

1772. June 30. TRUSTEES OF CHARLES MURRAY *against* EARL OF MARCH.

ADJUDICATION.

Penalties not restricted.

[*Dictionary*, p. 268.]

On the 15th December 1729, Sir Alexander Murray of Stanhope granted an heritable bond of corroboration to Mr John Douglas, brother of the late Earl of March, for L.9862 : 10s. Scots ; and, in security of the payment of the said principal sum, annualrent from the term of Martinmas preceding, and a fifth part more of liquidate penalty, Sir Alexander disposed to him the lands of Stanhope.

On the death of John Douglas, the present Earl of March, his nephew made up titles to this heritable bond ; and, on 28th November 1749, after many years' interest was due, obtained decree of constitution against the heir of Sir Alexander Murray, on which he adjudged the estate of Stanhope, for payment of the said debt, extending to the accumulated sum of L.21,700 Scots.

A ranking and sale having been brought, the Earl was ranked, without objection, for the principal sum in his adjudication, and interest thereon. But the trustees of Mr Murray (who, by this time, was dead,) objected to the claim for the penalty. The lands being sold, it turned out that the price was more than sufficient to pay all the creditors, and that there would be a considerable reversion to Mr Murray's heirs. It, however, appeared, from a calculation which was lodged, that, even by receiving payment of the penalty, the adjudger would not be indemnified for the loss which he had sustained by not receiving his interest regularly.

The point was reported to the Court on informations, when the trustees, besides stating certain objections, in point of form, to the bill on which the summons of adjudication had proceeded, and to the summons of constitution, referred to the case of *Hamilton against Wiseman*, in 1753. The Earl, on the other hand, relied on the case of *The Creditors of Auchinbreck*, 12th July 1769 ; and *Creditors of Kinminity's*, 5th August 1757.

The following opinions were delivered :—

HAILES. It is said, that, in the days of Alexander II, the law was to comprise for principal, annualrent, and expenses. There was no such thing as annualrents known at that time. *Interesse* means *lucrum cessans*, not *annualrent*.

Lord March has not adjudged for more than the *interesse* : in truth he will draw less. I imagined that the case of *Wiseman* proceeded upon specialties ; and that the case of the creditors of *Auchinbreck* went upon the general point.

MONBODDO. This form of adjudication is authorised by the Act of Sederunt. An adjudication is a right of property, redeemable upon payment of the sums

adjudged for. I thought the case of Wiseman ill determined: the case of Auchinbreck well.

AUCHINLECK. We must determine by general rules. If people have not their interest paid punctually, they must borrow money to support themselves. It is no matter whether that was actually the case here or not.

COALSTON. If the creditor had been nimious in diligence I would have followed the judgment in the case of Wiseman; but no such thing here. On the contrary, the charge against him, is, that he was too indulgent. The penalties are not sufficient to indemnify him for the want of his money.

PITFOUR. Though general rules should be observed, yet the Court ought not to give up its Prætorian powers. The objections to the adjudication are slender; but, as slender objections have been sustained against an expiry of the legal, why not against an adjudication? I would strike off some part of the penalties.

PRESIDENT. Penalty in a simple bond is different from a penalty in an adjudication. The case of Auchinbreck is strong. Lord March was no rigorous creditor. There is a difference between a question among onerous creditors and a question with the heir. Objections might be sustained in the former case which would not in the latter.

On the 30th June 1772, "The Lords repelled the objections, and found Lord March entitled to his full penalties."

*Act. H. Dundas. Alt. J. Montgomery.
Reporter, Pitfour.*

1772. July 1. ELIZABETH SUTHERLAND *against* ROBERT SYME.

HUSBAND AND WIFE.

- I. A husband and wife having, by a contract, agreed to live separately, and that the husband should pay her an annuity, which she accepted in full of her legal claims; and the annuity having been paid until the death of the wife,—*found* that a revocation privately executed by her, previous to her death, was not effectual.
- II. An heritable subject belonging to the wife, having been sold by her, with her husband's consent, and the price uplifted by him,—*found* that he was bound to account for it to her representatives.

In 1733, the defender was married to Jean Reid. In 1762, a contract was executed between them, which proceeded on the narrative, "Whereas the said Robert Syme and Jean Reid, finding that it is both disagreeable and inexpedient for them to live together, have agreed to live separately: and, as there is no contract of marriage betwixt them,—for supplying that defect, and for the said Jean Reid her better accommodation and subsistence," &c. By this contract, the defender, besides allowing his wife to take with her a quantity of household furniture, agreed to pay her an annuity of L.30 during her life. On the other part, "and in consideration of the premises, the said Jean Reid has