

1749. December 5.

The REPRESENTATIVES of Sir WILLIAM BINNING *against* The CREDITORS of Sir JAMES CAMPBELL.

IN the ranking of the creditors of Sir James Campbell of Auchinbreck, compearance was made for the Representatives of Sir William Binning of Wallyford, who produced an adjudication led in 1664 of the barony of Glassary in Argyleshire, upon a decree *cognitionis causa* against Richard Earl of Lauderdale, who had renounced to be heir to Charles Earl of Lauderdale his father, proprietor of the said barony ; and thereupon craved to be preferred to Auchinbreck and his creditors upon the said barony, which was part of the subject of the ranking and sale.

And the creditors, amongst other rights which they produced in the person of Auchinbreck their debtor, having pleaded upon an heritable bond for a great sum granted in 1706 to Sir Robert Blackwood by John Earl of Lauderdale, who, upon the death of Earl Richard his elder brother, had served heir in special *cum beneficio* to his father Earl Charles, which, with the infeftment thereupon taken that same year, Sir Robert had conveyed to Auchinbreck ; it was *alleged* for the Representatives of Wallyford, That their adjudication was preferable to the infeftment on the heritable bond ; for that although no infeftment had followed on Wallyford's adjudication, yet being within year and day of Sir William Sharp's, the first effectual adjudication, on which infeftment had followed, it was therefore on the act 1661 preferable to Sir Robert Blackwood's heritable bond. And it was further *observed* in support of their preference, that Sir William Binning had endeavoured to obtain the possession by an action of mails and duties, pursued on his adjudication in 1699.

But the LORDS, on report, found ' That notwithstanding that Wallyford's adjudication was within year and day of Sir William Sharp's, and that he had raised a process of mails and duties in 1699 ; yet as he suffered the same to lie over from the 1699 to the 1706, the date of Sir Robert Blackwood's infeftment, and for several years thereafter, the said adjudication cannot compete with Sir Robert Blackwood's infeftment, nor could interpel John Earl of Lauderdale, proprietor by virtue of his service as heir *cum beneficio* to Earl Charles his father, and his infeftment upon his estate.'

It is an established point, that the act 1661 concerns only the preference of apprizers and adjudgers among themselves, but statutes nothing with respect to the competition between adjudgers and voluntary rights ; that though it is true, that even an executed summons of adjudication prior to a voluntary sale, and on which decree of adjudication follows, though after the voluntary sale, and much more a decree of adjudication prior to the voluntary sale may be preferable, that is not upon the act 1661, but on the head of litigiousity, which flies off, where the adjudger has been *in mora* of following forth his adjudication.

No 86.

An adjudication, though prior to a voluntary right, postponed thereto, on account of *mora* in the adjudger.

No 86.

How long time is necessary to have that effect, has never been fixed, only cases have been determined as they have occurred; and the shortest time that has been sustained to infer such *mora* is six years, in that case observed by Spottiswood, Hamilton against M'ulloch, No 78. p. 8383. And here, though Wallyford had pursued a mails and duties in 1699; yet it then slept, not only to 1706, when Sir Robert Blackwood's heritable bond was granted, but has never to this hour been awakened, the adjudication not having been heard of till it was produced in this process.

Fol. Dic. v. 3. p. 391. Kilkerran, (LITIGIOUS.) No 1. p. 339.

* * D. Falconer's report of this case is No 71. p. 2832, *voce* COMPETITION.

1764. July 26. DUCHESS OF DOUGLAS and WALTER SCOT, Competing.

No 87.

The subject being rendered litigious by the citation in a process of adjudication, how long does it continue litigious?

In July 1747, an adjudication was deduced by the Duke of Douglas against the estate of Lord Cranston his debtor, for the accumulated sum of L. 516 Sterling. In June 1750, Walter Scot merchant, having lent L. 400 Sterling to Lord Cranston, obtained an heritable bond, upon which he took infeftment without delay. And in about three years after a ranking and sale of Lord Cranston's estate was raised. The Duchess of Douglas, who had right to the said adjudication from her husband, *insisted* to be preferred before Walter Scot upon the following ground; That by the Duke's adjudication the subject was rendered litigious, so as to bar every voluntary deed by the debtor in prejudice of the Duke's diligence. It was *answered*, That the Duke had lost his privilege of litigiosity by a *mora* of near three years between his decree of adjudication and the heritable bond granted to Mr Scot, during which period he had done nothing to complete his diligence, not even a charge against the superior. Which answer was sustained by the Court, and Mr Scot was preferred upon his infeftment; to which interlocutor they adhered 20th November 1764.

With respect to litigiosity, there is a remarkable difference between a citation in a process of adjudication, and a decree of adjudication with or without a charge. In the former case, there is no necessity nor reason for barring the defender from granting voluntary deeds, except as long as to afford the pursuer sufficient time for obtaining a decree; and, therefore if he once allow his process to sleep, he ought no longer to enjoy the privilege of litigiosity. But a decree of adjudication ought to have a more extensive effect with respect to this privilege, according to what is pleaded in the decision Wallace of Cairnhill, No 85. p. 8388. In the present case, the Duke's adjudication is within year and day of a former, upon which the superior was charged; and it is understood, that after infeftment or charge against the superior by one adjudger, it would be rigorous in the other adjudgers to proceed to infeftment, as loading both themselves and their debtor with expenses; consequently, an ad-