

1769. July 12. Competition CREDITORS of AUCHINBRECK.

No 34.

IN the same ranking, a different rule was laid down with regard to double securities upon the same estate or subject. Campbell of Balerno and others, Creditors by heritable bonds upon the estate of Auchinbreck, having also adjudged the said estate for their debts, including arrears of interest, &c. received payments in the course of the ranking, to account of the interest on their heritable bonds. They afterwards insisted to rank, *1mo*, On their heritable bonds; *2do*, Upon their adjudications for the whole sums therein contained, till their accumulations should be fully paid. They *pleaded*, That when an adjudication is habilely led against any subject, that subject is only redeemable from the adjudger on payment of the whole sum for which it was led, with the interest thereof from and after the date of the adjudication. *Answered*, That it would be highly unjust and oppressive to allow the same subject to be attached over and over again, whether in the way of voluntary or legal security for one and the same debt, to the effect of enabling the creditor to rank upon it for his whole debt repeatedly, in prejudice of other creditors. THE LORDS found, That the preferable creditors were entitled to rank upon their adjudications only for the balance, deducting what they had drawn upon their heritable bonds. See No 39. p. 14139.

Fol. Dic. v. 4. p. 243.

1781. August 2.

DOUGLAS, HERON and Co. *against* The BANK of ENGLAND, and Others.

IN the ranking of the Creditors of Messrs William and Robert Alexanders, the company of bankers under the firm of Douglas Heron and Co. claimed to be preferred, in virtue of an heritable bond, upon sundry parcels of the bankrupt's landed estate in Scotland. They likewise claimed to be ranked a second time for their whole debts, in virtue of an adjudication, affecting the subjects, covered by the heritable bond.

To this claim the Bank of England, and others, adjudging creditors, opposed the decision 12th July 1769, Ranking of the Creditors of Auchinbreck, No 34. p. 14130, by which it was found, "That the heritable creditors adjudgers, were entitled to be ranked upon the funds *pari passu* with the other adjudgers, only for what remained due of their accumulated sums, after deduction of what they should draw in virtue of their infestments."

No 35.

Creditors cannot be ranked twice for their whole debts, upon the same subject, in consequence of different diligences. See No 39. p. 14139.

No 35.

The interlocutor of the Court in this case was precisely in terms of the above decision.

Lord Ordinary, *Justice-Clerk.* Act. *Abercromby.* Alt. *Rae, Law, W. Miller.*
C. *Fol. Dic. v. 4. p. 243.* *Fac. Col. No 79. p. 135.*

* * * See Observations on this case in the APPENDIX.

1782. June 24. Ranking of the CREDITORS of JARVIESTON.

No 36.

Right in security of the penalty in an heritable bond gives a preference for necessary expenses.

IN this ranking, several of the creditors by heritable bond were infeft, ' in security of their principal sums, annualrents, and penalties;' and by virtue thereof claimed to be ranked for their penalties, to the extent of the expenses actually incurred, in the same class in which they were ranked for their principal sums and annualrents.

The common agent in the ranking,

Objected; Were the strict words of the obligation the rule, this claim would be well founded. But that rule would not only justify a demand for the whole expenses, but also for the whole penalty, although no expenses had been incurred. Practice, however, has tempered the severity of this stipulation, by restricting the creditor's claim to the neat expenses. And on the like principles, in a question with posterior creditors, having lent their money on similar securities, a competitor cannot avail himself of the strict terms of his infeftment, to the effect of obtaining a preference for the whole expenses incurred.

The expenses of obtaining infeftment being disbursed at the same instant that the security is created, may be considered as a debt then actually existing.

But beyond that, an infeftment in security of the penalty is really a security for debts not then contracted, because, if the money be paid at the term, no penalty is due. It is likewise exceptionable, as creating an unknown and general burden on lands, because it cannot be known at any period what expenses have been laid out. On all these accounts no person has any difficulty in lending money upon an estate, although the penalties annexed to the debts heritably secured would fully exhaust the common fund, it being universally understood, that such security can go no farther than, at the utmost, the expense of infeftments, which is generally paid when the money is advanced, and, at any rate, is exceedingly trifling.

Answered; The conventional penalty in bonds for borrowed money, is an agreed modification of the damage the creditor may sustain by delay of payment; and the moment the debtor fails in payment, the penalty is due. From equitable motives indeed, the Court of Session has restricted penalties of this nature to the expenses laid out by the creditor; but to the penalty thus restricted, the creditor has the most undoubted claim; and if the same be se-