

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.'

R 2

No 25.

No 42.

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

No 42.  
found ineffec-  
tual,

Adjudication was led upon this bond ; but requisition against the debtor was not used previous thereto. The summons of adjudication was called in the year 1742, but decret did not go till the year 1745.

In a question betwixt David M'Guffock assignee to M'Milton, insisting for the accumulations in the adjudication, and David Edgar, disponee of M'Kill, who had paid up the principal sum and interest ; it was *objected* for David Edgar, That the adjudication was ineffectual, in respect no requisition was used previous to it.

It was *answered* for M'Guffock, The reason why the requisition was stipulated and required, is, that the debtor might not be taken unawares, but might have sixty days to prepare the money for his creditor. Now, in the present case, the debtor had full time to prepare his money, not sixty days, but three years ; there being this distance of time betwixt the summons and decret of adjudication.

THE LORDS affoizied Edgar.

For M'Guffock, *J. Dalrymple.*

*Alt. Crosbie.*

*Fol. Dic. v. 3. p. 7. Fac. Col. No 82. p. 180.*

1784. *February 4.*

THE APPARENT HEIR of JOHN PORTEOUS of Glenkirk, *against* Sir JAMES NASMITH.

No 43.  
An adjudica-  
tion, led for  
bygone rents,  
without a  
previous de-  
cree of con-  
stitution, set  
aside, both as  
to these rents,  
and as to the  
whole other  
sums adjudg-  
ed for, which  
had been ac-  
cumulated  
into one sum,  
without  
distinction.

JOHN PORTEOUS, of Glenkirk, possessed lands, belonging to the Earl of Selkirk, for seven years, under a tack ; and he continued in possession two years longer, by tacit relocation.

The Earl, being, at the same time, creditor, by bond, to John Porteous, deduced an adjudication of his lands ; in which the nine years tack-duties, and the sum contained in the bond, were accumulated together in the same decerniture.

Sir James Nasmith acquired right to this adjudication ; against whom it was objected, that no decret of constitution had been obtained, in order to ascertain the tack-duties due to the adjudger. Erskine, book 2. tit. 12. § 4.

THE LORDS were clearly of opinion, That, to the extent of the rents due by the contract of lease, the debt was liquidated, with sufficient precision, by the lease itself ; and that it was competent to the landlord to adjudge for such, without the formality of a decret of constitution, in the same manner as it was to a creditor, by bond, to adjudge for bygone annualrents.

With regard to the tack-duties of those years, however, during which the debtor had possessed by tacit relocation, their opinion was different ; because the adjudication was, in this respect, altogether unwarranted by any voucher, and therefore equally exceptionable as if no debt had been due. The effect of this informality, it was farther observed, was a total nullity in the adjudication, and not merely a restriction as to the tack-duties of the two years ; which last would have taken place, if the different sums, instead of being accumulated, had been separately decerned for.