

No. 13. The Lords nearly unanimously sustained the objection to the adjudication to the effect craved by the objector.

Lord Ordinary, *Justice-Clerk Rac.*

Alt. *Arch. Campbell, junior.*

R. D.

For the Common Agent, *Boyle.*

Clerk, *Home.*

Fac. Coll. No. 240. p. 542.

1805. *December 19.* ALLISONS *against* BALLANTINE.

No. 14.

What is understood by "first adjudication" in the act 33d Geo. III. cap. 74. § 81.

IN a process of ranking of the creditors, and sale of the estate of David Ferguson, merchant in Ayr, an objection was stated by William Ballantine, the common agent, to the interest produced for Mary, Jean, Burrel, and Margaret Allisons, on account of an alleged defect in their adjudication.

David Ferguson's heritable estate was understood, at the time of his death, to consist of two different subjects; but it was afterward discovered, that he had a right to a third subject, in the neighbourhood of Ayr.

The first adjudication against his estate, was obtained at the instance of Messrs. Innes, Beveridge and Company, merchants in London, on the 24th January 1794, and it adjudges lots first and second, for payment of the principal sum, interest and penalty due to them.

The greater part of the creditors also adjudged these two lots. But after the adjudications were led, upon lot third being discovered, it became necessary to lead a new set of adjudications against it.

The first adjudication of lot third that was brought into Court, was at the instance of Mrs. Elizabeth Ferguson, which was, on the 10th December 1794, appointed to be intimated in the usual manner, in terms of the bankrupt-act; and with this adjudication the greater part of the creditors were afterward conjoined.

In order to bring the adjudication led by the Misses Allison within year and day of the first adjudication by Messrs. Innes, Beveridge and Company, which affected lots first and second, they were under the necessity of applying to the Court to dispense with the *inducia* of the second diet of their summons. And as by this time Mrs. Ferguson's adjudication against lot third had also been executed, this subject was also included in their adjudication.

Mrs. Ferguson's summons of adjudication, which was called in Court upon the 10th December 1794, had been intimated in common form; but the twenty days did not expire, so that she could not obtain adjudication against this subject until the 28th January 1795.

Messrs. Innes, Beveridge and Company's adjudication, had been obtained upon the 24th January 1794. Misses Allisons obtained decree of adjudication upon the 24th January 1795; and they not only adjudged the two first subjects contained in the previous adjudication of Messrs. Innes, Beveridge and Company, but they also adjudged lot third, which was not contained in any former decree of adjudication.

The common agent in the ranking and sale of the estate, objected to the decree of adjudication obtained by the Miss Allisons, That “ the decree of adjudication, in so far as it affects the piece of land with the nolt faulds, (lot 3.), has been led in a very irregular manner ; for although it was the *first* adjudication against these subjects, yet it does not appear to have been intimated in terms of the act of Parliament. Neither did these adjudgers wait for the expiry of the days of intimation assigned in the adjudication at the instance of Mrs. Ferguson, which were then running, but having applied to the Court to dispense with the *inducia* of the second diet of their summons, obtained decree at once against the whole subjects. This adjudication, therefore, can only rank upon lots first and second.”

The Lord Ordinary pronounced the following interlocutor : “ In respect that the adjudication at the instance of Mrs. Elizabeth Ferguson, which was called before the Lord Ordinary, prior to the calling of the adjudication at the instance of the Allisons, is to be held in terms of the act 33d of the King, to be the first process of adjudication affecting lot third of the debtor’s subjects, and that in said process of adjudication intimation was duly made for other creditors to be conjoined in it, find, That there was no occasion for such intimation being made in the adjudication by the Allisons, although, in consequence of a dispensation granted by the Court, decree happened to be pronounced in the Allisons’ adjudication, prior to the decree in that of Mrs. Elizabeth Ferguson ; therefore repels the objection to the Allisons’ adjudication being ranked on lot third, as well as on the other two lots.”

The common-agent presented a petition to the Court, and

Pleaded : The adjudication of Miss Allisons was the first adjudication affecting the third lot of the debtor’s estate ; for decree in it was obtained some days previous to the decree obtained by Mrs. Ferguson. But, though a first adjudication, it was not intimated, and consequently is null and void, in terms of the 33d George III. cap. 74. § 81. If this adjudication were to be sustained, the whole of the other adjudging creditors must be set aside ; for their adjudications were conjoined with Mrs. Ferguson’s, which was not the first effectual adjudication, and therefore, by the decision in the case of Kinlochaline, November 24th, 1801, (APPENDIX, PART I, *voce* BANKRUPT), their adjudications are inept.

Answered : By the first adjudication referred to in the 33d George III. must be understood that which is first called in Court, not that which is first made effectual by decree. This is obvious from the nature of the intimation, which must be made whenever the process comes into Court, and before any decree is obtained. Mrs. Ferguson’s adjudication was the one which was first called, and therefore the only one which required to be intimated, in terms of the act of Parliament. The circumstance of decree having been first pronounced in the adjudication of the Miss Allisons, does not make it the first adjudication in the sense of the 33d of George III.

No. 14. The Lords, upon advising a reclaiming petition, with answers, adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Polkemmet.*

Act. *Cathcart.*

Agent, *Wm. Ballantine, W. S.*

Alt. *Macfarlan.*

Agent, *Geo. Tod.*

Clerk, *Mackenzie.*

J.

Fac. Coll. No. 231. p. 523.

* * See Campbell and others *against* Common Agent for Postponed Creditors in the Ranking of M'Lean of Kinlochaline, 24th November 1801, APPENDIX, PART I. *voce* BANKRUPT.

1806. January 21. MACLELLAN *against* MACREE.

No. 15.
Debtor re-
poned against
a decree of
expiry of le-
gal, obtained
in absence.

ROBERT MACLELLAN granted a bond to William Macree, for £45. In 1791, Macree led an adjudication upon a long lease of a piece of property of his debtor, in the neighbourhood of Stranraer, and obtained a decree of adjudication, declaring the tack to belong to him, in satisfaction of the principal sum due in the bond, interest and penalty.

In 1803, a partial payment was made by Maclellan; but as a balance of the debt still remained due, William Macree, the heir of the original creditor, raised an action of declarator of expiry of the legal, concluding for decree in common form. The summons was personally executed against Maclellan, who transmitted instructions to an agent in Edinburgh to attend to his interest. This agent, however, happened to be employed for the other party, and consequently declined the business. Decree was pronounced in absence in the month of July 1804. The lease was afterward exposed to public sale, when it was bought by Charles Wither, at the price of £71. Maclellan protested against the sale, and afterward instituted an action of reduction of the decree of expiry of the legal.

The Lord Ordinary assolizied the defender. Upon this Maclellan presented a petition; and

Pleaded: The doctrine, that the lapse of the legal *ipso facto* renders an adjudged subject the absolute property of the creditor, has been long abandoned. For that purpose, a decree of declarator is necessary; Campbell *against* Scotland, March 7, 1794, No. 6. p. 321. There is no reason for holding, that a process of expiry of the legal is to be governed by different rules from other actions of a similar nature. A decree in absence, pronounced in such a process, cannot have any greater effect than a decree in absence in other cases, against which a defender is entitled to be reponed; Landale *against* Carmichael, November 25, 1794, No. 16. p. 305. Young *against* Thomson, February 5, 1799, No. 70. p. 7012. The pursuer is ready to shew, that the debt is nearly extinguished; and it was entirely owing to the accident of the agent whom he employed, being engaged for the other party, that decree in the declarator was pronounced.