

No. 11. “ having been a trust for the granter’s behoof, though it contained a power to
 “ the trustees of selling the lands, for the purpose of paying off the granter’s
 “ debts, but which power the trustees never exercised, and still stood bound,
 “ in the event of a sale, to reconvey or settle the remainder for behoof of the
 “ granter and his heirs, which did not disable his lawful creditors, not acceding
 “ to the trust-deed, from doing diligence against himself while he lived, or against
 “ his apparent heir, after his death, for payment or security of their debts ; and
 “ therefore repelled the objections to the adjudications led by the other creditors
 “ against the son and the apparent heir of their debtor after his decease.”

A reclaiming petition, presented by the trustees of Inverliver, was unanimously refused, without answers.

Lord Ordinary, *Justice-Clerk Eskgrove*.
 Clerk, *Home*.

For Inverliver’s Trustees, *Fletcher*.

R. D.

Fac. Coll. No. 210. p. 480.

1801. *January 20.*

MARGARET BUCHANAN, *against* JAMES PURDON GRAY, and his Administrator-in-Law.

No. 12.

An adjudication led on an heritable bond against the heir of the granter, restricted to a security, in respect the adjudger omitted to obtain a decree of constitution against the heir before leading the adjudication.

Will the penalty in a general adjudication be restricted in a question with the debtor?

In 1787, Isabella Gray granted an heritable bond over her lands of Chryston, for £1000 lent her by Mrs. Margaret Buchanan.

Isabella Gray died in 1790, leaving an infant son, James Purdon Gray, to whom his father John Purdon was administrator-in-law.

The interest of the loan was regularly paid till Whitsunday 1793. But the rents of the lands proving insufficient to defray the annual burdens on them, Mrs. Buchanan obtained first a decree of mails and duties, and thereafter adjudged the lands for the principal sum in the bond, bygone interest, and £200 of penalty, accumulated into one sum, bearing interest from the date of the decree.

In the process of adjudication, James Purdon Gray was cited personally, and John Purdon edictally, as his administrator-in-law.

Under these circumstances, John Purdon, in virtue of a decree of the Court of Session, sold part of the lands for payment of the debts, and out of the price he offered to repay Mrs. Buchanan the principal sum, bygone interest and the whole expenses which she had incurred. But she refused to discharge her adjudication, excepting on payment of the full sum contained in it, including the penalty.

A multiplepointing was, in consequence, raised in the name of the purchaser in which John Purdon Gray

Pleaded : *1st*, The adjudication is irregular from John Purdon, not having been especially cited. Tutors and curators are allowed to be cited edictally, from a presumption that they may not be known to the pursuer ; Balfour's Practics, p. 309. *voce* Summons. But a pursuer can hardly fail to know that the pupil has a father who is his legal administrator. On account, therefore, of this irregularity, the adjudication should be restricted to a security for the sum truly due.

2dly, But although the adjudication were unexceptionable, equity requires that Mrs. Buchanan should get no more than her debt, with interest and expenses. In questions with co-creditors, the Court are in the daily practice of restricting adjudications in this manner ; and no good reason can be assigned why the same equitable mitigation should not be extended to the debtor. Had Mrs. Buchanan sought the penalty, merely in virtue of her bond, the Court would have given redress ; and her claim is not strengthened by the adjudication. While apprisings continued, they could proceed only for the debt justly due to the creditor, and when the act 1672 introduced special and general adjudications, the Legislature in the former case allowed the creditor to adjudge for a fifth part more than his debt, " in respect he was necessitate to take land " for the same ;" but, in general adjudications, the former law remained so much unaltered, that the old statutes respecting apprisings, are referred to as containing the rule agreeably to which general adjudications should be led ; 30th November 1680, Earl of Panmure, No. 40. p. 128.

Answered : *1st*, It has been the uniform practice for the last 150 years, to cite administrators in law edictally ; Stair, B. iv. Tit. 38. § 23. ; Bankton, B. iv. Tit. 23. § 11. ; Erskine, B. iv. Tit. 1. § 8. ; 8th March 1626, Earl of Kinghorn, No. 9. p. 2180.

2dly, The practice since the act 1672, (and in most cases, it is *optima legum interpretas*,) has been universal, even in general adjudications, to adjudge for the penalty : Indeed, the act of sederunt, 26th February 1684, expressly authorises this ; and from its being passed so recently after the statute, there is no room for doubting, but that this was the intention of the Legislature. It would, however, be a contradiction in the law, were it to authorise the creditor to adjudge for the penalty, and at the same time call upon the Court in every case to interpose its equitable powers to restrict the penalty to the actual expenses. Accordingly, in questions with the common debtor, no such restriction has been granted, July 12, 1769, Creditors of Auchinbreck, No. 39. p. 268. 1772, Creditors of Murray, No. 40. p. 268. Winter-session 1787, Creditors of Maxwell of Dalswinton, (not reported) ; 4th January 1789, Gordon of Kenmuir (not reported).

The Lord Ordinary " ranked and preferred Mrs. Margaret Buchanan upon " her interest produced, *primo loco*, to the funds *in medio*, for payment to her " of the accumulated sum contained in the decree of adjudication produced

No. 12. “for her, and interest thereof from the date of the said decree, and till payment.”

On advising a reclaiming petition, with answers for John Purdon Gray, the Court, on the first point, thought, that although it would have been better to have cited the administrator-in-law specially, yet that citation was not legally objectionable.

On the second point there was much diversity of opinion. Five of the Judges, including the Lord President, were for restricting the penalty. A general adjudication (it was observed) was to be regarded as a mere *pignus praetorium* in security of the debt, and not like a special adjudication, a surrogatum for it; and this being the case, it was a duty of a supreme court of law and equity, to mitigate the penalty to the expenses which the creditor had incurred, together with any loss which he could qualify from being disappointed in getting payment of the principal sum when he wanted it, or from the debtor's irregular payment of the interest.

But other five of the judges thinking Mrs. Buchanan's claim well founded, on the grounds stated for her, the Court (5th June 1799) “adhered.”

Upon this a second reclaiming petition was presented for Gray and his administrator in-law, in which, besides repeating their former arguments on the general ground, they stated, for the first time, that Mrs. Buchanan had omitted to obtain a decree of constitution against James Purdon Gray, the present debtor, before adjudging; and that on account of this flaw in the diligence, it ought to be found to be void, or at least restricted to a security for the principal sum and interest.

To this it was answered, that the debt being liquid, and the petitioner having entered heir to his mother prior to the date of the summons of adjudication, a decree of constitution was unnecessary.

The Court, on again advising the cause, thought the diligence irregular, on account of the want of the decree of constitution; and this rendering it unnecessary to enter upon the question respecting the penalty, the Judges waved its determination.

The Lords accordingly, on this new “ground, (10th July 1800), restricted “the adjudication to a security for the principal sum, interest, and expenses of “the adjudication, and found no expenses due to either party.”

And afterward, on advising a third reclaiming petition for the debtor, with answers, the Court found him entitled to £15. as the expense which he had incurred from the period at which he first stated the point on which the decision of the Court ultimately turned.

Lord Ordinary, *Craig.*

Alt. *Robertson, Williamson.*

For Gray, *Walker Baird, J. Grahame.*

Clerk, *Sinclair.*

R. D.

Fac. Coll. No 12. (Appendix) p. 23.