

1781. February 13.

DAVID and HUGH MITCHELL *against* WILLIAM FERGUSON.

No 105.

A. purchased a house from B. and entered to possession. A. assigned her disposition to C., without having been infeft. C. likewise omitted to take infeftment. The house was adjudged by a creditor of B. The adjudication was found preferable to the personal disposition.

AGNES CARSON purchased a house from William Donald, of which he executed a disposition in her favour. She then entered into the possession; but, without being infeft, assigned the disposition to William Ferguson; who likewise omitted to take infeftment.

Meanwhile, David and Hugh Mitchells, creditors of Donald, led an adjudication of the subject, upon which they were infeft. And thence arose a competition between these adjudgers and Ferguson; the latter, *qua prior* disponee, with a personal right only; the former, *posterior* adjudgers, but whose diligence had been completed by infeftment.

Pleaded for Ferguson; Within the legal, an adjudger, though infeft, and in possession, is, in the judgment of law, not properly vested in the feudal right; nor is he protected against even the personal deeds of the reverser; notwithstanding that these do not appear in any public record. For, says Lord Stair, (3. 1. 21.): 'Because apprisings within the legal may be taken away in the same manner as personal rights; therefore assignations, discharges, and back-bonds, by those who have right to apprising, being made within the legal, are effectual: But, after expiring of the legal, infeftments upon apprisings are in the same case as infeftments upon irredeemable dispositions.' And, to the same purpose, Lord Bankton, (3. 2. 6c.) Again, it is clear, that, within the legal, the right of an adjudger may be extinguished in such a manner as is not discoverable by means of any public register; for example, by a discharge merely, or, *ipso facto*, by intromission; so that registration is not requisite to render any deed effectual against a deed of that kind; Erskine, (2. 12. 36.)

Now, according to the adjudgers own plea, if, prior to their infeftment, sasine had followed on Donald's disposition, and had been duly recorded, all effect of their diligence must have been precluded. But, as it has likewise become evident, that it is no sufficient objection to a deed affecting the right of an adjudger, though infeft, if, before expiry of the legal, either that such a deed is only personal, according to Stair, or that it is latent and unregistered, agreeable to Erskine; it follows, that, in the present case, sasine was not necessary to make the disposition effectual against the subsequent adjudication.

To this simple deduction, it cannot reasonably be objected, that the personal deeds of an adjudger have a stronger effect against his singular successors, than those of the proprietor himself, executed at a time when his right was unlimited, could produce against the adjudger. This were to suppose adjudgers to derive from proprietors, more extensive rights than these last themselves could claim. On the contrary, it is to be remarked, that a singular successor to an adjudger, is in a more favourable situation with respect to his author, than the

the adjudger is, as to the reverser; because the former has a direct reliance on the subjects adjudged; whereas the latter, prior to his adjudication, may not have had them at all in his view.

This question may be placed in another light, flowing from more general principles. A person who grants a second disposition *in fraudem* of the first, is thereby guilty of a crime. This, then, is an act which the law will compel no man to perform. But will it, nevertheless, interpose itself in the place of the disposer, and, in effect, do the very same thing, by adjudication? That idea seems equally repugnant to common sense and to law. It is clear, that a prior disposition, with or without infestment, is preferable to every subsequent personal one. And, though it is likewise true, that a subsequent disposition, by being clothed with infestment, may become effectual against the prior remaining personal; yet this consequence is widely different from the case supposed: For, notwithstanding that the *dolus* of the disposer has occasioned the second conveyance, which thus becomes valid in law, still the law by no means gives force or effect to that fraud. The statute 1617 has appointed records as the medium through which information, concerning the conveyance or the burdening of lands, is to be communicated. If a *bona fide* purchaser, who, upon the faith of this legal information, bargains and pays his money, were, by a personal and latent deed of his author, to be cut out from his purchase, his situation would be more severe than that of the person who had obtained that deed; because, besides labouring equally with the latter, under the deceit of his author, he would also have been deceived even by the law itself, which had established the credit of its records; a thing too absurd to be imagined. But, as it is merely through a just confidence in these, that a second disponent is rendered secure; so a posterior adjudging creditor, who did not contract in reliance upon them, but trusted solely to the personal security of his debtor, can no more exclude an anterior disponent without infestment, than with it appearing on record. So far as concerns the lands adjudged, the latter has no *bona fides* to plead, respecting either his debtor or the law; since, had he not relied on his debtor's personal security merely, he would have taken heritable security.—In a word, a disponent is entitled to demand the subject conveyed, according as it appears from the records. An adjudger, on the other hand, having no reliance on these, must be contented to take that which he has adjudged, *tantum et tale*, as it stood in the person of his debtor.

This doctrine is confirmed by the following additional authorities: Dirleton's Doubts, *voce* COMPRISING, and Sir James Steuart's answers, where it is laid down, that rights pass to adjudgers, *cum sua causa et labe*. The decisions from 1670, downwards, as stated by Stair, support back-bonds against adjudgers. The case of Neilson, 28th January 1755, (see APPENDIX) comes still closer to the point: Also Gibb *contra* Livingston, 14th December 1763, (see APPENDIX). In that of Bell against Garthshore, 22d June 1737, No 80. p. 2848, the distinction between adjudgers and disponents, not having been stated, was not

No 105. attended to. See likewise Menzies *contra* Gillespie, 8th December 1761, No 174. p. 5974.

Answered for the adjudgers; Such is the nature of feudal rights, that they cannot be affected, qualified, or burdened by any personal deed. Notwithstanding even a conveyance, if only personal, the feudal right still remains in the disponent.

This principle is firmly established by the judgment of the Court in the case of Bell *contra* Garthshore, mentioned by the disponent; in which, it is true, the argument, with respect to adjudgers taking only *tantum et tale*, was not touched; a sign of its not being solid. The only question then agitated was, Whether a *personal* disposition were not sufficient to denude the disponent of a feudal right remaining merely personal? But the principle of that decision, which likewise determines the present question is, that *personal deeds cannot affect feudal rights*. From this principle it arises, and not from any effect of *bona fides*, that a second disponent, the instant he is infest, excludes the prior remaining without infestment. For, though *mala fides* may cut down a title, no *bona fides* can, of itself, create a right. Even the statute 1617, on which the disponent chiefly founds his argument, is a strong authority for the adjudgers on this point. It has prescribed the registration of sasines and reversions; and why not also of dispositions? The reason is, that the former, in their nature real, may qualify a feudal right, which the latter, being personal, cannot. As for the argument, that the law ought not to do what the disponent himself could not lawfully do, it is quite deceitful. A bankrupt debtor cannot, indeed, lawfully disponent to any of his creditors, in prejudice of the rest; but is none of them entitled to adjudge? Again, if a man grants one disposition without procuratory and precept, and afterwards to another disponent, a second with both, he cannot, it is true, *bona fide*, execute a third conveyance in favour of the first disponent; yet surely this disponent is not precluded from leading an adjudication in implement. All the decisions quoted on the other side, as also the opinions of Dirleton and Steuatt, refer to act 1621, and to those *fraudulent* rights acquired in contravention of that statute, which an adjudger must take *cum sua labe*.

Were the opposite doctrine to be received, many opportunities would be afforded for the commission of fraud. Thus, for example, our marriage-contracts are sometimes framed in the English form, bearing a conveyance, *de presenti*, to trustees, who may not perhaps infest themselves. Creditors, ignorant of this conveyance, lend their money, lead adjudications, and justly think themselves secure. Upon the footing of this doctrine, however, the trustees, by that personal deed, would preclude them. Or, suppose a man owing debts to grant an heritable bond without infestment, and afterwards to borrow money from other creditors, who, for their security, adjudge. By that latent bond, according to the same doctrine, they may be totally cut out.

The plea of the adjudgers is also supported by these authorities: Ranking of the Creditors of Sir John Douglas of Kelhead, 22d February 1765, (see APPENDIX)

Countess of Caithness, and Lady Dorothea Primrose, against Creditors-Adjudgers of the Earl of Roseberry, No 103. p. 10288. No 105.

THE COURT, on a hearing in presence, ' Found, That the adjudication, and infestment following upon it, are preferable to the personal disposition founded on by Fergusson.'

Lord Ordinary, *Monbodo*.
Clerk, *Colquhoun*.

Act. *Rae, G. Fergusson*.

Alt. *M^cLaurine, M^cCormick*.

Fol. Dic. v. 4. p. 72. Fac. Col. No 35. p. 60.

1786. November 15.

THOMSON *against* DOUGLAS, HERON, & COMPANY.

A PARTY having acquired a right to lands under trust, but fraudulently omitting the trust in his infestment, his adjudging creditors were thought liable to the objection which lay against him, their rights not being completed by infestment. No 106.

N. B. This point, though stated in the report, No 52. p. 10229, was little discussed, as the fund was said to be exhausted by preferable debts; and the Court did not mean to lay down the rule in general, that adjudgers must take *tantum et tale*.

Fol. Dic. v. 4. p. 72.

1787. August 8.

CREDITORS of SIR JOHN SINCLAIR *against* Captain JAMES SUTHERLAND.

IN consequence of a stipulation contained in a lease granted by Sir John Sinclair of Mey to Captain Sutherland, the latter, after the death of the former, made several payments to Sir John's Creditors.

Several years afterwards, the other creditors deduced adjudications *contra hereditatem jacentem*, and sued the tenant for the whole rents which arose after that period, as being all attached by such adjudications.

The defender *pleaded*; If, before the death of the landlord, and after the payments made by the defender, a creditor of the former had adjudged his estate, the latter would have been entitled to plead, that by such payments, made under the authority of the landlord, the posterior rents were so far actually extinguished; and that, therefore, he could not be liable for them; although, perhaps, the same plea could not be maintained against a *bona fide*

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No 107.
Payment of rents by a tenant, after his landlord's death, in virtue of a special authority contained in his lease, found effectual against the creditors of the landlord, who afterwards attached the lands, by adjudications *contra hereditatem jacentem*.