

(RANKING OF ADJUDGERS AND APPRISERS.)

*Answered:* As it is easy for any adjudger to obtain decree of certification in a process of sale, within a much less time than a year posterior to his adjudication becoming effectual, he might, if the objection were good, exclude, at his pleasure, the benefit of the statute of 1661. In the case of Riccartonholm, the adjudication in question had not been deduced till after *the year and day from the first effectual one* was elapsed; so that there the statutory benefit was not affected.

The Lord Ordinary 'repelled the objection;' and

The Court adhered to that interlocutor.

Lord Ordinary, *Braxfield.* A.G. *A. Abercromby.* Alt. *C. Hay.* Clerk, *Horns Stewart.* *Fol. Dic. v. 3. p. 14. Fac. Col. No 237. p. 367.*

1791. June 1.

CATHARINE MACKENZIE, and others, *against* ROSS and OGILVIE, and others.

THE late Roderick Mackenzie being regularly infeft, as a crown-vassal, in the lands of Redcastle, executed a conveyance thereof, in favour of himself in life-tenure, and of Kenneth Mackenzie, his eldest son, in fee.

This conveyance contained a precept of *saſine a me*, as well as *de me*, and a procuratory of resignation; and Kenneth Mackenzie, the disponee, immediately proceeded to take a base infeftment; but he neither obtained a charter of confirmation from the Crown, nor executed the procuratory of resignation.

Both old Redcastle, who died in 1786, and his son, owed large sums; and, in the years 1788 and 1789, their common creditors adjudged the property of the lands of Redcastle, as vested in the person of the son, and the superiority, as *in hereditate jacente* of the father, upon special charges.

In order to obtain, to their adjudications, the privilege of being the first effectual, the creditors pursued different measures.

Catharine Mackenzie having, along with those whose adjudications had been conjoined with her's, obtained in Exchequer a charter of adjudication of the superiority, proceeded to infeft herself *qua* vassal in the property.

Messrs Ross and Ogilvie, on the other hand, obtained in Exchequer a charter of adjudication, which contained a clause of confirmation, whereby it was intended to consolidate the property and superiority.

The signature of adjudication presented by Mrs Mackenzie, &c. was prior to that of Messrs Ross and Ogilvie; and as it unquestionably rendered her adjudication the first effectual one as to the superiority, she maintained, that the subsequent proceedings of these gentlemen, in applying to the Crown for a confirmation, were irregular and inept; and that the infeftment in the property granted by her to herself was sufficiently authorised. In support of these propositions, she

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Lands being disposed *a me*, or *de me*, and a base infeftment taken; a creditor of the disponee, in order to render his adjudication the first effectual one, may throw into his signature of adjudication a clause of confirmation; and this, though the right of superiority has been before effectually adjudged by a creditor of the disponee.

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*Pleaded*: The right of superiority in old Redcastle, and the right of property in his son, were two distinct and separate estates, which their respective creditors might attach for their payment. The former of these was accordingly attached by Catharine Mackenzie, and those who concurred with her, as creditors of old Redcastle, by charter of adjudication, followed with infeftment. These proceedings would have been an effectual bar to young Redcastle's attempting, by confirmation, or by executing the procuratory of resignation, to consolidate the property with the superiority; and they must prove equally fatal to the measures pursued by Messrs Ross and Ogilvie, in order to accomplish the same purpose. Indeed, to suppose, after the right of superiority had been duly transferred to a subject, whether by voluntary or judicial alienation, that it could be exercised by the Crown, would be quite inconsistent and absurd; Stair, b. 2. tit. 3. § 28.; Hope's Min. Pract. p. 62. § 151. 152, 1st December 1738, Ramsay of Wyliecleugh *contra* Brownlees, p. 211. v. 1. of this Dictionary; 27th January 1756, Creditors of Tulloch, p. 250. v. 1. of this Dictionary.

*Answered*: If young Redcastle had been desirous of holding the lands of the Crown, he might have applied for a charter of confirmation; and thus he would have united in his person both the property and the superiority. A creditor of young Redcastle, after being inflated in his right by adjudication, could pursue no other course.

It is true, that as the right of superiority, till it was, in the way above described, transferred to young Redcastle, continued in the person of the father, or after his death in his *hereditas jacens*, it might be attached for his debts; and so the adjudication led by Mrs Mackenzie, &c. having been followed out before any application for confirming by his son, or his creditors, must so far be considered as the first effectual one. But this adjudication can be considered only as an incumbrance, or *pignus prætorium*, the right of superiority itself still floating between the father and son, till it was by confirmation effectually vested in the latter, or those deriving right from him.

From this, it is evident, that as the infeftment granted by Mrs Mackenzie to herself was altogether inept, an adjudger before the expiration of the legal, having no right of entering vassals, so it was still competent to apply to the Crown for a confirmation of young Redcastle's base infeftment, in the same manner as if no diligence had been used for attaching the right of superiority. The authorities quoted on the other side relate to a period in the law of Scotland when the diligence of apprising was used, which was truly a judicial sale, under a faculty of redemption. And although it be true, that with regard to the bygone arrears in an adjudication, the same doctrine has been admitted; in all other respects, an adjudication before the expiration of the legal is now viewed in a quite different light; Stair, b. 2. tit. 10.; b. 3. tit. 2. § 29. 30. 38.; Erskine, b. 2. tit. 7. § 15.

Mrs Mackenzie had also charged the heirs of old Redcastle, his eldest son having died, to give her infeftment in the property. But as before this the signa-

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ture for Messrs Rofs and Ogilvie had been presented, it could be of no use, unless Mrs Mackenzie could have shown, that there was some irregularity in their proceedings.

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The Court were unanimously of opinion, That the adjudication of the superiority by Mrs Mackenzie was no bar to the subsequent confirmation obtained by Messrs Rofs and Ogilvie; and they were equally clear, that the infestment granted by Mrs Mackenzie to herself, was quite unauthorized.

The Lord Ordinary had found, That the adjudication at the instance of Catharine Mackenzie, is the first effectual adjudication *quoad* the superiority; but that the adjudication at the instance of Messrs Rofs and Ogilvie, is the first effectual one *quoad* the property.

And, after advising a reclaiming petition, which was followed with answers, THE LORDS adhered to the Lord Ordinary's interlocutor.

Another reclaiming petition was preferred; but it was refused without answers.

Ordinary, Lord Justice Clerk.  
Clerk, Home.

Act. Honyman.

Alt. Abercromby, M. Rofs.

*Eol. Dic. v. 3. p. 14. Fac. Col. No 183. p. 371.*

Craigie.

1739. July 15. The CREDITORS of Thomson, Writer to the Signet.

The first effectual adjudger was found entitled to annual rent of the expence of his adjudication.

*Fol. Dic. v. 3. p. 15. Kilkerran, (ADJUDICATION.) No 5. p. 4.*

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1755. June 17.

COMPETITION betwixt Lieutenant DUNCAN CAMPBELL and NEIL M'VICAR.

LIEUTENANT DUNCAN CAMPBELL having purchased the estate of Kirnan, by a minute of sale, from Robert Campbell, apparent heir thereof, did, upon the 3d July 1744, deduce an adjudication in implement of the minute. On the 26th August 1747, he obtained from Sir James Campbell, superior, a charter upon his adjudication; and, upon the 1st September after, was infest.

Neil M'Vicar being creditor to the said Robert Campbell in a considerable sum due by bond, led an adjudication of the estate of Kirnan upon the act 1672, bearing date 10th July 1744. The adjudication was followed by a charge against Sir James Campbell the superior, 27th May 1745; and in this state the adjudication was produced in process, without being completed by infestment.

In a ranking of the creditors of Kirnan, M'Vicar insisted that his adjudication should be ranked *pari passu* with the Lieutenant's adjudication in implement.

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Adjudication in implement, and adjudication or apprising for debt, are incapable of a *pari passu* preference.