

lives and lives, That the decret of adjudication, made principal and annualrent into one sum, bearing annualrent; after which there could be no modification, which was never sustained in appraisings; in place of which adjudications are now come.—It was *replied*, That the Lords had been frequently in use to modify penalties in appraisings, and adjudications, if they be exorbitant, especially before they attain possession, or come to singular successors; and it were against reason, that if an indigent debtor should make a penalty equivalent to the principal, that the single sentence of adjudication, proceeding upon a summons of six days, should exclude all remedy against the common privilege of all foreign courts, to modify exorbitant penalties; which cannot be hindered, though parties should, upon never so peremptory terms, renounce the same; and, therefore, the Lords always modify terms failzies and penalties in adjudications and appraisings; and, as to the clause of preference, it is an unjust monopoly, for who would ever enter in terms of buying the defender's land, if he knew it were to no purpose, but that Panmuir would get it: But seeing this clause is contained in the contract of wadset; if Panmuir should prevail and reserve it, it would infer taking of usury more than the annualrent; but, being in the wadset, it can only be understood to be in the same, while it stands unredeemed.

THE LORDS found this penalty exorbitant; the ordinary penalties being 100 pounds for 1000 merks, which doth not so increase when sums become great; and therefore they modified the penalty to the tenth part of the principal, and the annualrent thereof since the adjudication, and decerned Panmuir to renounce simply all contained in the wadset, without exception of the clause of preference.

Fol. Dic. v. 1. p. 9. Stair, v. 2. p. 806.

1757. August 5. CREDITORS OF KINMINITY against JOHN GORDON of Cluny.

UPON the 2d of February 1737, Sutherland of Kinminity, granted an heritable bond to Thomas Arrot, for L. 3000 Sterling; upon which he was infest. This debt, Arrot conveyed to John Gordon; who was also infest.

In February 1744, Gordon led an adjudication for the debt itself, and L. 415 of annualrents then due, and L. 600 of penalty, making in all L. 4015.

In June 1744, the lands of Kinminity were sequestrated, and a factor appointed, with the burden of paying to John Gordon, the annualrents of his principal sum; which were regularly paid after the sequestration.

When the creditors came to be ranked, Mr Gordon, being the preferable creditor, claimed the whole sum in his adjudication, including the penalty.

The other creditors *objected* to this; because, in that manner, Mr Gordon would not only receive his principal sum, with the L. 415 of interest, and the expence of his charter, and interest of that expence, but also L. 600 of penalty, and fourteen years interest, upon that sum, amounting in all to L. 1020, while, at the same time, the other creditors would receive no part of their debts.

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judication
had been led.

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Whether the
penalty of an
adjudication
can be re-
stricted to the
real expences?

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In point of law, it was *argued*, That Mr Gordon had no just ground to lead an adjudication in this case, as he was secured for his principal sum and annual-rent, and for the expences of his saine, by his heritable bond and infestment, by which his became the preferable security upon the estate, except a small debt to Sir Kenneth M'Kenzie ; and, he might have recovered his annualrents from the tenants : so that his adjudication must have been led merely *lucris causa*. *2do*, At any rate, the penalty ought to be carried no farther, than so far as the adjudger was truly out of pocket by expence laid out ; which, in this case, amounted only to the expence of his adjudication.

That the end of covenanting penalties, was to secure the recovery of the debt ; when that end is attained, the claim to the penalty vanishes. And accordingly, the Court is in use to restrict penalties to the creditor's real expence, even in questions with the debtor. In England too, it is usual to restrict double bonds, even after the condition is incurred, to the single sum which was lent, with the interest and expence.

That the equitable powers of the Court are not taken away by the creditor's leading an adjudication. The statute of Alexander II. introducing apprisings, orders the debtor's lands to be sold, *quousque fuerit creditori satisfactum de summa principali, cum damnis, expensis, et interesse*. And the statute 1469, ' appoints ' lands to be sold to the avail of the debt, and pay the creditor ; or to apprise ' the said lands, and assign the creditor to the avail of the said sum.'

When penalties were afterwards inserted, in order to answer the expence of diligence, the Court has restricted them, when exorbitant ; 30th November 1680, Earl of Panmure *against* Durham of Grange, (No 40. *b. t.*) ; and lately, in a question between Sir Hugh Hamilton and Lockhart Wiseman ;* though, in both these cases, the objection was made by the debtor himself. And indeed, penalties are, in general, exhausted by the expence, where the debts are small ; but, the same proportion, which is rational in a small debt, becomes exorbitant in a large one. The exorbitancy depends upon the extent of the profit the creditor puts in his pocket, and not upon the proportion between the penalty and the principal sum.

Answered, The adjudication was necessary, as there were three years interest due to Mr Gordon ; and there were prior inhibitions and adjudications upon the estate ; and as the law then stood, he must have paid, though the preferable creditor, a proportion of the expence of a ranking and sale ; and besides, he was entitled by law to adjudge his debtor's estate, if he did not get payment of his money.

This objection to the penalty is extremely new ; and there is no instance where, without any objection to the validity of the diligence, or to the proportion of the penalty, the claim of a creditor to be ranked for it was ever objected to.

* See General Alphabetical List of Names.

After an adjudication, the lands are not redeemable, except upon payment of the accumulate sum, with the interest due upon it. Posterior adjudgers, after year and day, carry nothing but this right of redemption, and the ranking and sale of the estate does not vary their interests.

In the case, 30th November 1680, Earl of Panmure, the penalty was exorbitant, being beyond what was stipulated in bonds at that time; and, in the late case of Sir Hugh Hamilton, several nullities were objected to the adjudication.

By the Civil Law, there was no modification of conventional penalties, as being introduced in order to liquidate the *interesse*. Penalties in bonds were introduced for the same reason: And, though in practice, they are restricted to the expence, where the debtor only fails in payment at the day; yet, if the creditor is obliged to adjudge, the penalty cannot be restricted; because the creditor is obliged to take land for his money; which is the reason given in the act of Parliament 1672; and, in a case, 30th June 1737, Watson of Saughton *against* James Baillie, (*See* ADJUDICATION upon act 1672); the Court found, That a special adjudication could not be redeemed, but upon payment of a fifth part more.

It is difficult, if not impossible, to determine the damage which a creditor may sustain by being obliged to take land for his money, or to wait the event of a ranking and sale; but it is proper that a general rule should be established, of allowing, in such cases, a certain proportion of the debt in name of penalty. In some cases, this penalty may not be equivalent to the creditor's loss; in other cases, it may exceed it; but this is of less consequence, than to follow a different rule for each particular case.

THE LORDS found, That John Gordon must be ranked for his whole accumulate sum, including the penalty; reserving the restriction of the penalty, till the making out the scheme of division, that the creditors are to draw their money.

Reporter, *Lord Justice Clerk.*
Johnston.
(Sir Wm Pultney.)

For the Creditors, *Fergusson.*

Alt. *Johnstone, Burnett,*
Fac. Col. No 50. p. 82.

1762. February 25. DAVID M'GUFFOCK *against* DAVID EDGAR.

IN the year 1733, John M'Kill granted an heritable bond upon his lands of Cleugh, to George M'Millan, for the sum of 4000 merks, redeemable for payment of principal and interest, and bearing this clause, 'The said John M'Kill and his forefairs, always premonishing the said George M'Millan and his forefairs, when the said money is to be paid, sixty days before the term, by a notary before two witnesses, as effairs; and the said George M'Millan likewise premonishing the said John M'Kill and his forefairs, in the terms abovementioned, when the said money, principal, penalty, and annualrent, are to be required.'

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A bond contained a clause, stipulating notarial requisition before demanding payment. No requisition was made before adjudging. The adjudication