

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

such a *pluris petitio* as must restrict the effect of the diligence. If the diligence had proceeded upon the infestment of annualrent in the bond, the termly failzies might, as *debita fundi*, and had they been attached *habile modo*, by a poinding of the ground and letters of comprising, have been accumulated; but as it had been deduced, in terms of the act 1672, and consequently upon the personal obligation, the adjudger could only accumulate the ordinary penalty; and, at all events, could not accumulate and adjudge for both. 29th Nov. 1677, Orrock *against* Morrice, No 39. p. 128. 27th Jan. 1699, Mackenzie *against* Creditors of Cockburn, No. 31. p. 259.

No. 6.

The defender answered :

When an adjudication was led upon a personal bond, it was in practice grounded both upon the personal obligation and the real right, the one without prejudice of the other. The first included the principal sum and penalty for non-payment; the last the arrears of annualrent and termly failzies, properly considered as *debita fundi*; but precisely of the same nature with the penalty, and intended to secure punctual payment of the interest in the same way as the penalty secured payment of the principal. Whenever a term's annualrent was allowed to run in arrear, the termly failzie, corresponding to it, became due; and, like every other debt, might be the ground of an adjudication. The law and practice accordingly authorised the diligence that had been used equally in the one case as in the other; and as both obligations had been legally incurred, they were equally, without restriction, liable to be accumulated in the diligence. Bankton, B. 3. T. 2. § 99.

Though other objections were urged, it was upon this that the Judges decided the question; and the following interlocutor was accordingly pronounced: "Restrict the adjudication in question to the principal sum, annualrents thereof, and necessary expenses, to be accumulated at the date of the decree, with the annualrents of the said sum thus accumulated after the date of the said decree of adjudication till payment."

Lord Ordinary, *Monboddo*.
Clerk, *Ross*.

For Park, *G. Ferguson*.
For Craig, *R. Blair*.

R. H.

Fac. Coll. No. 104, p. 317.

1776. February 9. FRANCIS STRACHAN *against* SIR JOHN WHITEFORD.

James Aird was proprietor of the lands of Brackenhill, in which he was infest. Agnes Mackenzie his spouse was infest in an yearly annuity out of them, in the event of her surviving her husband.

James Aird conveyed these lands to James Aird, his son, and Isobel Foggo, his spouse, for a life rent annuity. The son was infest.

The whole parties afterward, by a minute of sale, sold the lands to Mr. Matthew Stuart, professor of mathematics in the university of Edinburgh, obliging themselves to grant a disposition, containing procuratory and precept in his favour.

No. 7.

One having a disposition in security over lands, held and possessed by his debtor on minute of sale without infestment, cannot complete