

(Pars periculo petentis.)

1666. November 15. GEORGE CHEIN *against* JAMES CHRISTIE.

No 7.
It was not found competent for a third party to plead upon a right, preferable to, or exclusive of the right in the debtor's person.

GEORGE CHEIN having pursued umquhile David Christie, as charged to enter heir to James Christie his father, for payment of a debt of his father's; David renounces to be heir, whereupon George obtained decreet, *cognitionis causa*; and David being now dead, he pursues James Christie, as now apparent heir to his debtor, for adjudication of an annualrent, as belonging to the defunct's debtor, out of the lands of Baffilie. It was *alleged* for the defender, absolvitor, because that annualrent was but base, never clad with possession, and the defender stands validly infest, *singulari titulo*. The pursuer *answered*, that the defence is not competent *hoc loco*, when the pursuer is but *suo periculo* craving adjudication of his debtor's right, and cannot be forced to dispute the same, till, after adjudication, he use diligence for getting of the same; but this defence will be competent, whensoever upon his adjudication, he shall pursue. The defender *alleged* a practick betwixt Schaw of Sornbeg and the Lord Forrester, wherein Forrester's public infestment was excepted in the adjudication.

Yet the LORDS shewed no inclination to follow that practick, and therefore repelled the defence, and adjudged.

Fol. Dic. v. 1. p. 12. Stair, v. 1. p. 404.

* * * The same Case is thus reported by Dirleton :

GEORGE CHEIN pursued adjudication against David Christie, of a right of annualrent, which pertained to James Christie, the said David's brother, the pursuer's debtor. James Christie writer, compeared and *alleged*, he had right to the lands (craved to be adjudged), by an expired comprising of the property of the same against the said David Christie, who had right to the said lands; and that the said James's right of annualrent was null, being base, and never clad with possession.

THE LORDS found, that the allegiance was not competent *hoc loco*, against the adjudication; and, that the said debate would only be competent after the adjudication, when he should pursue a pointing of the ground. The LORDS found the contrary before, in an adjudication pursued by Sornbeg *against* the Lord Forrester, which practick was obtruded and not respected; because the Lord Forrester's right in that case was clear; and this the Lords thought hard, Forrester being content to dispute his right, that a right to his lands should be established in the person of another to trouble him. But it were fit our practicks were uniform: And it appears hard, that a creditor who is a stranger, and has not the papers in his hands, and is not in a capacity to pursue for them, before he can get a title by adjudication, should be forced to dispute his debtor's right.

Reporter, *Newbyth.*

Dirleton, No 45. p. 19.