No. 8. day to produce a progress, purge incumbrances, &c. in terms of the act of Parliament. The Lord Kames Ordinary pronounced, 2d Aug. 1776, the following interlocutor: "Repells the defence founded on the trust disposition alleged "to have been granted by the defender for the behoof of his creditors, and as- "signs the 12th of November next to the defender to produce a progress, "purge incumbrances, and fulfil the other points of the act of Parliament, and "first alternative thereof anent adjudications, with certification."

Gilchrist desirous, as he said, to do justice to the pursuer, and to prevent, at the same time, the hardship and loss which would accrue to the other creditors by the adjudication, made offer to the pursuer, by the hands of the attorney for William Wallace, of the principal sum contained in his heritable bond, with interest from the term of payment to the term of Martinmas then next. This offer the pursuer chose to reject; and the progress not having been produced by the defenders, the pursuer extracted an act, which, having come to be called before the Lord Ellioch Ordinary, his Lordship pronounced, Nov. 29th 1776, the following interlocutor: "Circumduces the term against the defender for "not producing a progress, purge incumbrances, and performing the other con- "ditions of the act of Parliament, in terms of the act, and adjudges, decerns, and "declares."

The defenders, considering the Lord Ordinary as exauctorated, applied by petition to the whole Lords, who, upon advising the petition with answers, "found that the pursuer was obliged to receive the principal sum and interest "due as at Martinmas last, with necessary expenses; but find that the defend- "ers are liable in the expense of the petition."

Lord Ordinary, *Ellioch.* Act. *Morthland.* Alt. *M'Cormick.*

J. W.

1797. *June* 20. EDIE and LAIRD, Petitioners.

No. 9.
A creditor, during the dependence of a judicial sale, and after obtaining a dividend out of part of the lands, on which he was preferably secured, adjudged the remaining lands, as a title to the purchaser, for the whole debt, without deduction of

THE lands of Kerse and Clannochyett, belonging to Mr. Weir, were brought to judicial sale.

Several heritable securities had been granted by him on Kerse, and, among others, an heritable bond to Edie and Laird; but none over Clannochyett.

In 1793, a decree of ranking was pronounced. In 1794, Edie and Laird received a large dividend out of the price of Kerse, and in 1795, they adjudged, as a title to the purchaser, the lands of Clannochyett, for their whole debt, without deduction of the dividend which they had received; but in order to avoid the objection of *pluris petitio*, they previously stated in a minute, that their object was merely to draw full payment of the balance due to them.

The other creditors adjudged within year and day.

The price was insufficient to pay the whole creditors.

Edie and Laird claimed to be ranked for the whole sum in their adjudication, and to be repaid the expense of it. But the Lord Ordinary found, "That

" they were only entitled to be ranked on the funds *in medio* for the balance " due them, after deduction of all partial payments that they had received to " account of their debts; and further, found they were not entitled to the ex- " pense of the adjudication at their instance.

In a reclaiming petition, they

Pleaded: When the process of ranking came into Court, the petitioners might have adjudged Clannochyett for their whole debt; and, notwithstanding a partial payment afterwards received by them out of other funds, they would have been entitled to rank for the whole sum contained in their diligence; 16th February 1734, Earls of Loudon and Glasgow against Lord Ross, No. 23. p. 14114. 2d August 1781, Douglas, Heron, and Company, against the Bank of England, No. 35. p. 14131. 8th February 1792, Maxwell's Creditors against Heron's Trustees, No. 63. p. 2136. and as the dividend from Kerse was not accepted extra-judicially, but paid by the act of Court, there is no reason why the petitioners should be in a worse situation as to their security for the balance than before the dividend was received.

The adjudication was necessary for the security of the purchaser; it was the first effectual one, and the other creditors adjudging within the year and day, must, in terms of the act 1661, pay the expense of it.

Observed on the Bench: The debt was in part extinguished by the dividend received from Kerse, and the claimants ought at most to have adjudged only for the balance. But there was no occasion for adjudging at all, as the act of sederunt, 11th July 1794, § 15. declares the decree of sale to be a sufficient title to the purchaser.

The petition was refused without answers.

No 9. the dividend already received; and claimed to be ranked accordingly. But he was found entitled to rank only for the balance due to him at the date of the adjudication; and he was refused the expense of it, because it was posterior to the act of sederunt 11th July 1794, by § 15. of which such adjudications are rendered unnecessary.

Lord Ordinary, *Craig*. For the Petitioners, *J. W. Murray*. Clerk, *Home*.

D. D. *Fac. Coll. (APPENDIX), No. 4. p. 6.*

1800. *February 25.*

JAMES FORBES and ATTORNEY *against* The YORK-BUILDINGS COMPANY.

No. 10. An adjudication on an English penal bond, without a decree of constitution, pronounced for the principal and interest, and one-fifth of the principal as penalty, found ineffectual as to the latter.

In 1734, Richard Scarr led an adjudication against the estates of the York-buildings Company, for 350 bonds, which he held in trust against them. These bonds were in the usual English form, the debtor being bound to pay the principal and interest at 4 *per cent.* or the penal sum of double the principal.

Scarr did not take decrees of constitution on them; and this omission was afterwards found not to be fatal to the adjudication; see 31st January 1783, No. 23. p. 228.

He adjudged, not for the penal sums in the bonds, but for the principal and interest due at the date of the decree, with one-fifth of the principal in name of penalty.

Among the bonds adjudged for, were two for £100 each, which the Governor and Company bind themselves to pay, " with interest after the rate of