

(NATURE and EFFECT.)

No 20. to the principles of law ; *Legibus, non exemplis, judicandum*. In the case of Saline, Lord Harcarfe observes, that this point was not fully considered. In order to found compensation, there must be a debtor and a creditor to make a concurrence : But as there is no debtor, unless the lands, for the accumulate sum, and annual-rents thereof, these cannot be pleaded as a ground of compensation ; nor will they be the foundation of diligence, by pointing or arrestment ; nor will the accumulate sum be sustained as a ground for adjudging the debtor's separate estate.

*Replied* for the pursuers, It cannot be pleaded, that a debt is extinguished by leading an adjudication, where the creditor is neither in possession, nor the legal expired ; Stair, p. 400. ; act 19. 1672. The law plainly supposes, that all manner of diligence, whether personal or real, is competent to an adjudger who has not attained possession of the lands, without distinction whether the legal be expired or not ; and when diligence can be used upon the debt, it is impossible to deny that the debt is still subsisting.

' THE LORDS found, That General Wade's disposition libelled on, does carry the debts that were due to him by the York-buildings company, as well those secured by the adjudications, charter, and infestments, as those that were not.'

Reporter, *Shewalton*. A.G. *Ferguson*. Alt. *Hamilton Gordon*. Clerk, *Home*.  
*Fol. Dic. v. 3. p. 12. Fac. Col. No 257. p. 474.*

1764. *January 25.*

WILLIAM WILSON Assignee of JANET STEEL *against* ALEXANDER EARL of HOME.

No 21.  
 An adjudication subsists as a security for expences, only to the amount of the penalties for which it is led ; and, if led jointly for behoof of the executor and the heir, the penalties fall to be proportioned between them.

In the year 1638, James Earl of Home, as principal, and others as cautioners, granted two bonds to Lawrence Henderfon, one for 3000 merks, with L. 300 of penalty, payable to Henderfon ; and, failing him by decease, to Barbara and Janet Henderfons, his daughters ; the other for 4000 merks, with L. 400 of penalty, payable to Henderfon ; and, failing him by decease, to his daughters Agnes and Janet equally, their heirs, executors, or assignees.

Henderfon, in 1659 and 1660, by separate conveyances, assigned these bonds to other two daughters, Isobel and Margaret equally, their heirs and donators.

In 1663, the Earl, as principal, and certain cautioners, granted bonds of corroboration of these two debts, with interests due on them, to the said Isobel and Margaret Henderfons, their heirs, executors, or assignees ; one for 3630 merks, and 400 merks of penalty, and another for 4840 merks, and L. 500 Scots of penalty, with interest from the next term.

Margaret Henderfon, who had right to one half of these debts, married Henry Alcorn, but without conveying to him her right ; and, of this marriage there was a son, Richard Alcorn, heir to his mother, in her share of these debts.

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Richard Alcorn, in 1723, confirmed himself executor to his mother, then dead, in 1500 merks, as her half of the original bond of 3000 merks, with interest due thereon; but did not confirm her half of the other original bond; nor was he confirmed executor to his father in the annualrents of these sums which belonged to him *jure mariti*.

Having erroneously set forth in his summons, "That he was only lawful son and heir served and returned to the deceased Henry Alcorn his father, and that he was also executor decerned and confirmed to the deceased Margaret Henderfon his mother:" Richard Alcorn, in 1728, brought a process on the passive titles against William late Earl of Home, brother to Earl Alexander, for 1500 merks, as Margaret Henderfon's half of 3000 merks contained in the first original bond, with interest from Martinmas 1638, being the original term of payment, and L. 100 Scots instead of L. 150, as the half of the penalty in that bond; and, *2do*, for 2420 merks as her half of the principal sum of 4840 merks contained in the bond of corroboration of the other original bond of 4000 merks, with interest from Whitfunday 1662, and L. 250 as half of the penalty in the bond of corroboration. The Earl having renounced to be heir, decret *cognitionis causa* passed for the whole sums libelled.

Upon this decret, Richard Alcorn, in 1730, obtained an adjudication of the whole estate of Home, for payment of the sums decerned for in the decret of constitution, then accumulated to L. 13980 : 5 : 2 Scots, but with this variation from the constitution, that the half of the penalty in the bond for 4840 merks, is only 250 merks instead of L. 250.

On the death of Richard Alcorn, James Alcorn his son was served heir to him; and, in 1747, Janet Steel, as creditor to Richard Alcorn, adjudged the above rights from James Alcorn as charged to enter heir to his father, and brought a process of mails and duties.

The Court, by interlocutors in 1765, found, "That the principal sums, as contained in the original bonds of 3000 and 4000 merks Scots, being heritable, as the law stood at the time when they were granted, were not rendered moveable, neither by the assignations, nor by the bonds of corroboration granted in the 1663; and consequently that Richard Alcorn's confirmation, as executor to Margaret Henderfon, did not carry, or vest in him, any right to her share of the principal sums contained in the original bonds;" but found, "That the confirmation of Richard Alcorn, as executor to his mother, did carry her share of the principal sums contained in the bonds of corroboration 1663, in so far as the same were made up of bygone annualrents, and also the whole annualrents which had fallen due upon the bonds of corroboration from the death of Henry Alcorn his father; and therefore, in so far sustained the decreets of constitution and adjudication at Richard Alcorn's instance." Found, That Janet Steel, "in virtue of her adjudication led against James Alcorn, has a sufficient title to carry on this

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process." And, upon advising a reclaiming petition, with answers, sustained "the decreets of cognition and adjudication at Richard Alcorn's instance, as a security for the said part of the principal sums, and hail annualrents due at, and preceding, the death of Margaret Henderfon, and the necessary expences as accumulated at the date of the said adjudication; and remit to the Lord Ordinary to proceed accordingly."

William Wilfon, as having right from Janet Steel, and from the heir of Margaret Henderfon, and the executor of Henry Alcorn her husband, proceeded to supply the defects of the former diligence, and, in 1766, obtained and extracted a decret for payment of half of the two original bonds, principal and interest, so far as had been found to belong to the heir; and, particularly, for the one half of both the penalties of L. 300 and L. 400 Scots, contained in the said two original bonds. He also, as in right of Henry Alcorn's executors, obtained decret for the interest of the two bonds which fell under Henry Alcorn's *jus mariti*. And as assignee to Janet Steel, he, in 1767, wakened, and insisted in her process of mails and duties before the Lord Ordinary.

The article principally disputed by the parties, was the extent of the expences, for which the adjudication fell to be sustained as a security. The Lord Ordinary, by interlocutor 24th December 1767, found, "That the adjudication being allowed to subsist as a security for the expences, does not render the adjudication broader than it was before, and thereby secure expences which were not adjudged for, but singly entitles the pursuer to hold the adjudication as a security for the expences therein adjudged for, in as far as he shall show, that the necessary expences amounted to that sum." And it appearing, that the adjudication had been led for 400 merks of penalties, and that the expences exceeded that sum, his Lordship sustained the adjudication as a security for expences to that amount.

In a reclaiming bill, it was *pleaded* for the defender, That, as the adjudication had been only sustained for the sums to which the executors of Margaret Henderfon had right, it could not be intended that the pursuer should have the benefit of the penalties, so far as the same belonged to the heir, and not to the executor, or beyond what his author or executor could have adjudged for. The adjudication was led jointly for the behoof of the executor and the heir, upon debts *in cumulo*, and, in separating their shares of the debts, the penalties adjudged for fall likewise to be divided between them. As the interlocutors only sustain the adjudication, so far as the executor's share of the debt extended, he can only have security for his expences, to the extent of the penalties to which he had right. The heir of the creditor is found entitled to the principal sums of both the original bonds; the penalties, therefore, in these bonds, as accessories, must likewise belong to him. The executor's right then can only extend to the penalties in the bonds of corroboration, in so far as they exceed the penalties in the original bonds.

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2do, Supposing the executor can take the benefit of the whole penalties adjudged for, the defender cannot likewise be liable to the heir of Richard Alcorn in the very same penalties, for which the pursuer, as in his right, has taken decret; but, if the penalties are not to suffer a proportional division, the pursuer, who stands in right both of the heir and the executor, does, as in right of the executor, get his adjudication sustained to the amount of the whole penalties adjudged for; and, at the same time, as in right of the heir, again levies these identical penalties. 3tio, The pursuer has no title to the benefit of the accumulation in one of the bonds of corroboration, upon which the adjudication did not proceed. The adjudication is only for the contents of the first bond of corroboration of the 4000 merks bond, and for the contents of the original 300 merks bond, without adjudging upon, or for the corroboration of the last bond.

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Answered for the pursuer: The question is not entire, for, being fixed by a judgment long ago become final, it cannot now be brought under review. But, in any event, it is clear from the interlocutors, that, in so far as penalties and liquidate expences were adjudged for, the adjudication must be sustained as a security for the necessary expences that had been laid out, in suing for, and securing the debts as accumulated at the date of the adjudication. Penalties are *summo jure* due in default of payment, as arising *ex pacto* of the parties, though nothing should be expended by the creditor; much more when the expences exceed the penalties, do the full penalties become due in equity. When a penalty is stipulated in any obligation in default of implement, the implementing in part will not liberate the debtor from the penalty, or any part of it; if in any particular the obligation is unimplemented, *stricto jure*, the whole penalty is forfeited; nor does it make any difference whether the creditor was pursuing for implement of the whole obligation, or only for implement in part. Had the heir of Margaret Henderson had an interest in the adjudication, the penalties to be adjudged for would have fallen to be divided in proportion to the respective interests of the parties, as each would have borne a proportional part of the expence laid out; but the adjudication has not been sustained, *quoad* the interest of Richard Alcorn as heir, but only in so far as he had an interest as executor to his mother. And, as the whole expence of diligence fell on him, it is but equitable that the whole liquidate expences adjudged for should be applied towards his indemnification.

2do, Whether the penalties can again be levied by those in the right of the heir, is not necessary to inquire into; but there is nothing absurd in supposing, that one should be subjected in penalties ten times over. There is no law that makes penalties only once exigible; the rule of law is, that, as often as a contract is infringed, the penalty is forfeited; and the party who, in procuring performance of articles, is obliged to lay out a sum equivalent to the liquidate penalty,

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must be entitled, upon every breach of the contract, to demand payment of the liquidate penalty as the indemnification of his expences.

3<sup>to</sup>, Richard Alcorn confirmed the 300 merks bond, and the confirmation mentions the corroboration thereof; the bond of corroboration, therefore, though not explicitly, is yet virtually adjudged for, as it arises totally from the contents of the original bond; and, if the original bond is adjudged for, the interest of the creditor in the whole debt must thereby be effectually secured.

THE LORDS remitted to the Lord Ordinary, with power to call and hear parties.

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In consequence of this remit, the Lord Ordinary found "the pursuer's adjudication in question subsists only as a security for his expences, so far as he has right to the penalties; and further finds, That it subsists as a security only for Richard Alcorn's share of the sums contained in the bond of corroboration of the bond for four thousand merks, and of the sums due by the original bond of three thousand merks."

For E. of Home, *Rae*.For Wilson, *M<sup>rs</sup> Queen*.Clerk, *Home*.

April 9, 1772.

\* \* This case was appealed. The House of Lords "ORDERED and ADJUDGED, That the appeal should be dismissed, and the interlocutors therein complained of, be affirmed."

*P. Chalmers.**Fol. Dic. v. 3. p. 12. Fac. Col. No 87. p. 154.*

1740. February 13.

DICKSON of Kilbucho, *against* APPARENT HEIR of Poldean.

No 22.

AN adjudication, upon a special charge, carries bygones, from the death of the predecessor, who was last infest, in the same way as they are carried by an adjudication *cognitionis causa*; and, for the same reason, *i. e.* because there is no other method invented, in law, for carrying bygones, in these cases.

*Fol. Dic. v. 1. p. 10.*

1783. January 21.

Ranking of the CREDITORS of the YORK-BUILDINGS COMPANY.

No 23.  
A creditor by an English penal bond, after obtaining decret of adjudication, is entitled to interest on the penal sum.

OF the penal bonds, issued by the York-buildings Company, some had been secured by adjudication against the Company's estates in Scotland, before twenty years had elapsed from the term of payment. The creditors in these having insisted to be ranked for the penal sums contained in the decreets of adjudication, and for interest thereafter till paid, the common agent

*Pleaded*: By the tenor of these bonds, the obligation of the debtor can in no event exceed the penal sum; nor is effect, by the practice of England, ever given