

1728. *July.*MAIR *against* BALLANTINE.

No 70.

IN a competition betwixt an apprising and a voluntary disposition, the LORDS in respect that the disposition was prior to the denunciation of the apprising, preferred the voluntary right completed by confirmation of the superior, although posterior to the charge upon the comprising, in regard the charge was only to be considered in competitions of diligences among themselves, but not with voluntary rights. See APPENDIX.

*Fol. Dic. v. 1. p. 182.*

1749. *December 3.* BINNINGS *against* The CREDITORS of Auchinbreck.

No 71.

An adjudication not followed forth, cannot compete with a posterior voluntary infestment.

CHARLES MAITLAND of Hatton, afterwards Earl of Lauderdale, by several deeds settled upon his son Alexander 25,000 merks, payable at his death; and having deceased, Alexander obtained a decret of cognition, against Earl Richard his son, who renounced to be heir; and thereupon led an adjudication 1694 for his principal sum, with interest, from a blank term; and, after Richard's death, transacted his claim with Earl John his brother and successor, for 20,000 merks, with interest from Whitsunday 1697.

Another creditor had adjudged 1694, and was infest 1695; and Sir William Binning of Wallyford adjudged also 1694, upon which he raised a process of mails and duties 1696, wherein there is a minute 1699, but there was no further procedure.

Earl John granted an heritable bond 1706, out of the lands of Glassery, to Sir Robert Blackwood of Pitreavie; whereon he was infest, and conveyed it to Sir James Campbell of Auchinbreck, who had purchased these lands from the Earl of Lauderdale, and also bought in Mr Alexander Maitland's adjudication extending over them.

In the ranking of Auchinbreck's Creditors, Mr William Binning of Wallyford, and Jean Binning, as representing Sir William, claimed the lands of Glassery, in virtue of his adjudication; and *objected* to Mr Alexander Maitland's adjudication, That the sums for which it was led, fell only due on the death of Earl Charles, of which there was no proof in the decret of constitution; and this was the more fatal, as the interest was adjudged for, which run from his death, the time whereof did not appear: It might be hard totally to annul a diligence, on account of inaccuracy, in a question with the debtor; but here was a competition of diligences, in determining whose preference greater exactness ought to be observed.

*Answered*, It was notorious Earl Charles was dead, and his heir appeared and renounced; after which, there needed no further proof. And the adjudication being led for the principal, with interest from a blank term, was equal as if no

interest had been libelled at all, and could only be a security for the interest running from its date: And the adjudger having after transacted for 20,000 merks, which is within the 25,000 merks adjudged for, is sufficiently secured.

*Objected* to the heritable bond; Wallyford having adjudged within year and day of the first effectual adjudication, is entitled to be ranked with it; and, in consequence of the infeftment upon it, to exclude the posterior heritable bond: At least, the heritable bond being granted after the estate was made litigious by his adjudication, cannot compete with it; unless it could be said he was *in mora* in following it forth, which he was not, being not obliged to further diligence, as he was entitled to the benefit of his co-adjudgers infeftment, whereby his right was completed; and he also insisted in an action of mails and duties.

*Answered*, The act bringing in co-adjudgers *pari passu*, does not regulate their preference with other rights, and here Wallyford was *in mora*.

THE LORDS found, That the adjudication led by Mr Alexander Maitland behoved to subsist for the restricted sum of 20,000 merks and interest, in terms of the agreement betwixt the Earl of Lauderdale and the said Mr Alexander: And found, that notwithstanding of Wallyford's adjudication being within year and day of the first effectual adjudication, and his having raised a process of mails and duties in the 1696; yet, as he suffered the same to ly over from the 1699, to the 1706, the date of Sir Robert Blackwood's infeftment, and for several years thereafter, the said adjudication could not compete with Sir Robert Blackwood's infeftment, nor could interpel the proprietor from granting a voluntary infeftment on his estate.

Reporter, *Kilkerran*.

Act. *Ch. Binning*.

Alt. *T. Hay*.

Clerk, *Kirkpatrick*.

*D. Falconer, v. 2. p. 120.*

1764. July 26.

The DUTCHESS of DOUGLAS against WALTER SCOT Merchant in Leith.

ON the 27th February 1747, Henry Ogle obtained against Lord Cranston an adjudication of his Lordship's lands of Crailing, holding of the Crown, and of the lands of Wauchope, holding of the late Duke of Douglas.

Ogle raised a horning on the 11th of April thereafter, which he executed against the Duke on the 21st of the same month; and having assigned his debt and diligence to Richard Grieve, a process of mails and duties was brought by him in August, in which an interlocutor was pronounced in December following.

The Duke of Douglas adjudged the above lands on the 21st of July that same year; but took no other step.

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No 72.

A creditor by heritable bond preferred to a prior creditor by adjudication who was *in mora*.