

(ALLOWANCE AND ABBREVIATE.)

1712. February 22.

ALEXANDER NAIRN of Drumkilbo, *against* ROBERT M'LELLAND.

No 2.

Effect of filling up, in the allowance, a greater sum than in the decree.

IN the competition, betwixt Drumkilbo and Robert M'Lelland, creditors adjudgers of some lands in North Queensferry, belonging to William Liddel; Drumkilbo *objected*, against M'Lelland's adjudication, That, suppose it be more than year and day anterior to his, and the legal expired, yet it should be reduced; at least Drumkilbo ought to be brought in *pari passu* with M'Lelland: Because, the allowance of M'Lelland's adjudication, as it stands recorded in the Bill-chamber, bears to be for L. 763 Scots; whereas, there was only due to him, at the date of the adjudication, 783 merks, which is the sum in the decree.

THE LORDS found the objection not a sufficient ground to bring in both the adjudgers *pari passu*, but only to take off the expiration of the legal of M'Lelland's adjudication.

Fol. Dic. v. I. p. 13. Forbes, p. 593.

1741. February 20.

GUTHRIES *against* SUPERIORS.

No 3.

Abbreviates are required, not only of adjudications that came in place of apprisings, but of all other adjudications.

A COMMON bill of horning, against superiors, upon an adjudication in implement, being presented to the Ordinary on the bills; the Clerk of the bills stated the *objection*, to the Ordinary, That there was no abbreviate of the adjudication; and, therefore, he could not, without particular directions, write out the common deliverance, viz. because the Lords have seen the decree marked, and the abbreviate recorded, conform to the act of Parliament.

Interlocutor.

The Ordinary having reported the objection, the LORDS were unanimous, 'That, upon the construction of the act of regulations, abbreviates were required, not only of such adjudications as came in place of apprisings, but of all other adjudications;' and so the clerk reported to be the practice.

A variety, however, of things occurred, in the reasoning on the Bench. And, *first*, it was observed, That, in no case, the want of an abbreviate was a nullity; and though, in competition, another, though posterior adjudger, with an abbreviate, would be preferable, yet, as it was effectual against the granter, there seemed to be no good reason, why horning might not proceed upon it.

And, it being *answered*, That, though it was true, it was no nullity; yet, as it was certain, that there could have no charge proceeded against superiors, upon an apprising, without an allowance, it would appear to be the same in the case of an adjudication, wanting an abbreviate, when the statute, introducing abbreviates, declares them to have the same effect as allowances had before.

It was *replied*, That there was no parallel; for the messenger, who was judge in the apprisings, could not give warrant for a horning, which was only authorized

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by the registration of the apprising; or, which is the same thing, the allowance, which was the interposition of the Lords authority; whereas, in an adjudication, the Lords decern against the superior; which, therefore, is of authority, equal with the abbreviate, to warrant the charge; and, therefore, though an adjudication, in implement, without an abbreviate, is not good, in a competition; yet, as it denudes the granter, horning ought to proceed, upon it, against the superior.

But, then, it was further observed, That great inconvenience would arise, to purchasers, should it be found, that horning could proceed against superiors, where there was no abbreviate; as it was the only record of the adjudication. True, it occasions no inconvenience to other adjudgers; for still, in competition with these, the adjudication is ineffectual, without an abbreviate; but, as the want of an abbreviate is no defect, in competition with voluntary purchasers, and that a charge against the superior is such a step of diligence, as saves, to the adjudger, his preference to a posterior voluntary right; posterior purchasers would be rendered very insecure, could horning proceed where there was no record of the adjudication.

And, on this ground, merely, it was, that, upon a vote, it carried, That the Ordinary should refuse the bill of horning.

N. B. At any rate, there is a defect, in the security, from the records, in the case of adjudications; there being no record of the charge against the superior; though it would be still greater, were there no record of the adjudication, which, at least, leads to enquire, whether the superior has been charged.

Fol. Dic. v. 3. p. 10. Kilkerran, (ADJUDICATION.) No 10. p. 6.

1764. June 21: JOHN SIBBALD, Supplicant.

JOHN SIBBALD, flesher, and convener of the trades in Cupar, applied, to the Court, by an intimated petition, setting forth, That he had raised a summons of adjudication, on two bills, against John Campbell, vintner in Cupar; and had, on the 6th of March last, obtained decret, from Lord Edgefield, Ordinary: That an adjudication, at the instance of another person, had been led against Campbell, on the 9th March, 1763; and the abbreviate of it duly recorded on the 19th of April, thereafter.

That Campbell, to disappoint the petitioner of his *pari passu* preference with the other adjudger, the year and day of whose adjudication was on the point of expiring, when the petitioner's was decerned in, preferred a representation, praying the Lord Ordinary to recall the decret; or, at least, to stop execution, till he was heard, on certain defences; which his Lordship refused, on the 10th of March.

That, immediately upon this, the petitioner caused write out the extract of the decret of adjudication, to be signed by the Clerk, and the abbreviate to be signed by the Lord Ordinary; both which were produced.

No 3.

No 4.

A Lord Ordinary having died, after pronouncing decree of adjudication, but before the extract was signed by the Clerk, or the abbreviate was signed by his Lordship; a remit granted to a new Ordinary, to sign the abbreviate, which was allowed to be recorded, though without the 60. days.