

19th March 1707, Buchanan *contra* Marquis of Montrose, No. 11. p. 196.
 16th Dec. 1707, Tod *contra* Scott, No. 4. p. 190.

No. 4.

The Lord Ordinary decreed in the adjudication; and upon advising two reclaiming petitions with answers, the Judges were of opinion that nothing could stop or delay an adjudication but consignment of the debt; and therefore they "adhered to the interlocutors reclaimed against, reserving all exceptions *contra executionem*."

Lord Ordinary, *Hales*.
 Clerk, *Ross*.

For Thain, *Rolland*.
 For Moncrief, *J. Douglas*.

R. H.

Fac. Coll. No. 36. p. 99.

1771. July 31.

EDWARD TYSON, Merchant in LONDON, *against* ALEXANDER CUNNINGHAME,
 Clerk to the Signet:

Helen Fleming, in the year 1754, with consent of George Dunbar her husband, disposed the lands of Poleark and Granges to John Dunbar her son; reserving her own liferent, and under the burden of certain provisions to her three daughters, Alison, Elisabeth, and Helen. Helen Fleming and her husband died in 1768. John the son had been engaged in trade abroad, and had contracted a large debt to John Watson of London, to which Edward Tyson came to have right as executor to Watson's children. John survived his parents but a few months: The fee of the above lands opened to his two sisters Elisabeth and Helen, to whom also Alison's provision had accresced by her pre-deceasing her mother.

No. 5.
 Effect in a ranking of objections to an adjudication.

These two ladies, instead of entering heirs, brought a sale of the lands as apparent heirs to their mother and brother; and at the same time assigned to Alexander Cunninghame, as trustee, the sums to which they had been provided by their mother's disposition, including the provision to their sister Alison, deceased.

Upon this trust-assignment Cunninghame charged Elisabeth and Helen to enter heirs in general to their mother and brother. Upon their renouncing, he obtained decree *cognitionis causa*, and thereafter decree of adjudication, for the whole principal sums due to them, with the annualrents, and a fifth part more of liquidate penalty.

Tyson having appeared in the ranking as a creditor of John Dunbar's, a state was made out; in which Janet Fleming, sister and a prior creditor of Helen's, was preferred *primo loco*; Cunninghame for the accumulate sum in his adjudication, *secundo loco*; and Tyson upon his debt, for which also he had adjudged, *tertio et ultimo loco*.

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To this state Tyson objected, That Cunninghame ought to be ranked to the extent only of the principal sum and interest due ; while Cunninghame, on the other hand, maintained, That he was entitled to rank also for his penalties and expenses. The Lord Ordinary having repelled the objection to Cunninghame's interest,

Tyson, the pursuer, in a reclaiming petition, pleaded :

1mo, The adjudication by Cunninghame, the trustee for the two sisters, was nimious and unnecessary ; and as their security was otherwise complete and certain, ought not to entitle them to penalties. The debt due to the two sisters was preferable to every debt of John Dunbar's, who succeeded in virtue of a disposition burdened with these very debts ; and as there was no bygone interest resting upon these provisions, which had only begun to be due at their mother's death, it was impossible they could run the smallest risk of losing any thing. The present adjudication therefore had been led, not for payment of a debt, but to give the adjudger the benefit of a *penalty* over and above receiving his full payment ; and had the effect of evicting so much of the fund, which would otherwise have gone to satisfy the pursuer's debt.

The present case was very different from that of Auchinbreck, where penalties had been sustained ; as the adjudications there were proper and necessary ; and upon calculation made, it appeared that the adjudger had, upon the whole, been no gainer by having the penalties sustained in his favour.* The court had been in use to cut down exorbitant penalties, where it appeared from the circumstances that advantage was taken ; 30th Nov. 1680, Earl of Panmure *contra* Durham, No. 40. p. 128. and in the case, 13th Dec. 1753, Lockhart Wiseman *contra* Hugh Hamilton, (not reported,) it was found, that an adjudication was redeemable upon payment of the principal sum and annualrents due at the date of the decree, with the annualrents of the accumulated sum since that time, and the necessary expenses debursed in leading the adjudication, and making it effectual.

2do, Independent of the objection to the penalties, Cunninghame's adjudication laboured under various objections in point of form, which would, at any rate, operate a restriction of it to the sums truly due. *1st*, The decret of constitution, *cognitionis causa*, had been taken out before the days of the general charge and *induciæ* of the summons of constitution had elapsed. Though it no doubt was the general practice to execute the general charge and summons of constitution at the same time, and though this was contrary to the statute 1540, it had always been understood in practice, that both must be fully elapsed before the action came into Court ; which rule had not, in the present instance, been observed. *2d*, Sufficient time had not been given for the running of the *induciæ*, upon the summons at Cunninghame's instance, after the expiry of the *annus deliberandi*. *3d*, The disposition by Helen Fleming having remained a personal

* The case of the Creditors of Auchinbreck is shortly mentioned No. 39. p. 269. It is not in the Faculty Collection. A detail of the particulars is intended to appear in Appendix, Part II. which is to consist chiefly of cases not formerly reported.

deed at her son John's death, containing a substitution in favour of the sisters, Cunninghame, in order to pave the way for his adjudication, instead of a new general charge, without reference to the disposition, ought to have given a *general special charge*, calling upon Elisabeth and Helen to enter heirs to John in that particular subject contained in the disposition or personal right.

Cunninghame answered :

1mo, When a creditor was obliged to adjudge for payment of his bond, he was entitled to adjudge for the penalty as well as the principal and interest, and to accumulate the whole into one sum. It was equally well established, that when an adjudication was habily deduced against a subject, it could be redeemed from the adjudger, only upon payment of the whole sum for which it had been led, with the interest since the date of the decree. This doctrine was authorised by the principles of the civil law, where parties, in a contract, were entitled to exact penalties, without being obliged to prove the real damage they had sustained. Inst. L. 3. T. 20. § 19. Penalties in bonds and other contracts were, upon the same principles, allowed in the law of Scotland ; and in all rankings it had been the uniform practice, where no objection lay to the adjudication, to rank the adjudger for the whole accumulate sum in the diligence.

The rule was extremely reasonable ; for besides the delay of payment, an unavoidable expense was always incurred ; and hence it had been established as a general rule, that a creditor, for his indemnification, was entitled to recover that penalty which he had stipulated, and which the debtor had become bound to pay. So it had been decided in the case of Auchinbreck ; where the Court proceeded, not upon any specialties, but upon the abstract point. In the case, 30th Nov. 1681, Earl of Panmure, No. 40. p. 128. the penalty was exorbitant, being much beyond what was usual at that time to be stipulated in bonds. The case, Wiseman *contra* Sir Hugh Hamilton, was attended with very special circumstances ; the money was well secured ; no other creditors were attempting to adjudge ; the debtor had been guilty of no delay in payment of the annualrents ; so that the Court considered the adjudication as a nimious and oppressive diligence, and accordingly gave relief.

The adjudication, in the present instance, could not be considered as of that description. A ranking of creditors was foreseen ; and as that might depend for a long course of time, it became expedient, and even necessary, to lead an adjudication in the usual mode, which might afford them a security and indemnification for the expenses they might incur, and the loses they might sustain by the delay of payment.

2do, The objections stated to the regularity of the diligence did not apply to the circumstances of the case. *1st*, By bringing the process of sale, the heirs had sufficiently declared that they were not to represent their predecessors, but would renounce when convened in any action by the creditors ; who had therefore no occasion to wait till the expiry of the forty days, and of the *inducia* of the summons of constitution. The elapse of the full *inducia* was not, in every

No. 5. case, required to authorise a decree *cognitionis causa*; for though the heir was not obliged to answer till the full *inducie* were run, yet if, after the *inducie* of the summons, he appeared in Court, and gave in a renunciation, this would sufficiently authorise a decree *cognitionis causa*, as the foundation of an adjudication *contra hereditatem jacentem*; which was all that had been taken in the present instance. 14th July 1631, Blair *contra* Brown. No. 29. p. 6870. 2d, There was no occasion, in this case, to wait the *annus deliberandi*; as the heir, by bringing a sale upon the act 1695, had put an end to any further deliberation; so that the creditors, without more delay, were entitled to establish their debts against the estate. 3d, A special charge or *general special charge* become necessary only when the debt was either the proper debt of the heir, or when it was made so by a personal decerniture against him; but when the heir renounced, there was no room for either, as the estate, in that case, was not adjudged as the estate of the heir, but as the *hereditas jacens* of the defunct.

The Court found, "That Mr. Cunninghame could only be ranked for his principal sums, annualrents, and necessary expenses, accumulated at the date of the decree of adjudication, and annualrents thereof."

Lord Ordinary, *Gardenstone*.
Clerk, *Tait*.

For Tyson, *Ilay Campbell*.
For Cunninghame, *Macqueen*.

R. H.

Fac. Coll. No. 99. p. 295.

1771. November 15.

Dr. WILLIAM PARK of Langlands, *against* ROBERT CRAIG in Barkip.

No. 6.

An adjudication, where both the *penalty* and *termly failzies*, in an heritable bond, were accumulated, found liable to the objection of a *pluris petitio*, and restricted accordingly.

IN the year 1726, William Park and John his son granted to John Hamilton an heritable bond, in common form, for 3000 merks, over the lands of Barkip; on which infeftment followed.

Part of the sum was paid; and in the year 1743, Hamilton adjudged from the pursuer, the heir of John Park, the lands of Barkip, for payment of £2080 Scots of principal, interest, penalty, and *termly failzies*, due upon the bond.

This adjudication having come by progress into the person of Craig the defender, he in 1752 obtained a charter of adjudication, and was infeft.

In 1766 no declarator of expiry of the legal having been obtained, the pursuer brought an action of reduction and declarator of extinction of this adjudication; wherein he stated a variety of objections; all of which the Lord Ordinary repelled.

The Pursuer gave in a reclaiming petition, craving the Court to restrict the adjudication to a security for the principal sum and annualrents; and in support of this application,

Objected.—That as the adjudication accumulated not only the £1000 Scots of principal, with annualrent from the date of the bond, and £150 Scots of penalty, but £5 Scots of *termly failzies* of each year down to the date, this was