

No 108.

a defender in the furthcoming called, *hoc nomine* to represent the deceaft debtor.

fuer, wherein a decret being produced, in which umquhile Clement Edgar was found his debtor, after the deceafe of the which debtor, it was transferred againft Edward Edgar, apparent heir, and brother and neareft of kin, to the faid umquhile Clement, *cognitionis caufa*, to the effect that the creditor thereof might have execution, not againft the brother, and apparent heir foresaid, by personal execution, but *contra bona defuncti*, who was his debtor: This decret being given before the LORDS, but the party abfent, was found null fummarily in this procefs, to make arrefted goods furthcoming, by way of exception, becaufe there fhould have been fome perfon called *hoc nomine*, to represent the debtor deceaft, viz. either as heir, or as charged to enter heir or executor, or renouncing to be heir or executor to the defunct; neither whereof being done, but only the apparent heir called, which was not enough, albeit called only *cognitionis caufa*; the LORDS would not fustain the fentence, feeing in effect it was given without any party called, and without any defender to represent the debtor.

Aft. Cheap.

Alt. Nicolson.

Clerk, Gibson.

Durie, p. 71.

1626. June 15.

STIRLING against TENANTS.

No 109.

In transferring the action, and calling the apparent heir, it is not neceffary that he be charged to enter.

JAMES STIRLING purfues the tenants of Old-bar, in whose hands the farms addebted by them to the Lady were arrefted; and the Lady being called for her interest, for making of the farms furthcoming to the purfuer, for fatisfying of a debt addebted to him by the Lady: Litiscontestation being made in the caufe, and the probation renounced, before the advifing the Lady dies; whereupon the LORDS found, that the procefs could not be advifed, until the fame fhould be transferred in fome perfon to represent the Lady, who was principal debtor; and therefore the transferring being raifed at the purfuer's instance againft her fon, who was convened only as apparent heir; and the defender *alleging*, That the procefs could not be transferred *hoc nomine* againft him, as apparent heir, feeing he was neither charged to enter heir, nor called as charged to enter heir, but only as apparent heir, which was not *nomen juris*: THE LORDS fustained the transferring againft the apparent heir, in refpect of the ftate of the procefs, which was concluded before the deceafe of the Lady; and that no execution was craved againft the Lady, or her heirs, but only upon the arreftment againft the tenants; and found no neceffity of a charge, nor any other title in the perfon of the defender: but adjudications are not fo fustained againft apparent heirs.

Aft. Hope.

Alt. ———

Clerk, Gibson.

Fol. Dic. v. 1. p. 58. Durie, p. 202.