of that decision, and at a time when it was vulgarly believed that such addition did not vitiate bills; No 27.

2*do*, In this particular case a peculiar answer occurred, arising from the circumsances of the parties, which behoved to remove the objection, viz. that the defender, at the time of granting the bills in question, was Mr Arrot's friend and lawyer, so could not object to his own deed, for these bills behoved to be considered to be the defender's deeds, as much as Mr Arrot's, who was no lawyer, and trusted the defender that he would not give him an informal security for his money.

THE LORDS found, that the defender being, at the date of these bills, ordinary lawyer and trustee to Mr Arrot, was thereby debarred from objecting against the form of the bills.

Fol. Dic. v. 4. *p.* 79. *C. Home, No* 251. *p.* 405.

1744. *June* 20. WALDIE *against* ANCRUM.

No 28.
The adjudger of an heritable debt due by himself cannot plead an expired legal.

FOUND, that where a debtor in an heritable bond adjudges his own heritable bond upon a debt due to him by his creditor, he can never plead an expired legal to carry the whole debt in the heritable bond, supposed to be greater than the debt adjudged for.

The reason is, that the moment one adjudges a debt due by himself, he is *eo ipso* free of so much of his own debt which he has adjudged, which to him is equal to payment of the debt adjudged for; and payment which extinguishes, must of course stop the legal.

Kilkerran, (ADJUDICATION and APPRISING.) *No* 15. *p.* 11.

1745. *February* 13. WILSON *against* PURDIE.

No 29.
An accepter of a gratuitous disposition to an estate cannot use a preferable right purchased by him, to the prejudice of debts charged on the estate, farther than he paid for the right.

JAMES PURDIE of Hairburnhead had a process raised against him, at the instance of the children of Samuel Purdie, his brother, whose curator he had been, and thereon was inhibited, and a decreet was finally pronounced against him for L. 6000 Scots. He afterwards granted an heritable bond, on his lands of Westforth, to James Wilson of Gillies for 400 merks, to which his second son Thomas signed as consenter; and the inference drawn from this, and what followed by Mr Wilson, is, that he had then come to a resolution to make Thomas Laird of Westforth, and that the 400 merks should be a burden thereon; but Thomas Purdie, the defender in this cause, denied that any such consequence could be drawn, and took notice, that the bond did not bear to be with his advice and consent; but only in the testing clause, he being called to be a witness, was designed consenter; and if his eldest brother had been present, his consent would have been adhibited in the same manner.

No 29.

However, some time after, James Purdie disponed to his son Thomas the lands of Westforth, under the burden of 2400 merks to his younger children, reserving his own liferent, and power to alter; and Thomas accepted of this disposition, by obtaining a charter from the superior, and taking sasine thereon.

He afterwards purchased in the debt due to the children of Samuel Purdie, or part of it, which had been secured by inhibition, and thereupon adjudged the lands of Westforth; and this step he alleged was necessary for him to take, not only to save his estate from eviction at the instance of the inhibiters, who were clearly preferable to his disposition, but also to get the better of some extravagant deeds done by his father to his prejudice, in favour of the younger children, and which he had power to do by the reservation in the disposition, *viz.* increasing their provisions to 4000 merks, for which he gave them an heritable bond on the lands of Westforth, and also a tack of the said lands for nineteen times nineteen years, at the rent of L. 100 Scots, by colour of which rights they, on his death, took possession of the estate, retaining the tack-duty for the interest of their provisions.

Thomas insisted in a process of mails and duties on his adjudication, in which the Lords, 19th June 1741, 'Found that he could not use the debt purchased by him from the Representatives of Samuel Purdie in prejudice of the 2400 merks, to which he was subjected by his acceptation of the disposition from his father.' Which interlocutor being acquiesced in, became final, and James Wilson having appeared for his interest, and founded on his heritable bond, the Lord Ordinary, 21st January and 13th February 1744, 'Found that Thomas Purdie's acceptance of a gratuitous disposition did not bar him from taking the benefit of any other right or diligence purchased by him, affecting the lands disponed, in competition with the other creditors of the disponer, nor oblige him to communicate the benefit of such purchase to these creditors.'

Pleaded in a reclaiming bill; That the petitioner's case was pretty similar to that of the younger children. By the disposition he was taken bound to pay their provision, and this debt, to which he is a consenter, was at the time charged on the estate. It could not be doubted the disponer intended he should pay it; and it was *contra fidem* of the transaction between his father and him, to purchase in a claim in order to defeat it. He was in the case of an heir *cum beneficio*; and though it might be observed, that an heir *cum beneficio* is personally bound, yet an executor is not so, who is bound also to communicate eases. A superior, purchasing the gift of his own ward, could not extend it farther against his vassal than to the amount of the purchase money; and the Lords found, 10th March 1636, Crawford *contra* Lord Murdiston, No 10. p. 7756.; that a vassal's right having fallen by the forfeiture of his mediate superior, the gift of forfeitry purchased in by the immediate superior accresced to the vassal; for, though it was doubted if the absolute warrandice, *contra omnes*

mortales, did extend to guard against forfeitry, so as to furnish any action against the immediate superior, yet seeing the gift was acquired by himself, he behoved to communicate the benefit of it to his vassal. No 29.

The foundation of these determinations was, that when two parties are concerned in a subject, one of them purchasing in any right thereon is presumed to do it for their mutual interest, and is therefore obliged to communicate it, as the superior was found obliged to do to his vassal, though he was not bound in warrandice.

Answered; That were it not to avoid entering into a tedious account, the respondent needed not to contest the point of law, since, as he had only agreed with two of the three representatives of Samuel Purdie, one third of that debt was still standing out, for which the estate was liable to be evicted; and, as the younger children possest it a very long time for their patrimonies, he behoved to be allowed to state these rents; and if he were only to state what he truly paid for the debt purchased in, it would do more than exhaust the value of the subject.

In point of law, it was allowed, That the petitioner's bond was preferable to the respondent's gratuitous disposition; but, on the other hand, it was contended, that the debt secured by the inhibition was preferable to the bond, which the respondent was not bound to pay. He was not heir to his father, neither was he author to the petitioner in this debt, so as to be debarred from purchasing in any right that might compete with it. The provision to the younger children was an express burden upon the grant in his favours; and he, by acceptance thereof, personally bound; but the disposition was nowise burdened with this debt; and, with regard to his consent in the bond, besides what might be urged from the manner of its being adhibited, Spottiswood, under the title, WARRANDICE, gave this general rule, *Nemo propter solum consensum de evictione tenetur*; and to the same purpose Craig expressed himself, l. 2. Dieg. 4. *In omnibus evictionibus*, &c.; and so it had been often decided, 23d February 1667, Earl of Errol *contra* Hay, No 80. p. 6523.; 8th January 1668, Forbes *contra* Innes, No 81. p. 6524.; 27th January 1681, Stewart *contra* Hutchison, No 15. p. 7762.

The fallacy of the petitioner's argument consisted in not distinguishing the case of a consenter from that where the rule of *jus superveniens* applied, which was only where the person was bound in warrandice.

THE LORDS found, that Thomas Purdie the son, as consenter to the heritable bond, could not claim or state more than the compounded sum at which he purchased the debt secured by the inhibition from the representatives of Samuel Purdie.

It was *urged* on the Bench in favour of Thomas Purdie, That his father having, posterior to the disposition, done such deeds as were virtually a total

No 29. recalling thereof, he was to be considered in the same case as if he had never accepted it.

Act. *H. Home.* Alt. *Lockhart.* Clerk, *Forbes.*

D. Falconer, v. 1. p. 76.

1746. *June* 13.

CREDITORS of Sir ALEXANDER MURRAY *against* The DUKE of NORFOLK.

No 30.
An heritor let his mines to a company, in which he himself purchased a share, and they subset them. The heritor pursued the company for damages, by the undue working of their subtacksman; but it was found he, as a partner, having joined in the subtack, could not, as an heritor, insist against the company.

SIR ALEXANDER MURRAY of Stanhope granted a lease of his lead mines to the Duke of Norfolk and others, in certain shares, with this proviso, 'That it should be lawful to him to inspect the working of the mines, and where any neglect or undue working should appear, that upon notice to the proprietors of the said mines, and their refusing or neglect to work the same in a mineral manner, he should and might re-enter, possess, and enjoy the said mines to his own use.'

New tacksmen were admitted, and alterations made in the extent of the shares, by conveyances from the lessees; and Sir Alexander was, by this means, become proprietor of a sixteenth-part of the lease, when they subset it to the York-Buildings Company, for the original tack-duty to the heritor, and a considerable sum of advance to be paid to the tacksmen.

The Creditors of Sir Alexander, and Mr Charles Murray his disponee in the subject, having affected this estate, raised a declarator of irritancy both of the principal and subtack, and an action of damages for undue working by the York-Buildings Company and the tacksmen; at the same time insisted against the Company for relief; which processes were conjoined, and it was found by interlocutor of the Ordinary, 28th November 1741, 'That Sir Alexander Murray, as proprietor of the mines, was entitled to insist in the process, notwithstanding his being a partner in the original lease, and that the irritancy was incurred.' This was finally adhered to.

The Creditors insisted in their conclusion of damages, and the Ordinary, 13th July 1744, 'Found it competent to Sir Alexander Murray and Charles Murray, and their creditors, to insist for damages against the Duke of Norfolk and his partners, as well as against the York-Buildings Company.'

Pleaded in a reclaiming bill; That Sir Alexander having consented to the sub-lease, he, nor his creditors in his right, could not insist for damages against the original tacksmen for the malversations of the Company; and the case was similar to that of a superior granting a charter to a new vassal on a resignation; for though he might still insist for any forfeiture incurred upon the first charter, yet for the *reddendo*, or on account of any new irregularities, action lay only against the present vassal.