1769. *July* 12. Competition of CREDITORS of AUCHINBRECK.

No 39.
Penalties in adjudications on heritable bond and infeftment, ought not to be reſtricted to the neat expences.

CREDITORS, by heritable bond and infeftment, having alſo led adjudications for their principal ſums, arrears of intereſt, and penalties accumulated; the poſtponed creditors *inſiſted*, That the penalties, thus adjudged for, ſhould be reſtricted to the neat expences, this being the uſual rule with reſpect to conventional penalties in bonds; but the LORDS being of opinion, That creditors had a right to adjudge for their penalties, refuſed to reſtrict.*

Fol. Dic. v. 3. *p.* 15.

1772. CREDITORS of MURRAY of Stanhope, *againſt* the EARL of MARCH.

No 40.
Found as above.

FOUND as in the above caſe. Here, however, it appeared, that the adjudger had loſt, by lying out of his intereſt, a ſum more than equal to the whole penalty.*

Fol. Dic. v. 3. *p.* 15.

1781. *December* 8.
SINCLAIR and DOULL, *againſt* the EARL of CAITHNESS and INNES.

No 41.
How an adjudication becomes effectual, in terms of the act 1661, when led upon the perſonal obligation in an heritable bond. When reſtricted to a ſecurity. When, being led againſt the anceſtor, it ſtands in oppoſition to others led againſt the heir for the anceſtor's debt.

SINCLAIR of Aſſery, in the year 1761, granted an heritable bond and infeftment over his eſtate to Innes of Sandſide; who, in the year 1770, led an adjudication, which was afterwards made effectual by a charge againſt the ſuperior, for the principal ſum, and for the annualrents and penalties incurred ſince the conſtitution of his ſecurity.

Aſſery died in the year 1771, and his ſon made up titles to the eſtate, by precept of *clare*, and infeftment. In 1774, Sinclair of Stempſter and Patrick Doull, creditors of old Aſſery, led adjudications; and, within a year after them, the Earl of Caithneſs, and Innes of Scotſcalder, likewiſe adjudged for debts due by old Aſſery.

A ranking of the creditors, and ſale of the eſtate of Aſſery, having been commenced, Mr Innes of Sandſide's adjudication, on account of a trifling *pluris petitio*, was reſtricted to a ſecurity for the principal ſums, annualrents, and neceſſary expences, accumulate at the date of the adjudication.

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* The particulars of No 39. and No 40. which have not been reported, ſhall be diſcovered from the proceſſes, and given in the Appendix to the Title ADJUDICATIONS.

(RANKING of ADJUDGERS and APPRISERS.)

A ſtate of the intereſts produced in the ranking was then made up; in which Sandſide being the firſt effectual adjudger, was ranked in the firſt place: And as none of the ſubſequent adjudgers were within a year of him, they were ranked, one after another, according to the dates of their adjudications. By this mode of ranking, the Earl of Caithneſs, and Innes of Scotſcalder, could draw nothing till Stempſter and Doull were paid; whereas, if they could in any manner remove Sandſide's adjudication from being the firſt effectual one, thoſe of Stempſter and Doull would occupy that place, and theirs being within a year after, would be entitled to a *pari paſſu* preference. For this purpoſe, ſeveral objections were ſtated to Sandſide's adjudication. It was 1*mo*, *urged*, That being deduced on an heritable debt, it was exempted from the operation of the ſtatute 1661; and it was No 41.

Pleaded: The enactment 1661, c. 62, introducing a parity of preference in adjudications led before or within a year of the firſt effectual one, has excepted "ground-annuals, annualrents due upon an infeftment, and other real debts, and *debita fundi*, and compriſings following thereon." Adjudications for debts of this nature are in every reſpect ſituated as they were before this act: They can neither be ranked *pari paſſu* with other adjudications, nor have any effect in regulating their preferences.

Anſwered: The exception occurring in the ſtatute with regard to appriſings for real debts, was ſolely intended to preſerve the preference due to ſuch by virtue of their infeftments, and does not in any other way impinge on its effects. Nor could this exception, though of the extent pleaded for by the objectors, create any alteration in this ranking. Here the adjudication is led upon the perſonal obligement preceding the infeftment in ſecurity. No concluſion is drawn, or effect given to it, on account of the collateral real right. The creditor will indeed obtain a preference for a part of his claim in conſequence of his infeftment; and as he cannot draw his payment twice, his adjudication will operate only to ſecure the reſidue; but to this extent his adjudication is ſtrictly perſonal, and endued with all the qualities peculiar to ſuch a right.

It was, 2*do*, *objected* to Sandſide's adjudication, That being reſtricted to a ſecurity, it could not be the firſt effectual adjudication; and it was

Pleaded: An adjudication, deduced for more than was due, or defective in any other eſſential reſpect, is *funditus* void and null: And although this Court has been in uſe to ſuſtain ſuch a ſecurity, where the defect is only in the form of the diligences, or has ariſen from a trifling error as to the amount of the debt; yet in this its transformed ſtate, it muſt be deſtitute of the nature, and loſe all the effects of an adjudication. It is accordingly held, that an adjudication, thus reſtricted, can, by no lapſe of time, be converted into an abſolute right of property; nor can the creditor in it obtain a declarator of expired legal. It is merely equivalent to a bond of corroboration ſecured on land, and ought to be attended with no other effect in the preſent caſe.

No 41. *Anſwered:* The expreſſion uſed to ſpecify the effects of an adjudication, reſtricted to a leſſer ſum than the decreet of adjudication authoriſed the creditor to draw, does not alter its nature, nor convert it into a different ſpecies of ſecurity. It is ſtill an adjudication; and the creditor will draw the reſtricted ſums; and his diligence, in every other reſpect, will be equally complete, as if it had been originally led for thoſe ſums; with this only exception, that the debtor is relieved from the penal conſequences of an expired legal.

It was, 3*tio*, *objected*, That Sandſide's adjudication having been led againſt the anceſtor, could not regulate the preference of thoſe led againſt the heir; and it was

Pleaded: The ſtatute 1661 not only ſuppoſes an eſtate which is attached by various creditors, but alſo a *common* debtor, againſt whom all the adjudications entitled to an equal preference by this act, are led. The effect of the ſtatute is deſcribed to be the ſame "as if one adjudication had been led for the whole of the reſpective ſums contained in the adjudications, equally preferable by virtue of this act." Here the party againſt whom Sandſide's adjudication was led, and he againſt whom Stempſter and Doull's adjudications were deduced, are totally diſtinct; and it is impoſſible to ſuppoſe that the different adjudications could be contained in one. Indeed, were the eſtate alone conſidered in a ranking, as preſcribed by this act, very ſingular conſequences muſt enſue. Where a proprietor, whoſe lands had been adjudged, ſold his eſtate to another, the purchaſer's creditors adjudging the eſtate within a year after the creditors of the ſeller, would be entitled to a *pari paſſu* preference. Or, if we ſuppoſe an ineffectual adjudication to have been led againſt an anceſtor, and afterwards another againſt the heir, for his proper debts, the laſt would in like manner enjoy the benefit of this act. Nor can the ſuppoſed identity between the anceſtor and the heir make any diſtinction in this caſe. An heir, by the law of Scotland, may, by his deeds, incur a paſſive repreſentation; and, to the effect of being liable to the anceſtor's creditors, become *eadem perſona cum defuncto:* But ſuch deeds can create no connection between him and his predeceſſor's eſtate, which muſt be tranſmitted, according to feudal rules, with the concurrence of the ſuperior; and although, by particular enactments, certain forms of law have been, for the benefit of creditors, made equivalent to a ſervice, yet no active right is thereby conveyed to the heir in the property of the eſtate.

Neither is it new, that there ſhould, in this manner, be two claſſes of equally preferable adjudications affecting the ſame eſtate. In the caſes already put, the adjudications againſt the author, or anceſtor, cannot regulate the ranking of the creditors of the ſingular ſucceſſor or heir. The laſt could only attach the eſtate as it ſtood in their debtor, incumbered with one or more adjudications againſt the author or anceſtor, which will be conſidered in the ranking as ſo many heritable ſecurities affecting the ſubject of the competition. In the ſame manner, the ſub-

ject of the preſent ranking muſt be viewed as an eſtate veſted in the heir, incumbered with the adjudications againſt the predeceſſor; and the eſtate ſo incumbered, muſt be divided among the competitors according to the ordinary rules of preference. No 41.

Without this interpretation, the preſent ſtatute muſt be exceedingly defective. No proviſion is made for a caſe, which might frequently occur, of a debtor dying within the year, or perhaps a day, after adjudications have been made effectual againſt his eſtate. By this event, on account of the *annus deliberandi*, his other creditors muſt, without any fault on their part, and from their confidence in the efficacy of the preſent ſtatute, be precluded from every benefit ariſing from thence. This certainly would have been guarded againſt, if the legiſlature had intended, that the firſt effectual adjudication againſt the anceſtor ſhould be the leading diligence in the ranking of thoſe led againſt the heir.

Anſwered: The ſtatute 1661 has introduced no new rule of preference, nor altered in any manner thoſe which were formerly eſtabliſhed. At that period, it was in the power of a creditor, more rigorous, or better acquainted with the debtor's ſituation, by precipitant meaſures, to get the ſtart of his competitors; a circumſtance which, while it rendered the ſecurity of creditors exceedingly precarious, had a correſponding effect on the ſituation of the debtor. To remove this was the object of the preſent enactment, by creating a parity of preference, under certain reſtrictions, among adjudications which differed in nothing but in date, and where nothing hindered their being included in the ſame decreet, but that the creditors in ſome had been more induſtrious than others in bringing forward their diligence. Hence thoſe adjudications, which, prior to this period, could never be led at the ſame time, nor be included in one decreet, are not in the leaſt degree affected by it. Of this nature, are the examples adduced on the other ſide, where adjudications have been led againſt an author, and thereafter others againſt the ſingular ſucceſſor; or where, after adjudications led againſt the predeceſſor, others have been led againſt the heir for his proper debt. There the ſingular ſucceſſor, or heir, could carry nothing by their purchaſe or ſervice, but the right of reverſion competent to their reſpective authors; and their creditors, who by diligence ſubſtitute themſelves in their place, muſt be in the ſame ſituation.

Such inſtances, however, are to be carefully diſtinguiſhed from the preſent, where one adjudication is deduced againſt the anceſtor, and another againſt the heir for the anceſtor's debts. Here not only the ſubject of the ranking, but alſo the debtor, is the ſame, ſince the heir, whether having made up titles in the direct way by ſervice, or by fiction of law, through the *media* introduced by the ſtatutes 1540 and 1621, is, as to the creditors of the anceſtor, the ſame perſon with the anceſtor. Hence it does not admit of a doubt, that an adjudger againſt the anceſtor, whoſe diligence has not been made effectual, in terms of this ſtatute, during the anceſtor's life, would come in *pari paſſu* with the firſt effectual adjudger

No 41. againſt the heir for the anceſtor's debt. And, upon the ſame principle, where an effectual adjudication has been led againſt the anceſtor, that muſt be the leading diligence in the ranking of his creditors, and upon his eſtate. The inconveniency which might ariſe, in the particular caſe of a debtor dying immediately after his eſtate is carried off by an effectual adjudication, can rarely happen, and ſeems to have been overlooked by the ſtatute. If it occurred, it might be rectified, by allowing the diligence of the other creditors to proceed within the year, in the ſame manner as where the heir, in favour of particular creditors, has renounced the benefit of the *annus deliberandi*; Erſkine, b. 3. tit. 8. § 55. At all events, this defect, ſuppoſing it incorrigible, cannot prevent the effects of the ſtatute in caſes equally within its letter and ſpirit.

The firſt two objections were unanimouſly repelled by the Court; who, though ſome of the Judges expreſſed doubts as to the efficacy of the laſt, adhered to the Lord Ordinary's interlocutor, finding, "That Sandſide's adjudication was to be conſidered as the firſt effectual."

Lord Ordinary, *Monboddo*. For the Objectors, *Ilay Campbell & Crosbie*.
For Stempſter and Doull, *Rae & Maclaurin*. Clerk, *Menzies*.

N. B. All the Judges who ſpoke, declared their opinion, That a creditor, in danger of loſing his preference, by the death of his debtor, after an effectual adjudication had been led by another creditor, would obtain relief in the way ſuggeſted by the reſpondents.

Fol. Dic. v. 3. p. 13. Fac. Col. No 11. p. 20.

Craigie.

1783. *January* 25.

ROBERT CRAIG, *againſt* The CREDITORS of Riccartonholm.

No 42.
Adjudication, led after decreet of certification has been extracted, found entitled to no preference in the ranking.

IN the ranking of the creditors of Riccartonholm, the Lord Ordinary found, 'That Robert Craig's adjudication having been led after the proceſs of ranking, 'in which he produced his intereſt, had been brought into Court, and a decreet 'of certification pronounced and extracted, he is not entitled to any preference 'in virtue of ſuch adjudication, and ought, therefore, to be ranked as a perſonal 'creditor.'

Againſt this judgment, Robert Craig *reclaimed*, and

Pleaded: Adjudications, with the exception ariſing from the ſtatute 1661, in favour of thoſe which are led within year and day of the firſt effectual one, are to be conſidered as ſales under redemption, which are preferable according to their priority; nor have the acts 1681 and 1690, authoriſing the ſale of bankrupt-eſtates, introduced any alteration in this reſpect. From the nature of this diligence, therefore, no reaſon can be aſſigned why the petitioner, upon the produc-