1709. *June* 17. EARL of ABERDEEN *against* TOLQUHON.

No 9.
A creditor not obliged to accept of a partial adjudication, unleſs incumbrances are actually purged. Equivalents muſt not be obtruded in place of this.

THE deceaſed Sir Alexander Forbes of Tolquhon, being debtor to the Earl of Aberdeen, in ſundry conſiderable ſums by bond, there are decreets of conſtitution obtained againſt this Tolquhon, as lawfully charged to enter heir to his uncle, and thereon a ſummons of adjudication raiſed; wherein Tolquhon compears, and craves the benefit of the alternative in the 19th act 1672, introducing adjudications, offering lands to the value of the ſums, and a fifth part more, upon his producing a ſufficient progreſs, purging incumbrances, and ratifying his right, and thereon gets a term to prove the rental, purge and ratify. The Earl, at that diet, produces a condeſcendence of incumbrances; and, in regard they are not purged, craves a total adjudication.

Objected by Tolquhon, That the liferents being impurgeable, the Lords, on that account, might determine what warrandice the debtor ſhould give againſt them; and *quoad* the inhibitions, the Earl's debts are prior, and ſo cannot be quarrelled on that head. *Tertio*, As to the hornings produced, ſome of them ſtand ſuſpended; and the Earl may ſecure himſelf againſt the reſt, by taking the gift of Tolquhon's eſcheat.

Anſwered: The act of Parliament obliges the debtor to cede the poſſeſſion, which he can never do as to the lands liferented; and no warrandice can ſupply this, it being ſafer *incumbere rei quam perſonæ*; and, though he be in no hazard from the inhibitions, yet if he be reſtricted to a partial adjudication, he runs the manifeſt hazard of the hail other creditors adjudging within year and day, and ſo coming in *pari paſſu* with him; and his ratification will reduce on the act of Parliament 1621; neither is the taking his eſcheat any *ſalvo*; for that would burden the Earl with the payment of the debts contained in the hornings, whereon the eſcheat is taken.

THE LORDS remembered, That though debtors uſed to retard the firſt adjudger, by offering a progreſs, and to purge and ratify; yet theſe partial adjudications had ſeldom or never taken effect, as prejudicial to creditors; and, that equivalents were not to be obtruded in place of actual purging of incumbrances; therefore they refuſed to reſtrict the Earl to a partial adjudication, unleſs the debtor either offered to purge them at the bar, or inſtructed, that they were already ſatisfied and paid.

On the other hand, the prejudicede btors incur, by their total adjudications is, that it obliges all the other creditors to run and do the ſame diligence within year and day, otherwiſe to loſe their debts; and yet, it is difficult for incumbered debtors to pay all their ſums in the narrow current of a year. So, in ſhort, to balance and ſum up the account, a total adjudication is bad for the debtors, and a partial one, as inſecure for the creditors; but few or none of them have taken any effect; and debtors, after having gained ſome delay, are forced to yield at laſt to a total adjudication.

Fol. Dic. v. 1. *p.* 6. *Fountainhall, v.* 2. *p.* 504.