form was ever applied to an entailed estate.

Argument for Messrs. Craigie and Horne.

I. The present process is not at all calculated to carry into execution any decree appealed from. The interlocutors in question related solely to the service, and found that the service might proceed. They are carried to appeal, and it does not proceed; so that there is no pretence for saying that they are carried into execution. Even though the interlocutors in the service had been against Sir James Norcliffe Innes, it would not have prevented him from making up a title by another form, to which there was no objection. An appeal, or a decree against a claimant in a competition of creditors who used one form of diligence to which there is objection, would not prevent him from using another form to which there is no objection. 12th July 1785, Massey against Smith, No. 73. p. 8377. And a competition of rights of succession is just in a similar situation.

II. This process of trust-adjudication, so far from requiring a clear and undisputed right in the person using it, is the ordinary form of making up a title in doubtful cases. It is a mode by which the alleged heir merely vests in himself the right he truly is entitled to, whatever it may be, leaving the nature of it to be cleared by future discussion, and in which he absolutely avoids all interference with the claims of other people. If it turns out that they have a preferable claim to his, this process goes for nothing, and can do no harm to any body. If his right turns out preferable, he has the advantage of having made up a title without being prevented by a claim which turns out to have been ill-founded. The power of doing this arises from the nature of an adjudication, in which decree

No. 16. is always granted *periculo petentis*. See Stair, B. 3. Tit. 2. § 47. Dictionary, ADJUDICATION, *(contra hereditatem jacentem.)*

An ordinary adjudication, in short, transfers to the creditor whatever right the debtor has in him, and no more; and in the same way an adjudication, on a charge to enter heir, conveys to the creditor whatever right the debtor is truly entitled to enter to, and no more. A trust adjudication, on a charge to enter, is in the same situation as any other adjudication on a charge, and therefore can convey to the trustee, and ultimately to the truster, no more than he is really entitled to. When the decree of adjudication is obtained, and when a claim of possession is made, then, and not till then, the rights of third parties come into question. The only objection to giving decree in this process, if any can be admitted, must be, as in other adjudications, the production of an unquestionable title instantly verified.

This view of a trust-adjudication has uniformly been adopted in our law. It is quite a mistake to say, that it is founded on a presumption of service having taken place; it is founded on the very reverse. See statutes 1540 and 1621. The effects of it are similar to service in giving an active title, but that title is merely tentative, and it does not become a passive title till followed by possession, so that it is safe and innocent as to all parties concerned. In practice it has on that account been resorted to for a long time back as the ordinary title for trying questions of disputed succession, but it never was identified with service, which is a complete title at once. Nothing to that effect is to be found in the act of sederunt 1661, nor in the act of Parliament 1695, which recognize this form; and the view that has been given is clearly adopted by Bankton, B. 3. Tit. 5. § 101. Erskine, B. 3. Tit. 8. § 72; and in the decisions Hepburn against Scott, 25th July 1781, No. 35. p. 14487. and Beveridge against Crawford and Coutts, No. 41. p. 5296. The observation on the Bench, in this last case, did not call in question the general doctrine, in which the Judge who made that observation (Lord Braxfield) concurred with the rest of the Judges.

The decision, Gordon against Forbes, in Fountainhall, at the utmost, only shews that some evidence of the predecessor's connection with the lands might be required, where there was no notoriety of it; but here there is full notoriety of that fact, which is admitted on all hands. At any rate, this single old decision is of no great authority.

In this case, therefore, the adjudication must proceed, since no unquestionable title to the estate of Roxburgh instantly verified is produced for any objector.

III. General Kerr has not yet established either that there is an entail which operates beyond the succession of Sir James Norcliffe Innes, or that he is himself an heir of entail. But taking these things for granted, the entail cannot prevent the trust-adjudication. For the entail never was intended to prohibit adjudications in trust for making up titles under it. The adjudications it prohibits are adjudications "fra the heirs of entail;" so that even the strict words of it do not apply to trust adjudications.

No. 16.

It would, in many cases, be of great detriment to heirs of entail to be excluded from this mode of making up titles; and it would be a most irrational interpretation of the entail to extend the prohibition against a useful mode of carrying its own provisions into execution.

Even if it had, *ex figura verborum*, prohibited all adjudications, there would have been room for a reasonable interpretation. A similar interpretation has been adopted in the case of dispositions, which are generally prohibited *ex figura verborum*, and which are yet found not contrary to the entail when granted to the next heir of entail.

All ideas of danger resulting from this form are erroneous. The adjudication, till infeftment is taken on it, is essentially qualified by the back-bond, (see Erskine, passage following that quoted by General Kerr,) and a conveyance of it from the trustees to Sir James Norcliffe Innes is ready to be signed the moment it is obtained, so that all danger from breach of trust on their part is out of the question. But in all events, their right is essentially qualified by the conditions of the entail, which affect the right of succession in Sir James himself, from whom their right is derived; so that it is utterly impossible for them to make any use of it that is contrary to the entail. It is equally so for Sir James Norcliffe Innes himself, when the adjudication is conveyed to him. If it is said he may take infeftment without inserting the conditions of the entail, and affect the estate by act 1617, so he might upon a special service with just equal facility; but that is prevented by the certainty of losing both the estate and all the advantage of affecting it, if such a thing should be attempted. In this case there is an additional security; for the conditions of the entail are to be contained in the conveyance of the adjudication to Sir James Norcliffe Innes, which they need not be in the retour on a special service. See 1st Feb. 1726, Stewart against Denholm, No. 94. p. 7275.

The objections to the effect of the title by trust-adjudication, when completed, seem frivolous. The names of the trustees will not be introduced into the line of succession; they will appear merely as instruments in the investiture of one of the heirs of entail, which can do no harm. Nor will any new right be created, or new entail made, but the old right under the old entail transmitted. The power of redemption is of no moment; the sum is amply sufficient to prevent redemption; and, besides, this power is in the heir himself, and can no more invalidate his title, than the want of a truly onerous consideration for the trust bond can invalidate it. But such objections might equally be made to all trust-adjudications, and are wholly excluded by our settled practice.

The case of Noble against Dewar is one instance of a trust-adjudication of an entailed estate. The true ground of decision in that case was, that a trust-adjudication was not prohibited by the entail *. But at any rate the thing was done.

* President Craigie's Notes were referred to as shewing this.

No. 16. The majority of the Court adopted the arguments of the pursuers; and several Judges particularly expressed their opinion, that the adjudication must pass *periculo petentis*, and could be of no prejudice whatever to the other claimants of the estate, or the heirs of entail, since it could not possibly do more than supply the want of the maxim *mortuus sasit vivum*, and transmit to Sir James his right to the estate such as it truly was, and would turn out to be, when the truth should be discovered by the judgment of the House of Lords, provided he had any right at all; and that, if he truly had no right, this adjudication would go for nothing.

That even if Sir James Norcliffe Innes should take charter and sasine on the adjudication, that could make no difference. His title would still be of the same qualified nature, *i. e.* a mere tentative title; and this qualification would affect all conveyances he could make to third parties in any form whatever.

The minority adopted the arguments of General Ker.

The Court, by a majority of nine to six, adhered to the interlocutor of the Lord Ordinary.

A reclaiming petition was afterward presented for Bellenden Ker, who reiterated the arguments that had been used for General Ker; and particularly insisted upon the inconsistency of allowing Sir James Norcliffe Innes to make up a title in this way, without any determination as to the points of right that had been carried to appeal, when it had been found, and was a final interlocutor in the Court of Session, (10th July 1807,) that he could not do it by service till these points were determined. He maintained that there was no conceivable consequence of allowing the one, that would not also arise from allowing the other.

The Court refused the petition without answers.

Lord Ordinary, *Glenlee.* Act. *Dean et Craigie.* Alt. *Clerk et Gillies.*
Ja. Horne, W. S. *Hotchkis & Tytler*, W. S. and *Alexander Goldie*, W. S. Agents.
Walker, Clerk.

M. *Fac. Coll. No. 24. p. 78.*