

## (GENERAL CLAUSE.)

not extend to the teinds, nor comprehend the same, under the general denomination of lands, *et omne jus*, &c. ; which is but an extension of style, ampliating the right to the lands, and goes no farther.

*Fol. Dic. v. 1. p. 11. Fountainball, v. 2. p. 147.*

No 4.

1710. December 21.

SIR WILLIAM MENZIES, of Gladstains, *against* Dr ANDREW BROWN, of Dolphintoun.

JAMES CLERK having, in the year 1680, disposed his lands of Wrightshoufes to Sir John Clerk of Pennycuik, his brother, upon his granting him a back bond, obliging himself to denude in favours of the disponent, when paid of the sums therein contained ; there arose a competition, betwixt Sir William Menzies, as having right to an adjudication, in anno 1685, whereby the lands and estate of Wrightshoufes are specially adjudged from James Clerk, with all right, title, interest, reversion, &c. that he had, or could pretend thereto : And Dr Brown, who, in the year 1709, adjudged, specially, the back bond, granted, by Sir John Clerk, to the common debtor. Sir William craved to be preferred to the mails and duties of the lands, because his adjudication is prior to the Doctor's.

*Answered* for Doctor Brown. No respect can be had to Sir William's adjudication of the lands, with all right and interest that the common debtor had therein : Because, he, being denuded before, by disposition and infeftment, in favours of Sir John Clerk, had no real right in the lands that could be adjudged ; but only Sir John's back bond, which is only affected by the Doctor's special adjudication thereof, and could not be carried by the general clause in Sir William's adjudication ; more than Sir John's personal bond, obliging himself to dispoise his own lands, of Loanhead, to his brother, James, in a certain event, could be affected, at the instance of James's creditors, by an adjudication of Loanhead, with all title, interest, &c. though it might be affected by their adjudging specially the personal obligation, or *jus ad rem*, that stood in James's person. At least, such a special adjudication would be preferred to the adjudication of the lands, with such a general clause, November 21. 1673, Fairholm against Rentoun, (*No 1. b. t.*) ; January 23. 1674, Nisbet against Mein, (*No 2. b. t.*). *2do*, An adjudger of a special disposition of lands from his debtor, who never was infeft, would be preferred to another creditor, who had adjudged from him the lands, with all dispositions concerning them. James Clerk had no more right, by the back bond, to the lands of Wrightshoufes, than one has, by a simple disposition, without infeftment : Because, though the back bond did qualify Sir John, in the disposal of the right, it did not qualify the right itself ; so that Sir John might have disposed the lands to another, without the burden of the back bond. *3tio*, Sir William having adjudged only all rights, in general, concerning the lands of Wrightshoufes, that stood in the common debtor's person ; and the Doctor, having specially ad-

No 5.

An adjudication, of *all right*, &c. carried a back bond, in preference to an adjudication of the back bond only.

## (GENERAL CLAUSE.)

No 5.

judged the back bond, he must be preferred to Sir William: As an adjudication of particular lands, would be preferred to an adjudication of lands in general; or as a general adjudication of lands, with all right thereto, belonging to the common debtor, would not comprehend an obligation to constitute a servitude in his favour, though a special adjudication would. For *in toto jure generi per speciem derogatur, & illud potissimum habetur quod ad speciem directum est, L. 80. ff. de Reg. Jur.* So special legacies are preferred to such as are general; dispositions, or adjudications, of all lands, with houses, biggings, &c. according to the legal, in opposition to the grammatical sense, do not carry mills, unless mentioned, *per expressum*: And general discharges extend not to obligations to invest in lands; nor do general discharges, containing some particulars, extend further than to things of the same kind with the specialty expressed.

*Replied* for Sir William Menzies. One, who adjudges special lands from his debtor, with all right thereto belonging to him, has right, thereby, to any interest he has upon the subject, as, *eminenter*, therein contained, January 23. 1674. Nisbet against Mein. *2do*, The back bond, of the same date with the disposition, did qualify Sir John Clerk's right; in the same manner, as if it had been engrossed in the body of the disposition: Consequently, Clerk was not absolutely denuded, so long as that reversion was competent to him. As to the practice betwixt Fairholm and Rentoun, there is a great difference betwixt apprising some lands in special, with all other lands in general belonging to the debtor; and an apprising of particular lands, with all right competent to the debtor therein. For, it is true, that, if, in the first case, any apprise these lands, in special, that another had formerly appraised, by the general clause, the last appriser will be preferred; in respect the lands specially appraised by the one, and generally by the other, are different subjects: Whereas, in the last case, the first appriser of lands specially designed, with a general clause of all right competent to the debtor, is preferable to one apprising afterwards specially, some reversion, or other right competent to the debtor; the controversy being *de eodem subjeeto, viz.* lands specially designed. Nor is it a whit more necessary to apprise a reversion or back bond specially, than to apprise the disposition, or other rights and investments of the estate: Seeing all these are but the debtor's title and interest in the estate specially appraised. So that *L. 80. ff. de Reg. Juris*, is not to the purpose; Sir William's adjudication being as much *ad speciem* directed, as was necessary. *2do*, In the supposed case of Sir John Clerk's obligation to dispose the lands of Loanhead in a certain event, such an obligation behaved to be specially adjudged; because James Clerk has no manner of right to the Loanhead, and was only to have right in the event expressed in the obligation; just as it would hold, in the case of adjudging a disposition, or minute of sale, where the purchaser had no anterior right to the subject: Whereas, here, James Clerk was undoubted proprietor of Wrighthouses, at his granting the disposition, and receiving the back bond, which so qualified the disposition, that he might have redeemed it, *quovis tempore. 3tio*, There is no

(GENERAL CLAUSE.)

parity betwixt the back bond, and a fervitude acquired by the common debtor ; because, the former relates to the subject specially adjudged, and the latter comes out of some other subject, since *res sua nemini servit* ; and, therefore, ought to be specially apprised.

THE LORDS found, That the general clause, in Sir William's adjudication, did convey the right of the back bond, granted, by Sir John Clerk, to his brother, and all other right which the common debtor had of the subject adjudged ; and, therefore, preferred Sir William's first adjudication, to Dr Brown's special adjudication.

*Fol. Dic. v. 1. p. 11. Forbes, p. 460.*

\* \* Lord Fountainhall mentions the same case thus :

1711. November 20.

THE LORDS decided that considerable point betwixt Sir William Menzies and Dr Brown. It was *reasoned*, for the Doctor, That the property of the lands was not in James's person, but truly in Sir John Clerk, his brother, by virtue of the absolute disposition ; and all he had was only a personal back bond ; so that he having, *speciatim*, affected it, he falls necessarily to be preferred ; for *in generalibus latet dolus. et in toto jure generi per speciem derogatur*. And all lawyers require that libels be distinct and special. *Libellus debet esse aptus clarus et certus, ut reus intelligat quid et quantum petatur* ; and so *ubi est nimis generalis, obscurus et ambiguus merito rejicitur* ; for *omnis generalitas in jure periculosa, et exceptiones multas habet ; ex generali seu indefinita enunciatione sequitur vel absurdum vel juris repugnantia, quare ad species aptas redigenda est*. And, as to the precise question here, if a general adjudication, of all the debtor's rights, will denude him, as fully, as he who adjudged the back bond, *per expressum* ? It seems to be decided, in a parallel case, Colvil and Loch against Sir Patrick Home, 26th June 1705 \*, where Sir Patrick's author had only apprised the lands belonging to Colvil, his debtor, lying within the town and parish of Preston, in the Merie, whereas Loch had, *speciatim*, apprised three kirklands, holding of the Bishop of Dunkeld, lying in the fore-said barony of Bunkle and Preston. THE LORDS found Sir Patrick's general clause did not comprehend these temple-lands, holding of a different superior ; and so preferred Loch's special apprising thereto. *Answered* for Sir William, That it was impossible for creditors to know the precise rights their debtors had to the lands adjudged ; the writs, and evidents thereof not being in their hands, and oft-times industriously abstracted and concealed from them ; therefore, law, to supply this defect, has very justly introduced these clauses, not only for adjudging lands, but also all right, claim, title, or interest, they may have thereto, whether backbonds,

\* See General List of Names.

(GENERAL CLAUSE.)

No 5.

reversions, legals, or legal upon legal, which must have some figuification and effect, our ancient stiles being a part of our law : And Sir John Clerk's backbond, being of the nature of the *pactum de retro vendendo*, the adjudging all backbonds, and reversions, standing in the debtor's person, did fully and effectually denude him, before ever Dr Brown did specially adjudge it. And, to think that stile did not convey all the right in the debtor's person to the adjudger, were, at one stroke, to shake the securities of many estates in this nation, founded on no other bottom but such general clauses ; neither do any of the decisions cited come up to this case. THE LORDS, by a great plurality, found, The general clause, in Sir William Menzies's adjudication, carried this backbond, and denuded the debtor ; so as there was no room for Dr Brown's special adjudication ; and, therefore, preferred him to the Doctor. He also founded on another ground of preference, viz. That James Clerk, of Wright's-houses, had assigned this backbond to President Lockhart, and some others of his creditors, whereof the Doctor was one ; and this prior to Sir William Menzies's adjudication ; but, this point being new, they were remitted to the Ordinary, to be heard thereupon.

*Fount. v. 2. p. 675.*


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ADJUDICATIONS and APPRISING pass *periculo petentis* ; and all DEFENCES are reserved *contra executionem*, unless instantly verified.

No 1.

Exceptions against the grounds of debt, reserved, *contra executionem*, unless instantly verified.

1676. July 26.

BOYD against BOYD.

ALEXANDER BOYD pursues Thomas Boyd of Pinkel, his brother, upon several sums due to the pursuer, for himself and his assignees, for establishing the debts, and adjudging the lands in satisfaction thereof, conform to the act of Parliament. The defender *alleged*, no process, in this order, by accumulating the establishment of the debt, and the adjudication in one process. *2do*, The debts are suspended, and reduction and improbation raised against the same, which must be first discussed.

THE LORDS sustained the summons, and allowed the defender to repeat his reasons of reduction by way of defence, if the same were instantly verified ; and if he cannot, ordains the lands to be adjudged ; but with reservation of the reasons of reduction *contra executionem* in any process that shall be intended for mails and duties, &c. that the pursuer be not stopped in his diligence, or prevented by others.

*Fol. Dic. v. 1. p. 11. Stair, v. 2. p. 459.*