

argument. In a question with the common debtor, there was no harm in sustaining the adjudication as a security for those sums which were confessedly due. This was of advantage to both parties, by avoiding those expenses which would have been incurred in leading a new adjudication. These considerations, however, are of no weight in a competition of creditors, who are entitled to plead every objection, however minute, that can enlarge their fund of payment. In a question, particularly, respecting the transmission of landed property, it would be dangerous to give effect to a decret of any Court, which enters into no proper record for publication, so as to affect the rights of creditors and *bona fide* purchasers.

THE LORDS, after advising informations, pronounced this judgment:

"Find, that the judgment of the Court, sustaining the adjudication at the instance of Robert Ker's predecessor, as a security for the principal sum and interest, is to be held as a *res judicata*; and therefore repel the objection to the adjudication."

But upon advising a reclaiming petition, which was followed with answers,

THE LORDS "found, that the adjudication at the instance of Robert Ker's predecessor was only to be sustained as a proper step of diligence, in a question with those creditors whose debts were contracted after the judgment of the Lord Ordinary, of date 17th January 1774."

Reporter, Lord Rockville.

Act. Blair, Cha. Hay.

Alt. Rolland, Hope.

Clerk, Home.

C.

Fol. Dic. v. 4. p. 237. Fac. Col. No 85. p. 153.

1789. November 17. TOWN COUNCIL OF ROTHESAY against MACNEIL.

No 58.

A DECREE having been extracted, before expenses, though awarded, had been modified, and without any reservation of them having been made; the LORDS found it was not competent afterwards to demand decerniture for those expenses, though they were costs awarded by statute.

Fol. Dic. v. 4. p. 236. Fac. Col.

* * * This is No 335. p. 12188., *voce* PROCESS.

1789. November 24. GEORGE HARKIES against WELSH and CUMING.

No 59.
The property of a third party being poinded, may be reclaimed without the necessity of a reduction.

WELSH and CUMING caused a poinding to be executed, of a number of horses in the possession of John Hogg their debtor. Among these, there was one which proved to be the property of Harkies, as had previously been intimated by Hogg.

No 59.

Harkies having brought an action of spuilzie for having the horse restored, &c. the Sheriff of the county before whom the cause came, pronounced this judgment: "In respect it appears, that at the time of the poinding, the horse libelled was in the possession of John Hogg the debtor, and that there is a regular execution of poinding produced, finds, that it is beyond the jurisdiction of the Court to set aside that poinding, and therefore dismisses this action as incompetent."

The pursuer presented a bill of advocation, on which the following deliverance was given by the Lord Ordinary on the bills: "Finds, that as the poinding was *res inter alios acta* as to the complainer, who was no party to it, it cannot affect him in any respect, and consequently that he is not obliged to bring a reduction of it, or precluded from bringing an action for recovering possession of his horse in any way competent to him before it was executed; therefore refuses the bill, and remits to the Sheriff, with instruction to vary his interlocutor, sustain process at the complainer's instance, and do therein as to him shall seem just."

In a reclaiming petition it was argued, in the words of Lord Kames, That 'a poinding is of the nature of a decree; it is a sentence of a competent Judge, adjudging and decerning the goods to belong to the creditor; and this decree cannot be taken out of the way otherwise than by a proper reduction,' Currie, No 12. p. 6206. And this doctrine it was endeavoured to support by the authority of Lord Stair, who denominates the messenger 'Judge in the execution of poinding,' B. 4. Tit. 30. § 6.; and of Mr Erskine, who states 'the adjudication and delivery by the messenger, as vesting the creditor with the full right of the goods,' B. 3. Tit. 6. § 24.

The COURT were unanimous in the opinion, that in such cases it is competent for the owner to reclaim his property in a petitory action, and an illustration was given from the adjudication of lands that did not belong to the debtor, where the proprietor, without resorting to an action of reduction, would be entitled to be assoilzied from a process of mails and duties at the instance of the adjudger.

The petition was therefore refused without answers.

Lord Ordinary, *Dreghorn.*

For the Petitioner, *Elphinston.*

S.

Fol. Dic. v. 4. p. 237. Fac. Col. No 92. p. 167.

1793. December 17.

JOHN KER, and the TRUSTEE for His Creditors, *against* The AGENT for the SUN FIRE-OFFICE.

No 60.
A verdict of
acquittal in
the Court of
Justiciary

JOHN KER having been suspected of wilfully setting fire to his own house, in order to defraud the Insurers, a precognition was taken before a Magistrate