No 100. the disposition made *in lecto*, and consequently, the defender's right flowing therefrom by progress, though he was a singular successor, and knew nothing of its being done *in lecto*.

Fol. Dic. v. 2. *p.* 70. *Fountainhall, v.* 1, *p.* 803.

1698. *December* 14. COUNTESS of ROTHES *against* FRENCH.

No 101. IN a competition betwixt the Countess of Rothes and David French, creditors on the estate of Edmiston of Carden, the LORDS found a clause in a disposition, bearing, that it was given and accepted with the burden of a sum to be paid to another, is not merely personal, but real against any who succeed in that right; as also, found, that an apparent heir buying in a comprising on his predecessor's estate, it is not only redeemable from him within the ten years, in so far as it is not extinct by intromission, conform to the 62d act of Parliament 1661, but likewise the reversion operates against the apparent heir's creditors and singular successors, who have adjudged his right; for whom it was *alleged*, The act run only against the apparent heir himself; but the LORDS repelled this, and found it a real exception. They did not here determine *a quo tempore* the ten years began to run, whether from the date of the acquisition, or the infeftment or other deed, making the conveyance public, else it might be kept up latent till the ten years were run, though this was touched in the debate.

Fol. Dic. v. 2. *p.* 66. *Fountainhall, v.* 2. *p.* 25.

1728. *January* 25. GOURLIE *against* GOURLIE.

No 102. REDUCTION upon minority and lesion found not good against onerous singular successors. *See* APPENDIX.

Fol. Dic. v. 2. *p.* 70.

1744. *November* 8.

COUNTESS of CAITHNESS, and LADY DOROTHEA PRIMROSE, and the CREDITORS ADJUDGERS from the EARL of ROSEBERRIE, Competing.

No 103.
In what cases exceptions competent against the debtor are competent against the adjudger from him.

THE deceased Archibald Earl of Roseberrie disponed all his lands and other heritable subjects, excepting his entailed estate, as also his whole moveables, in favour of his four younger children, John, and the Ladies Mary, Margaret, and Dorothea, equally amongst them. But as the granter was by every body believed to have been upon death-bed at the date of this deed, and had also left great debts, the younger children transacted with their brother the now Earl of Roseberrie, renouncing the foresaid disposition, and accepting of a certain provision in full of all they could ask in and through their father's decease.

But as the Ladies Margaret and Dorothea were minors, and the Earl their brother was their curator at the time, this transaction was, so far as concerned their interest, thereafter reduced. And as, by that time it came to be discovered, that, subsequent to the date of the disposition by the late Earl, he had been seen walking at the Cross of Edinburgh at mid-day, where there is a constant market, by stands, &c.; they, upon a proof thereof, prevailed in a declarator of *liege poustie*. No 103.

While the transaction stood, the present Earl had made up titles as heir to his father, and disposed of great part of the heritable subjects; and the purchasers were safe. But as there were still certain of the heritable subjects remaining *in medio*, affected with adjudications at the instance of the present Earl's Creditors, the said Ladies, Margaret and Dorothea, brought a declarator, wherein they insisted to have it found, that the Earl their brother having intromitted with more than the half of the heritable succession which belonged to him in the right of John and Lady Mary, the whole that remained belonged to them the pursuers.

But the LORDS found, "That, in competition with the Earl's Creditors who have led adjudications, the pursuers could have no preference upon heritable subjects still extant undisposed of, for more than their equal half of these particular subject."

As the Earl became debtor to the pursuers by his disposing of more than his own half, he would have been *personali objectione* barred from any interest in the extant subjects. But as the Earl was not creditor to the pursuers in any thing, but joint proprietor with them in the subjects in question, and that his interest of property was not *eo ipso* extinguished by his becoming debtor, the adjudgers from him could not be affected by the personal exception competent against him. For the maxim, that every exception competent against the debtor, is competent against an adjudger, holds only true of objections of extinction; those and those only competent against the cedent, are competent also against the assignee; but every exception that may hinder the cedent to draw, will not be competent against the assignee.

And, whereas it was urged by some, from the analogy of the *actio familiæ erciscundæ* in the Roman law, that one of the heirs having got his share out of any subject, neither he nor his creditors had any further claim; the answer was, that the system of our law is in that very different from the Roman law; for that with us there is no such thing as the *actio familiæ erciscundæ*, which among the Romans proceeded upon the notion of the *hæreditas* being an *universitas*, without regard to the difference between heritable and moveable subjects, and of a *quasi* contract among the heirs, that any one's intromission with any subject, should impute in his part of the *universitas*; and as every thing was allodial, it made no odds, whether one of the heirs got one subject equal to his share of the whole, or his share of each subject; a notion very different from ours, who have no other action for division among heirs, but that of *communi dividendo*, as the heirs portioners succeed each to a share of each indivi-

No 103. dual subject, insomuch that it is not in the power of the Court to adjudge one subject to one, and another subject to another. Suppose the heritage to consist of lands of different holdings of the same or of different superiors, each of the superiors must have each of the heirs his vassal, and that in the several holdings, who again must separate their interests by a brief of division, which is the *actio communi dividundo*; and this being the system of our law, one's intromitting with more than his share of one of the subjects can never extinguish his interest in the other.

Kilkerran, (PERSONAL AND REAL.) *No* 4. *p.* 384.

1750. *February* 17. *and June.*

DEMPSTER *against* DAME ELIZABETH NEVAY, Widow of SIR JAMES KINLOCH.

No 104.
Infeftment for a greater sum than was advanced at the date.

IN the ranking of the Creditors upon the forfeited estate of Sir James Kinloch of that ilk, the following question occurred:

The Lady Kinloch stood secured in a liferent out of the estate of Kinloch, by infeftment, dated in December, 1742, registered in February 1743. George Dempster, merchant in Dundee, stood infeft on an heritable bond, conceived in common form, for L. 20,000 Scots in the said estate, also in December 1742, and his sasine was registered January 1743, some weeks before the Lady's infeftment was registered; but then he had at the date of his heritable bond advanced only L. 8735 Scots, which he of the same date acknowledged by a back-bond, whereby he became bound to pay and deliver to the said Sir James Kinloch at Whitsunday then next, or at any subsequent term of Whitsunday or Martinmas, the balance of L. 11,265, intimation being always made to him 40 days preceding the said term; and thereby it was further declared, that if the advance already made, and others thereafter to be required, should not extend to the foresaid sum of L. 20,000, in that event, the foresaid heritable bond, with what should follow thereon, should be restricted to what should be truly paid and advanced of the said L. 20,000 Scots money and no further. And by a writing on the back of the back-bond, of the 12th December 1743, Sir James acknowledged the obligation to have been implemented by payments at different times preceding that date of the said balance of L. 11,265.

The objection made for the Lady was, That George Dempster's infeftment could give him no preference for the L. 11,265, as not advanced till after she was infeft. By the common law before the 1696, it was lawful to grant an heritable security for debt contracted, or to be contracted, which became effectual from the date of the subsequent contraction; but still an intervening infeftment to a third party was preferable to the security for the debt contracted after it: But by the act 1696, it is declared, That any disposition, or other right, granted for relief or security of debts to be contracted, shall be of no force as to debts contracted after the sasine, without prejudice to the validity thereof