

1783. November 28.

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

No 33.

Penalties are exorbitant, where they exceed a fifth part of the principal sum.

An adjudication, including termly penalties, restricted.

THE grandfather of Sir James Nasmith was creditor to John Porteous of Glenkirk, in an heritable bond for 12,000 merks. The penalty, annexed to the not payment of the principal sum, usually called the liquidate penalty, was only 2000 merks; but that relating to the interest, which was to be paid half-yearly, or what is styled the termly penalty, amounted to 100 merks, being more than a fourth of the termly payment, even when the rate of interest was 6 per cent.

No annualrents having been paid for several years, an adjudication was deduced, in the year 1716, against the lands of Glenkirk, for the principal sum; for the annualrents; for the liquidate penalty; and also for the termly penalties.

In a challenge of this adjudication, the apparent heir of John Porteous

Pleaded: The termly penalties here stipulated, exceeding a fifth part of the sums, the payment of which they were meant to enforce, were altogether exorbitant and illegal. They were likewise improperly included in the adjudication. It is the purpose of the liquidate penalties, in an heritable bond, to indemnify the creditor of the expence he may be at, by using diligence against the lands, while those annexed to the termly failures are solely calculated to defray the expences incurred in recovering the annualrents out of the yearly produce of the estate. When a creditor, therefore, executes a poinding of the ground for the annualrents, he is entitled to the termly penalties, but cannot include in that diligence the sums stipulated in name of liquidate penalty. And, in like manner, when proceeding to attach the estate itself for payment of his debt, he must rest satisfied with the liquidate penalty, as fully adequate to his indemnification; *Stair*, 20th July 1678, *Morrice against Orrock* (*See JURISDICTION*); 15th November 1771, *Park against Craig* *.

Answered: The penalties in a bond of borrowed money are to be viewed, not merely as the means of recovering the expence of diligence used for attaching the estate of a debtor, but as a liquidation of the whole damage arising to the creditor from delay in payment. Being no where regulated by statute, their extent will naturally be proportioned to the interest of the creditor in his debtor's punctuality. Nor can those stipulated, on account of the irregular payment of interest, be the less due; because, through the insolvency of his debtor, the creditor has been obliged to follow legal measures, in order to recover the principal sum itself.

Neither would these objections, though well founded, be altogether fatal to the diligence: They would not even deprive the creditor of his liquidate penalty, which, in this instance, was uncommonly moderate. An adjudication is no longer like the ancient apprisings, a penal diligence; it has been converted, by

* See the General Alphabetical List of Names.

modern practice, into a mere security for what is justly due. And to that extent the attachment is supported in equity; especially in a question with the heir of the debtor, notwithstanding any defect, arising either from an informality in its execution, or from an undue charge against the debtor; *Kilkerran*, 6th November 1747, *Creditors of Ross against Balnagown, and Davidson*, (No 27. *b. t.*) In this instance, therefore, it would be sustained as a security for the principal sum, the annualrents, and liquidate penalty, accumulated at the date of the decret of adjudication.

THE LORDS being unanimously of opinion, that this adjudication was exceptionable in both respects; the only question was, to what degree it ought to be restricted? By one judgment, it was sustained as a security for the principal sum, annualrents, and liquidate penalties. But, upon advising a reclaiming petition, with answers, the LORDS, moved chiefly by an appearance of rigour in the measures which had been pursued in this case by the creditor, found, 'That the adjudication could only subsist as a security for the principal sum contained in the bond, and interest due thereon, to be accumulated at the date of the decret.'

Lord Reporter, *Westball*,

For the Apparent Heir, *Rolland, David Williamson*.

Craigie.

For Sir James Nasmyth, *Hay, Honyman, Mark Pringle*.

Clerk, *Hemp*.

Fol. Dic. v. 3. p. 5. Fac. Col. No 130. p. 204.

* * This case was appealed. The following was the judgment of the House of Lords:

'ORDERED and ADJUDGED that the appeal be dismissed, and the interlocutors complained of, be affirmed.'

For Sir James Nasmyth, Appellant, *A. Wight, Wm Adam*.

For Apparent Heir, Respondent, *Ilay Campbell, Ar. McDonald*.

1784. February 4.

THE APPARENT HEIR of JOHN PORTEOUS *against* SIR JAMES NASMITH.

SIR JAMES NASMITH acquired right to three fourths of a bond granted by John Porteous; and as he was in treaty with the creditor on the remaining fourth, which he afterward acquired, he deduced an adjudication for the whole debt.

By one interlocutor, the LORDS found the adjudication null *in toto*. But, upon advising a reclaiming petition, with answers, a distinction was adopted between a *pluris petitio*, when the sums adjudged for were not owing, or, which was the same thing, not vouched in a legal manner, and when the debt was truly due, but not to the person who had obtained the adjudication.

THE LORDS found, 'That the adjudication led at the instance of Sir James Nasmyth, was to subsist as a security for the three fourths of the debt, and penal-

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It is a *pluris petitio*, altho' the whole of the sums adjudged for be due, if not due to the adjudger.