

ADJUDICATION AND APPRISING:

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(FORMALITIES of the DILIGENCE.)

1707. July 3.

ALEXANDER DUNCAN of Strathmartine, *against* JOHN SCRIMZEOUR of Kirkton.

JOHN SCRIMZEOUR of Kirkton, having obtained decreets of constitution against WINTOUN of Strathmartine, as lawfully charged to enter heir to his father, for payment of principal sums, annualrents and penalties, contained in his father's heritable bonds, without using previous requisition in the terms of these bonds: And having thereafter made requisition, and then adjudged, the days of requisition being expired before executing of the summons of adjudication, and the requisition therein narrated: Alexander Duncan, the purchaser of the said estate of Strathmartine, raised reduction and improbation of Kirkton's adjudication; and contended, it was null, as proceeding upon decreets of constitution, which are null, for decerning to make payment of penalties in heritable bonds bearing requisition, though no preceding requisition was made.

Alleged for Kirkton. That a clause of requisition does not suspend the debtor's obligation, or any ordinary action for payment, provided he have forty days *inducia*, from the citation to the day of compareance; but only suspends summary diligence by horning, caption, or adjudication. Nor was the adjudication quarrelled, led immediately upon the heritable bonds, but upon a decret of constitution, following upon a general charge to enter heir, which took off the necessity of extra-judicial requisition: Seeing, thereby, the debtor had a longer forbearance than the terms of the requisition would have allowed. Now to clear that such solemnities may be supplied by judicial acts, intimation is a legal solemnity, as requisite to complete an assignation, as requisition is necessary to make way for summary diligence; and yet a charge of horning, or a process, supplies the want of intimation. And, in the case of decreets *cognitionis causa*, the charge to enter heir and process supply requisition: Consequently requisition may be supplied by a process. *2do, et separatim*, Requisition was used for the more security, after obtaining of the decret of constitution.

Replied for Duncan of Strathmartine. As the want of requisition would have afforded, to the debtor, a good ground of suspension against horning and pointing; so it affords a good defence against the constitution, upon which these diligences might follow; at least, in so far as concerns a penalty, which is only incurred in case of not-payment of the principal, and annualrents, after requisition. And, albeit a constitution might be pursued against an apparent heir, for principal, and annualrents, such a one could not be pursued and decreeted for penalties, which neither he nor his predecessor had incurred. Nor can the charge to enter heir, supply requisition, in this case, as is alleged in the case of decreets *cognitionis causa*; which the heir cannot quarrel, because of his renunciation; and by which he is not prejudiced, being only decerned, *dicis causa*, to sustain the person of the defunct, that the *hereditas jacens* may be affected for what is libelled *periculo petentis*. For, in processes of constitution, the heir can only be pursued to pay the

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Where requisition is stipulated in the bond, and not made till after decree of constitution; the adjudication is, on account of that omission, restricted to a security.

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No 4. fums in his predeceffor's obligement, in the terms thereof; and fo may juftly quarrel a decreet againft him for exorbitant penalties, never incurred by his predeceffor. *2do*, No regard can be had to the requifition produced, becaufe not ufed, *debito tempore*, before the decreet of constitution for principal, annualrents, and penalties: And, though libelled upon in the adjudication, it is not therein marked produced.

Duplied for Kirktoun. It is not only denied, that the penalty could only be incurred by a previous requifition, but the contrary is certain: For, it were in vain to ufe requifition againft an apparent heir, who is not bound in the bond, till once the debt be constituted againft him by a decreet.

Interlocutor.

THE LORDS refticted Kirktoun's adjudication to a security for his principal and annualrents, upon this nullity, That it was led for heritable fums which required requifition, and yet no requifition was ufed before the decreet of constitution againft Wintoun of Strathmartine, as lawfully charged to enter heir to his father.

Thereafter, July 19. 1707, Kirktoun craved, that the LORDS would fustain his adjudication, as a security for principal, annualrents, and a fifth part more, in regard of his lying out, and wanting the ufe of his money thefe ten years bygone; or. at leaft, would allow him the termly failzies, incurred through the not-payment of annualrents, which required no requifition, and the neceffary charges deburfed in procuring his adjudication, and expeding his charter and infeftment.

Answered. The act of Parliament allows not a fifth part more, except in the cafe of fpecial adjudications: And, how could that be allowed here, where the adjudication doth not bear it? And, the containing an additional fifth part would, by the act of federunt, have been another nullity. *2do*, The claim, of termly failzies, is moft extravagant; becaufe, a null adjudication can have no penalties; and no advantage taken of debtors is more hard upon, and ufurious, than the termly failzies: And nothing is due under the name of neceffary charges; the debtor being in no culpable *mora*, by the null and irregular diligence ufed againft him.

Replied. There is nothing more reasonable, than that Kirktoun fhould have fome allowance for his lofing the intereft of his annualrents, which became a principal fum to him when he paid the creditors; feeing the reafon, why the act of Parliament allows a fifth part more to adjudgers, is becaufe of their wanting the ufe of their money. *2do*, Kirktoun's adjudication is not found intrinically null; but only refticted, upon an informality in the requifition: And it is ordinary to fustain an adjudication, where accumulations are cut off, as a security for principal fum, annualrents, and neceffary expences. Nor are the termly failzies of an annualrent any hardship; thefe being fmall, and proportioned to the annualrent.

THE LORDS adhered to their former interlocutor; and refufed to allow either a fifth part more, or the termly failzies.